ANNOTATIONS INCLUDE 180 N. C.

NORTH CAROLINA REPORTS
VOL. 132

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1903

REPORTED BY
ZEB. V. WALSER

ANNOTATED
BY
WALTER CLARK
(2 ANNO. ED.)

REPRINTED BY THE STATE
RALEIGH
EDWARDS & BROUGHTON PRINTING CO.
STATE PRINTERS
1921

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FEBRUARY TERM, 1903

CHIEF JUSTICE:

*WALTER CLARK.

ASSOCIATE JUSTICES:

WALTER A. MONTGOMERY, *HENRY G. CONNOR,

ROBERT M. DOUGLAS, *PLATT D. WALKER.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

ZEB. V. WALSER.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

* Elected at the general election in November, 1902.

JUDGES OF THE SUPERIOR COURTS

Name	*District*	*Residence*
GEORGE H. BROWN	First	Beaufort.
ROBERT B. PEEBLES	Second	Northampton.
HENRY R. BRYAN	Third	Craven.
CHARLES M. COOKE	Fourth	Franklin.
OLIVER H. ALLEN	Fifth	Lenoir
WM. R. ALLEN	Sixth	Wayne.
T. A. MCNEILL	Seventh	Robeson.
WALTER H. NEAL	Eighth	Scotland.
THOMAS J. SHAW	Ninth	Guilford
BENJAMIN F. LONG	Tenth	Iredell.
ERASTUS B. JONES	Eleventh	Forsyth.
WILLIAM A. HOKE	Twelfth	Lincoln.
W. B. COUNCILL	Thirteenth	Watauga.
M. H. JUSTICE	Fourteenth	Rutherford.
FREDERICK MOORE	Fifteenth	Buncombe.
GARLAND S. FERGUSON	Sixteenth	Haywood.

SOLICITORS.

Name	*District*	*Residence*
GEORGE W. WARD	First	Pasquotank.
WALTER E. DANIEL	Second	Halifax.
L. I. MOORE	Third	Pitt.
CHARLES C. DANIELS	Fourth	Wilson.
RUDOLPH DUFFY	Fifth	New Hanover.
ARMISTEAD JONES	Sixth	Wake.
C. C. LYON	Seventh	Bladen.
L. D. ROBINSON	Eighth	Anson.
AUBRY L. BROOKS	Ninth	Guilford.
WILLIAM C. HAMMER	Tenth	Randolph
S. P. GRAVES	Eleventh	Surry.
JAMES L. WEBB	Twelfth	Cleveland.
MOSES N. HARSHAW	Thirteenth	Caldwell.
J. F. SPAINHOUR	Fourteenth	Burke.
MARK W. BROWN	Fifteenth	Buncombe.
THAD D. BRYSON	Sixteenth	Swain.

LICENSED ATTORNEYS

FEBRUARY TERM, 1903

ALLEN, RICHARD C.	Bladen.
ALLEY, FELIX E.	Jackson.
BARHAM, JOHN L.	Southampton, Va.
BECKERDITE, HUGH L.	Forsyth.
CARLTON, PRITCHARD S.	Duplin.
COOK, JAMES S.	Guilford.
DAVIS, EUGENE D.	Cumberland.
GAFFORD, WALTER D.	New Hanover.
GIBSON, JAMES B.	Scotland.
GLENN, JOHN F.	Buncombe.
GODWIN, ROBERT L.	Harnett.
GUDGER, FRANCIS A.	Buncombe.
HARWOOD, JOHN H.	Graham.
KELLAM, WOODUS	New Hanover.
LANE, GEORGE L., JR.	Wake.
LOCKHART, JAS. A., JR.	Anson.
LONDON, HENRY M.	Chatham.
LUNSFORD, NATHAN, JR.	Person.
MANERS, TOLA D.	Union.
MCLEAN, SYLVESTER B.	Robeson.
MCMICHAEL, THOS. G.	Mecklenburg.
PALMER, JUDE	Chatham.
PEELE, JONATHAN	Scotland.
PHELAN, MAURICE	Buncombe.
RAY, J. BISPHAM	Yancey.
RAYMER, DEWEY L.	Iredell.
ROBINS, HENRY M.	Randolph.
ROGERS, WILLIAM W.	Wake.
SMATHERS, FRANK	Haywood.
SMITH, JOHN Y.	Robeson.
SPELL, AMOS P.	Cumberland.
THOMPSON, DORMAN	Iredell.
WAY, EUGENE	Buncombe.
WOODALL, JAMES L.	Johnston.
WOOTEN, FRANK M.	Pitt.

Heretofore, the Court has not taken into consideration, upon these examinations, defects in spelling or handwriting, but it will do so hereafter; it thinks that an applicant for law license, as a part of his qualification, should at least be able to spell words ordinarily in legal use and to write a legible hand.

CASES REPORTED

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

CASES CITED BY THE COURT

A

B

C

D

E

F

G

H

I

J

K

L

Mc.

M

N

O

P

S

T

U

V

W

Y

Z

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1903

SEXTON v. PHŒNIX INSURANCE COMPANY.

(Filed 24 February, 1903.)

1. Attachment—Garnishment—Situs of Debt—Contracts—Insurance.

For the purposes of an attachment the *situs* of a debt is where either the debtor or the creditor resides.

2. Attachment—Garnishment—Insurance.

An unadjusted and unliquidated claim for a loss under a policy of insurance against fire is subject to attachment in the hands of the insurance company.

3. Exemptions—Attachment—Insurance.

The exemption laws of this State are a protection only against executions issued here, and have no extra-territorial effect.

ACTION by S. L. Sexton against the Phœnix Insurance Company, heard by *Moore, J.*, and a jury, at October Term, 1902, of WASHINGTON. From a judgment for the defendant, the plaintiff appealed.

H. S. Ward for plaintiff.
W. M. Bond and F. H. Busbee & Son for defendant.

CLARK, C. J. The plaintiff's property was destroyed by fire (2) while insured in defendant company, whose home office is in New York. There has been no denial of liability on the part of defendant, and, after the loss, but before adjustment of the amount due therefor, the indebtedness of said company was attached in New York

by a creditor of the plaintiff under proceedings regular in form, and judgment recovered to the full amount due upon the policy by reason of the loss accruing from said fire.

The only questions arising upon this appeal are based upon the validity or invalidity of the New York judgment, payment upon execution issued thereon being pleaded by the defendant in bar to this action.

1. The *situs* of the debt to the plaintiff from the defendant was in New York, so far as to authorize process of attachment or garnishment to be taken out in that State. *Balk v. Harris,* 124 N. C., 467; 45 L. R. A., 257; 70 Am. St., 606, where the subject is fully discussed; *Cooper v. Security Co.,* 122 N. C., 463; *Winfree v. Bagley,* 102 N. C., 515; *R. R. v. Sturm,* 174 U. S., 710. The recent case of *Strause v. Ins. Co.,* 126 N. C., 223; 48 L. R. A., 451, held that such indebtedness could not be attached in a state other than the residence of the debtor (or of the creditor), because it could have no *situs* in such other state, notwithstanding the debtor might have established an agency there.

2. The attachment taken out in New York, subsequent to the loss under the policy, though prior to an adjustment, is valid. Drake on Attachments (5 Ed.), sec. 549; *Ins. Co. v. Connor,* 20 Ill. App., 305; *Knox v. Ins. Co.,* 9 Conn., 430; 25 Am. Dec., 33; *Fisher v. Consequa,* 9 Fed. Cas., 120; *Ins. Co. v. Willis,* 70 Tex., 12; 8 Am. St., 566. The substance of these and other cases is thus stated in *Ins. Co. v. Field,* 45 Pa. St., 129: "An unadjusted and unliquidated claim for a loss under a policy of insurance against fire is subject to attachment in the hands of the insurance company." An attachment proceeding
(3) is in effect "an action by the principal debtor (the defendant in the action) in the name of the plaintiff (the attaching creditor) against the garnishee"; *Balk v. Harris, supra;* and therefore the amount due can be ascertained in such action. In *Ins. Co. v. Moore,* 63 Miss., 419, it was held that such liability after loss can be attached before adjustment, even when the insurance company denies any indebtedness to the assured. Here it affirmatively appears that the company admitted its indebtedness, and that the amount thereof even was undisputed. In *Peace v. Jones,* 7 N. C., 256, notes not yet due were held liable to garnishment. Where the contrary doctrine to the above decisions is held, it is based upon the wording of a local statute different from that in New York. The loss is not a contingent liability, which is not attachable, but a prima facie liability, and the liability and its amount are ascertainable in the attachment proceeding.

3. The plaintiff could not have set up his claim of a personal property exemption in the New York action, and the defendant is protected by that judgment and payment thereunder. Exemption laws are a pro-

tection only against executions issued in the state where the claimant resides. They have no extra-territorial effect. *Balk v. Harris,* 122 N. C., 64; 45 L. R. A., 257, citing *R. R. v. Maggard,* 6 Col. App., 85; Story on Conflict of Laws, sec. 539. "Exemption laws are not a part of the contract; they are a part of the remedy and subject to the law of the forum." *R. R. v. Sturm,* 174 U. S., 710, and cases there cited; Freeman on Executions, sec. 209.

No error.

Cited: Goodwin v. Claytor, 137 N. C., 229.

BOARD OF EDUCATION v. TOWN OF GREENVILLE.

(Filed 24 February, 1903.)

Limitations of Actions—Municipal Corporations—Towns and Cities—The Code, Secs. 756 and 757.

Under The Code, secs. 756 and 757, a claim against a town must be presented within two years after maturity or it is barred.

ACTION by the County Board of Education of Pitt County against the Town of Greenville, heard by *Brown, J.,* at October Term, 1902, of PITT. From a judgment for the defendant, the plaintiff appealed.

Skinner & Whedbee for plaintiff.
Jarvis & Blow for defendant.

WALKER, J. This action was brought by the plaintiff to recover the amount of certain fines and penalties which were collected by the defendant, and was heard in the Superior Court upon a case agreed. It appears therefrom that the plaintiff filed with the board of aldermen of the defendant, the Town of Greenville, on 3 April, 1902, a claim for the fines and penalties collected by said town for violations of the criminal law of the State and the town ordinances during the three years immediately preceding said date, and demand of the defendant that the claim be audited and that the amount of the fines and penalties so received during the said years be paid to it. The defendant admitted its liability to account with the plaintiff for the fines and penalties collected during the two years immediately preceding the date of the demand, and the claim for so much as was received during the said two

years was audited and paid by the defendant; but the defendant refused to audit and pay any part of the claim preferred for the year commencing 3 April, 1899, and ending 3 April, 1900, and de-
(5) nied its liability to account with the plaintiff for the same, its contention being that, by sections 756 and 757 of The Code, the plaintiff can recover only the fines and penalties collected during the two years immediately preceding the date of the demand upon it.

It is provided in section 756 of The Code that any claim against a county, city or town shall be presented to the chairman of the board of commissioners or to the chief officer of said county, city or town, as the case may be, within two years after the maturity of said claim, or the holder of the same shall be forever barred from a recovery thereof. The language of this section is plain and explicit, and there is room for but one construction of it. This Court has said that the provision of the statute is not in strict terms a limitation of the time within which an action may be prosecuted, but that it imposes upon the creditor the duty of presenting his claim within a prescribed period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter commenced. *Wharton v. Comrs.,* 82 N. C., 11. In a later case, *Davis, J.,* speaking for the Court, and referring to this section, said: "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." *Lanning v. Comrs.,* 106 N. C., 505. We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute, the claimant, by its very words, is "barred from a recovery" of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all-sufficient for the disposition of this appeal.

The learned counsel for the plaintiff, in his argument before us, cited *School Directors v. Asheville,* 128 N. C., 249, and several
(6) other cases of a like kind. In those cases the statute now under consideration was not pleaded, but the defendant relied upon the general statute of limitations, and the question in this case was not discussed. The cases, therefore, are not in point.

The judge who heard this case in the court below held that section 756 of The Code barred a recovery of the amount of the fines and penalties collected during the year next preceding 3 April, 1900, for

which this suit was brought, and rendered judgment for the defendant dismissing the action. In this decision we fully concur.

PER CURIAM. Judgment affirmed.

Cited: School Directors v. Asheville, 137 N. C., 507; *Dockery v. Hamlet,* 162 N. C., 120.

NORMAN v. HALLSEY.

(Filed 24 February, 1903.)

1. Mortgages—Assumpsit—Judgments.

A judgment creditor of a mortgagor cannot maintain *assumpsit* against a mortgagee for a surplus arising from a sale under the mortgage and paid to the mortgagor.

2. Mortgages—Sale—Liens—Notice—Foreclosure of Mortgages.

A mortgagee, who sells under the mortgage, is not liable to a subsequent mortgagee or judgment creditor for the surplus, unless he has actual notice thereof.

ACTION by Fannie E. Norman against B. F. Hallsey, heard by *Moore, J.,* and a jury, at Fall Term, 1902, of WASHINGTON. From a judgment for the plaintiff, the defendant appealed.

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

CONNOR, J. L. C. Marriner and his wife, Lula, on 9 January, (7) 1893, executed to J. W. Blount a mortgage with power of sale conveying a tract of land in Washington County, for the purpose of securing a note for $500. Thereafter, the said Blount transferred and assigned the said note and mortgage to the defendant.

The plaintiff, on 8 October, 1895, recovered judgment in the Superior Court of Washington County against the said Marriner for $975, which judgment was duly docketed in said county. Thereafter, the said Blount died, leaving a last will and testament, appointing Whedbee Blount and Bettie Davenport executors. Thereafter, the defendant, in the name of said executors, and pursuant to the power of sale in said mortgage, advertised the land for sale, and on 17 February, 1902, sold the same for the sum of $500, and received the purchase money. Said

executors executed a deed to the purchaser. The defendant, from the said amount, paid his note, and paid to the said Marriner the excess, to wit, $190.50. There was then, and still is, due on the plaintiff's judgment an amount in excess of $190.50. The plaintiff had no notice of said sale or the payment of said sum to Marriner. The defendant had no other notice of the plaintiff's judgment than was afforded by the docketing thereof. Marriner's homestead was allotted to him by the sheriff of said county on 16 June, 1898, in land other than that mortgaged to Blount as aforesaid, and return thereof was duly made to the Superior Court of said county. Marriner is insolvent.

At the conclusion of the testimony, the defendant made a motion, pursuant to the provisions of the act of 1897, as amended by Laws 1899, ch. 131, for judgment of nonsuit. The court denied the motion, and the defendant excepted. His Honor instructed the jury that if they believed the evidence, they should answer the issue in the affirmative, and the defendant excepted.

The action was instituted before a justice of the peace upon
(8) the theory that the defendant was liable to the plaintiff in *assumpsit,* as for money had and received to her use. If the action cannot be maintained upon this theory, the justice had no jurisdiction. We do not think, in any view of the testimony, the justice had jurisdiction. The defendant cannot be said to have received the proceeds of the sale of the land, or any part thereof, to the use of the plaintiff. The legal title to the land was, by the mortgage, vested in the heirs at law of Blount upon the trusts declared in the mortgage. The power of sale vested in him devolved upon his executors pursuant to the provisions of the act of 1887, as amended by Laws 1901, ch. 186. The assignment of the note and mortgage to the defendant did not vest either the title or the power in him. *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312; 58 Am. St., 789; *Burris v. Brocks,* 118 N. C., 789. Therefore, it was the duty of the executors to sell the land and apply the proceeds to the trusts declared in the mortgage, first to pay the note and all costs and expenses of sale, and, second, "to pay the surplus, if any, to the said parties of the first part," etc. Certainly, in view of this express trust, the executors of Blount were not liable to the plaintiff in *assumpsit* for any part of the proceeds of the sale of the land. The defendant having no title to or power in respect to the sale of the land, could have done nothing in regard thereto, except as the agent of the executors. He was liable, and it was his duty to pay the excess over and above his note to them, and the law could not imply any promise to pay to the plaintiff. Therefore, this action was not, in any aspect of the testimony, within the jurisdiction of a justice of the peace.

The action for money had and received can be maintained only when the money, or property which has been converted into money, is received by the defendant under such circumstances as in good conscience and equity makes it his duty to pay it to the plaintiff. It is because of this duty that the law implies a promise to do so. The judg- (9) ment creditor has no title to an estate or interest in the land of the judgment debtor; he has a lien thereon which he may enforce either by issuing an execution or by instituting a civil action, in the nature of a bill in equity, to enforce the lien. It is conceded that this lien, under our statute, extends to the equity of redemption. "A judgment creditor has no *jus in re* or *jus ad rem* in the defendant's land, but a mere right to make a general lien effectual by following up the steps of the law." *Dail v. Freeman,* 92 N. C., 351, 356; *Baruch v. Long,* 117 N. C., 509. The lien of the plaintiff was transferred by the sale of the land to the fund in the hands of the trustee or mortgagee, or, in this case, his executors. This lien he could have effectuated by an action brought in the Superior Court, in which all parties interested in the fund or its application could and should have been brought before the court, and their rights administered; but he cannot maintain an action in *assumpsit* against the defendant. He has not such right or interest in the money as is necessary to entitle him to do so. The motion to dismiss presents the question whether a mortgagee selling pursuant to a power of sale and receiving an amount in excess of his debt, is required, before paying it over to the mortgagor, to examine the records to ascertain whether there be encumbrances subsequent to his mortgage, or whether he is entitled to actual notice of such encumbrances, before he is required to withhold the money and refuse to pay to the mortgagee. We are of the opinion that the mortgagee is not under any obligation to examine the records for subsequent encumbrances before paying the surplus to the mortgagor, in accordance with the terms of the mortgage or deed in trust.

The Court, in *McLean v Bank,* 4 McLean, 430 (U. S. Circuit Court), referring to the rights of subsequent encumbrancers, said: "Those general principles must be admitted, but they can (10) only apply when notice was given to the first mortgagee of the subsequent liens. . . . And there is no proof of actual notice in this case. The bank, in its answer, denies notice, and constructive notice from the recording of the subsequent mortgages is insufficient. The reason of the rule is apparent. The Franklin Bank looks to the property covered by its mortgage for payment, and that being received, not knowing that there are junior mortgagees whose rights may be affected, is indifferent as to the appropriation of the surplus. A notice, then, which puts the party on his guard is essential to make him

responsible, and of such importance is this notice that it must be actually given, and not by the recording of a mortgage, which determines the lien." 2 Jones on Mort. (5 Ed.), sec. 1030; 2 Pingree on Mort., sec. 1464; Freeman on Judgments, 349; Black on Judgments, 404.

For the several reasons given, the court should have allowed the defendant's motion to dismiss. In refusing to do so there was error, and the judgment is

Reversed.

Cited: Staton v. Webb, 137 N. C., 41; *Jones v Williams,* 155 N. C., 192.

BALK v. HARRIS.

(Filed 24 February, 1903.)

1. Rehearing—Supreme Court.

The Supreme Court will not review a ruling of its own, which does not affect injuriously the complaining party, even where the ruling is erroneous.

2. Appeal—Courts—Federal Question—Judgments.

When the decision of a Federal question by a State Supreme Court is necessary to sustain the judgment rendered, the Supreme Court of the United States will review such judgment, although another question, not Federal, is decided.

(11) PETITION to rehear this case, reported in 130 N. C., 381. Petition dismissed.

Charles F. Warren for petitioner.
Small & McLean in opposition.

WALKER, J. This case is again before the Court upon a petition to rehear the judgment rendered at February Term, 1902. When the case was first here, at February Term, 1898, upon appeal of the plaintiff (122 N. C., 64; 45 L. R. A., 257), this Court decided that the judgment of the Maryland court in the garnishment proceedings, which was pleaded by the defendant in this suit as a defense in bar of plaintiff's recovery, could not avail the defendant, because it was invalid for two reasons: (1) that the affidavit upon which the writ of garnishment issued was defective in that it failed to state that the plaintiff, Balk, who was the defendant in that proceeding, had any property in the State of Maryland, and (2) that the payment of the judgment

of the Maryland court by Harris, the garnishee in that suit and the defendant in this, was voluntary.

The defendant, Harris, at February Term, 1899, of this Court, filed a petition to rehear the judgment rendered at February Term, 1898, alleging as error therein that the grounds upon which this Court based its decision against him were untenable. At said term the petition to rehear was dismissed, but, to use the language of the Court, "for an entirely different reason from that given at the first hearing," and the Court gave as its reason for the dismissal of the petition that the *situs* of the debt garnisheed was not where the debtor Harris was "found," but where he "resided," and as he and his creditor Balk resided at the time in this State, the process of garnishment sued out in the Maryland court and the judgment of that court by which the debt of Harris to Balk had been condemned to the payment of the debt of Balk to Epstein, was invalid, as the Maryland court had (12) acquired no jurisdiction to render any such judgment. As the first judgment in the court below was in favor of the defendant Harris, a new trial was ordered, and the case was again tried at May Term, 1901, of the Superior Court of Beaufort County, and in deference to the opinion of this Court, as just stated, the judge who presided at the trial of the case substantially directed the jury to return a verdict for the plaintiff, which was done, and a judgment in accordance therewith was entered against the defendant. The defendant, when the case was called for trial in the lower court, moved in that court to be permitted to plead and prove his discharge in bankruptcy, which had been issued to him by the proper court since the last continuance. This motion was refused, and defendant excepted. From the judgment against him he appealed to this Court, and assigned as errors the refusal of the court to permit him to plead his discharge in bankruptcy and the instruction in regard to the judgment of the Maryland court in the garnishment proceedings, the defendant contending that the court, by the said instruction to the jury to the effect that the judgment of the Maryland court was invalid for want of jurisdiction in the court to render it, and was no defense or bar to this action, denied full faith and credit to the records and proceedings of the Maryland court in the case of *Epstein v. Balk*. The case was again heard in this Court upon defendant's appeal at February Term, 1902, and the judgment was affirmed. *Balk v. Harris,* 130 N. C., 381.

It appears from the brief of the defendant's counsel, filed at said term, that he withdrew the assignment of error relating to the discharge in bankruptcy, and that, notwithstanding such withdrawal, the question raised by the said assignment was discussed in the opinion of the Court as given by *Furches, C. J.,* and decided against the defendant, as was

also the other question as to the judgment of the Maryland court.
(13) The defendant now asks the Court to rehear that judgment not only upon the ground that the Court inadvertently decided a question against him which was not presented for decision, but because the Court, as appears in the opinion delivered by *Furches, C. J.*, misconceived the contention of his counsel with reference to the first decision made by this Court in the case, and evidently supposed that his counsel wished this Court to abandon the ground of decision stated in the opinion of *Clark, J.*, filed at February Term, 1899 (124 N. C., 467; 45 L. R. A., 257; 70 Am. St., 606), and to place its decision upon the grounds set forth in the opinion filed at February Term, 1898 (122 N. C., 64; 45 L. R. A., 257), so that a Federal question could clearly be presented, and that this Court, by reason of said misunderstanding, had in some way, not made to appear very plainly to us, impaired the defendant's right to sue out and successfully prosecute a writ of error from the Supreme Court of the United States to said judgment. The former Chief Justice, in the opinion given for the Court at February Term, 1902 (130 N. C., 381, 382), referring to the defendant's supposed objection to the opinion of the Court filed at February Term, 1899 (124 N. C., 467; 70 Am. St., 606; 45 L. R. A., 257), uses this language: "This we cannot do without reversing our judgment and adopting arguments in the first opinion (122 N. C., 64; 45 L. R. A., 257), which we have admitted were not tenable, and were expressly abandoned in the second opinion." It seems from this language that the Court, though it may have misunderstood the argument of defendant's counsel, has said precisely what he desired to be said in the case.

We cannot see how the decision of the Court upon the question of the discharge in bankruptcy can in the least degree affect the defendant's right to sue and prosecute a writ of error to the judg-
(14) ment of this Court, or how it can defeat the jurisdiction of the Supreme Court of the United States to review the said judgment, if it otherwise has the jurisdiction, by reason of the question involved in this controversy. It is true, the court below refused to permit the discharge to be pleaded, but after doing this it decided, as it was bound to decide, before a verdict and judgment could be given for the plaintiff, that the judgment of the Maryland court was invalid and constituted no bar to the plaintiff's recovery. If this decision presented a Federal question because it was a denial of a right to which the defendant was entitled under Article IV, section 1, of the Constitution of the United States, requiring full faith and credit to be given in each state to the public acts and judicial proceedings of every other state, and the act of Congress passed in pursuance thereof, and this the

Supreme Court of the United States must decide, that question still remains undiminished and unimpaired, notwithstanding the ruling of the Court regarding the discharge in bankruptcy. It is undoubtedly true that when two propositions are presented in a record from a state court, one involving a Federal question and the other not, the Supreme Court of the United States will not assume jurisdiction, provided the latter question is sufficient of itself, notwithstanding the Federal question, to sustain the judgment of the State court. *Harrison v. Morton,* 171 U. S., 38. If the decision of the Federal question is necessary to the decision of the cause, and is actually decided adversely to a party claiming a right under the Constitution or laws of the United States, or, to state it differently, if the judgment could not have been rendered without deciding the Federal question, the Supreme Court of the United States has jurisdiction by writ of error or appeal, according to the nature of the case, to review the judgment of the State court and to reverse the same, or to give other adequate relief, if it is erroneous. *Murdock v Memphis,* 20 Wall., 590; *Cook County v. Canal Co.,* 138 U. S., 636. It is perfectly manifest that the decision of the (15) court below upon the motion of the defendant to be permitted to plead his discharge in bankruptcy did not dispose of the case, and was not sufficient of itself to sustain the verdict and judgment against the defendant.

The remaining question, as to the validity of the judgment of the Maryland court, and its legal effect as a bar to the plaintiff's recovery, was necessary to the final determination of the case by judgment against the defendant.

In the petition to rehear we are not called on to review the former decision of this Court with respect to the validity of the Maryland judgment. Indeed, we could not well do so on this rehearing, as the judgment of this Court at February Term, 1899 (124 N. C., 467; 45 L. R. A., 257; 70 Am. St., 606), is, as to the defendant in this case, *res judicata,* so that the correctness of that judgment and of the opinion upon which it is based is not now under consideration, and we refrain from expressing any opinion in regard thereto. If there was any error in that decision, the defendant cannot now allege it and have it corrected, nor, indeed, does he seek to do so. Whatever right he had to a writ of error when that decision was made, and was followed afterwards by a final judgment in the court below, which was affirmed by this Court (130 N. C., 381), is, in our opinion, still left to him unimpaired by anything that was said by this Court in the opinion filed at February Term, 1902. If any error was committed by this Court in giving that opinion, in the respect indicated in the petition to rehear, it was clearly harmless, and needs not to be corrected in order to save to the

defendant his right to a writ of error. There was substantially no error in that decision in regard to the discharge in bankruptcy.

The defendant does not ask this Court to correct any error in its judgment, which, if corrected, would reverse the judgment, but rather seeks to have this Court declare and define what was the reason
(16) for its decision, in order that the defendant may show that the judgment of the Court rested upon the decision of a Federal question adversely to him, and that he is therefore entitled to a writ of error, and to a review of the said judgment by the higher court. If it would avail the defendant anything to do so, or serve any useful or practical purpose, and the opinion and judgment of this Court were not already perfectly clear and explicit as to the very point decided, we would not hesitate to grant the prayer of the defendant's petition. The reason for the decision of this Court, as distinctly stated by the former Chief Justice, is to be found in the opinion of *Clark, J.*, filed at February Term, 1899 (124 N. C., 467; 45 L. R. A., 267; 70 Am. St., 606).

It is a well-settled principle that this Court will not review a ruling of its own, or of the court below, which does not injuriously affect the complaining party, even if the ruling was erroneous. *Nissen v. Mining Co.,* 104 N. C., 309; *Butts v. Screws,* 95 N. C., 215; Clark's Code (3 Ed.), page 771. The alleged error in such a case becomes immaterial. But in this case we now hold that the decision in regard to the merits of the defendant's motion to plead his discharge in bankruptcy was correct, and the Court was merely inadvertent to the fact that the defendant's counsel, in his brief, had withdrawn the assignment of error relating to that question.

As we do not see that the defendant can be prejudiced by the ruling as to the discharge in bankruptcy, and as his condition, in respect of his right to review the judgment of this Court by writ of error, is no worse by reason of the decision of that question than it would have been if the matter had not been passed upon, and as the defendant has therefore shown no necessity for granting to him the relief prayed for, we must refuse to allow the petition to rehear.

PER CURIAM. Petition dismissed.

Reversed (two judges dissenting), 198 U. S., 215.

BURTON v. ROSEMARY MANUFACTURING COMPANY.

(Filed 24 February, 1903.)

1. Contracts—Pleadings—Burden of Proof.

When the complaint alleges a contract to superintend certain work for a certain per cent of the cost thereof, and the answer denies the allegations of the complaint and sets up a special contract, the burden is on the defendant to prove the contract as alleged by him.

2. Pleadings—Assumpsit—Contracts—Quantum Meruit.

A plaintiff may declare on a special contract and join therewith a cause of action as on a *quantum meruit.*

3. Contracts—Definition.

Where the minds of two contracting parties do not come together, there is no special contract.

4. Issues—Mandatory—The Code, Sec. 395.

The provisions of The Code requiring issues "arising upon the pleadings" to be submitted to the jury are mandatory.

5. Instructions—Hypothesis.

The trial judge should not give instructions based upon hypotheses upon which there is no testimony.

ACTION by W. O. Burton against the Rosemary Manufacturing Company, heard by *Jones, J.,* and a jury, at August Term, 1902, of HALIFAX. From a judgment for the plaintiff, the defendant appealed.

W. E. Daniel and Claude Kitchin for plaintiff.
E. L. Travis for defendant.

CONNOR, J. The plaintiff set out in his complaint a cause of action upon a special contract, in that "on or about the last day of October, 1900, the plaintiff and defendant entered into an agreement whereby the plaintiff agreed on his part to personally superintend and direct the erection of a mill which the defendant contemplated (18) building on its property near the town of Roanoke Rapids"; that the defendant agreed and promised to pay him therefor a sum to equal 6½ per centum of the cost of the building; that the mill cost the sum of $51,000, and that the amount due him pursuant to the special contract was $3,315; that a portion of said sum has been paid, leaving a balance due thereon of $2,322.18.

For a second cause of action, the plaintiff alleged that he contracted to personally superintend the erection of the mill which the defendant contemplated building, and that the defendant promised to pay him therefor what his services were reasonably worth; that said services were reasonably worth the sum of $3,315; that defendant has paid him on account thereof the sum aforesaid, etc. There were several other items in the plaintiff's account in regard to which there was no controversy involved in this appeal.

The defendant admitted the contract as set out, except "that the defendant was to pay the plaintiff the sum of $1,200 for his services, and that the same had been paid." The defendant denied that there was an agreement to pay 6 per cent of the cost of the mill.

The defendant answering the allegation in regard to the second alleged cause of action, denied that there was an agreement whereby the defendant promised to pay the plaintiff what the service was reasonably worth, and averred that "it was expressly understood and agreed that for said service the defendant was to pay the plaintiff the sum of $1,200, and that the same was paid before the commencement of this action."

The court, without objection, submitted to the jury the issue, "Is the defendant indebted to the plaintiff, and if so, in what amount?" to which they responded, "$1,086.06½."

The plaintiff testified that the contract was as alleged in the complaint. S. F. Patterson, treasurer and manager of the defendant
(19) company, testified that there was an express contract to pay the plaintiff for his services $1,200, and that the same had been paid. Plaintiff and defendant introduced testimony tending to corroborate and sustain their several contentions.

His Honor charged the jury "that the burden was on the plaintiff to satisfy them by the greater weight of the testimony that defendant promised to pay plaintiff 6 per centum of the cost of the building, and that if plaintiff had failed to satisfy them, he could not recover under the special contract declared on in his complaint."

He also charged the jury "that, having alleged that the special contract was to pay the plaintiff $1,200, the burden was upon the defendant to satisfy them by the greater weight of the testimony that this was the contract." To this instruction the defendant excepted. To the first part of the instruction there can be no objection. It is to so much of the charge as places the burden of proof upon the defendant, in regard to its allegation of a special contract to perform the service for $1,200, that the defendant excepts. It is possible that some confusion arose by the form of the issue submitted. It is the purpose of the rules and principles upon which the Code of Civil Procedure is based to

present to the jury issues of fact, as far as possible, free from complications with questions or issues of law, arising upon the pleadings. The general issue should not be submitted. If the plaintiff had alleged "that the defendant was indebted to him in the sum of $3,315," and demanded judgment therefor, such complaint would have been demurrable. *Moore v. Hobbs,* 77 N. C., 65; also, 79 N. C., 535.

The complaint in this case sets forth the facts constituting the plaintiff's cause of action in accordance with the provisions of The Code as construed by this Court. The answer denied the allegations, and set up a special contract different in respect to the (20) amount to be paid for the service than that alleged in the complaint, coupled with an averment of payment in accordance therewith. The defendant could well and safely have contented itself with a denial and the affirmative plea of payment, using its testimony in regard to the alleged price to be paid to sustain its denial and defense. The plaintiff could not have recovered upon the defendant's averment of a special contract different from that set up as his cause of action; hence, the allegation made by the defendant, as we construe it, amounted to a plea of payment, and from this point of view the burden to sustain it was upon the defendant. The exception cannot be sustained.

It was the right of the plaintiff to declare upon a special contract, and to join therewith a cause of action as upon a *quantum meruit.* He could recover upon the common counts in general *assumpsit,* provided he had set forth facts sufficient to constitute a cause of action, although he had not specifically declared upon a "second cause of action." This Court has uniformly so held since the decision in *Jones v. Mial,* 82 N. C., 252. If the plaintiff succeeded in establishing a special contract, he could not abandon such contract and recover upon the common counts. This principle is illustrated and enforced in *Lawrence v Hester,* 93 N. C., 79. His Honor, in the case at bar, instructed the jury, "If, from the greater weight of the testimony, the jury should find that the plaintiff honestly believed the contract was on a 6½ per cent basis, and that the defendant honestly believed that the contract was for $1,200, then their minds had not come together so as to make a contract; and if the jury should find from the greater weight of the testimony that no contract was made, then they should find what it was reasonably worth to build such a mill as the one about which the suit was brought, deducting therefrom what was already paid, if they should find that he had not been paid a sufficient amount." To this instruction the defendant excepted. The instruction, properly (21) construed, amounted to saying to the jury that if the minds of the parties did not come to an agreement, there was no special

contract, and is sustained both by the elementary principles of the law of contract and the decisions of this Court. *Brunhild v. Freeman,* 77 N. C., 128; *Thomas v. Shooting Club,* 121 N. C., 238. The exception cannot be sustained.

While we find no error in the record for which we can order a new trial, it is apparent that the verdict rendered by the jury was a compromise, and does not commend itself to the judicial mind or promote that degree of practical certainty in the results of judicial proceedings which it is the aim and purpose of the law of procedure to reach.

We think that it is always best to observe and enforce the rules of pleading and practice required by The Code. This Court has frequently said that the provisions of The Code in regard to submitting issues "arising upon the pleadings" are mandatory. See cases collected in Clark's Code (3 Ed.), sec. 396. There is no exception to the issue as submitted, and we cannot interfere.

The defendant, among other instructions which were given and in respect to which there is no exception, requested the court to instruct the jury "that if the plaintiff, W. O. Burton, agreed, from what Patterson said about the building, to build the house for $1,200, thinking it would be about the size of the silk mill, and discovered his mistake when he was furnished with the plans given, and went on and superintended the building, it is too late to object to the plans, and he is bound by his contract." The instruction was refused, and the defendant excepted. The legal proposition involved in the instruction is correct. If the jury could have found that Patterson described the size, etc., of the building, and the plaintiff, assuming such description to be true and correct, and thereupon agreed to superintend
(22) its erection for $1,200, and thereafter ascertained from the plans, before beginning the work, that the projected building was of a different size, etc., he would not be under any liability to perform the service; to have required him to do so would have been to bind him to the performance of services which he never contracted. If, however, before entering upon the service, he had learned from the plans or otherwise that there was a mistake or misunderstanding in regard to the size of the mill, he should have notified the defendant and declined to proceed with the work. There is, however, no testimony upon which to base this theory or contention. Neither party to the transaction makes the slightest suggestion that there was any such misunderstanding or mistake in respect to the size of the building. The court should not give instructions to the jury based upon hypotheses upon which there is no testimony. This would be to authorize the jury to speculate in regard to bare possible conditions and guess at their

verdict. This is too well settled to require the citation of authorities. The exception cannot be sustained, and the judgment of the court below must be

Affirmed.

Cited: *Hatcher v. Dobbs,* 133 N. C., 242; *Falkner v. Pilcher,* 137 N. C., 450; *Stewart v. Carpet Co.,* 138 N. C., 63; *Jones v. Ins. Co.,* 153 N. C., 391; *Patterson v. Nichols,* 157 N. C., 415; *Dail v. R. R.,* 176 N. C., 113.

HOPKINS v. HOPKINS.

(Filed 24 February, 1903.)

Divorce—Affidavit—Verification—The Code, Secs. 257, 258, 1287.

The usual verification of a complaint in a civil action is insufficient as an affidavit such as is required by section 1287 of The Code, in an action for divorce.

ACTION by Julia A. Hopkins against R. B. Hopkins, heard by *Winston, J.,* at Spring Term, 1902, of PAMLICO. To an order allowing alimony *pendente lite,* the defendant appealed. (23)

L. J. Moore for plaintiff.
D. L. Ward for defendant.

WALKER, J. This is an action for divorce in which an application was made in the court below for alimony *pendente lite,* and to the order allowing alimony the defendant excepted. It is not necessary that we should consider this exception, as our decision of the case must turn upon another question presented by an exception of the defendant, which affects the plaintiff's right to longer maintain or prosecute this action.

The defendant moved in the court below to dismiss the action because the complaint is defective, and renewed the motion in this Court. He specially alleges here, as one of the grounds of the motion, that the complaint is not properly verified. The verification is in the following words: "Julia A. Hopkins, being duly sworn, says she has heard read the foregoing complaint; that the facts set forth therein are true of her own knowledge, except the facts therein set forth on information and belief, and as to them she believes it to be true."

This verification does not conform to the requirements of The Code, sec. 1287. In *Nichols v. Nichols,* 128 N. C., 108, this Court said: "It is necessary, in order that the court may take jurisdiction of the matter

of divorce, that each and all of the requisites mentioned in the affidavit required by The Code, sec. 1287, shall be set out and sworn to by the plaintiff. The requirements are mandatory."

This is not like the case of a complaint in an ordinary action which may or may not be verified under sections 257 and 258 of The Code, as the plaintiff elects. The plaintiff is not required by these sections to verify his pleading, but, in the case of a complaint in an action of divorce, the law is different, as the very language and purpose of
(24) section 1287 of The Code show it was intended that its provisions relating to the verification of the complaint should be mandatory, and a failure to comply with the requirements of that section is fatal to the plaintiff's case, as the court is without jurisdiction unless the proper verification of the complaint is made. Verification in the very manner prescribed by that section is essential to confer jurisdiction upon the court to entertain the action or proceed therein. *Nichols v. Nichols, supra; Holloman v. Holloman,* 127 N. C., 15; *Martin v. Martin,* 130 N. C., 27.

As the court below did not acquire jurisdiction of the case by reason of the failure to verify the complaint in accordance with the provisions of section 1287 of The Code, the motion of the defendant to dismiss the action must be allowed.

PER CURIAM. Action dismissed.

Cited: Clark v. Clark, 133 N. C., 30; *S. v. Tyson, ib.,* 696; *Williams v. Smith,* 134 N. C., 252; *Johnson v. Johnson,* 141 N. C., 94; *s. c.,* 142 N. C., 463; *Kinney v. Kinney,* 149 N. C., 325; *Cook v. Cook,* 150 N. C., 50; *Grant v. Grant, ib.,* 531; *Williams v. Williams,* 180 N. C., 273.

---

(25)

HOPKINS v. HOPKINS.

(Filed 24 February, 1903.)

1. Evidence—Cross-examination—Witnesses.

When a witness relates a part of a conversation of another witness for the purpose of contradicting the latter, it is competent to show on cross-examination that in the same conversation he made a further statement consistent with his testimony.

2. Arguments of Counsel—Improper Remarks of Counsel—Divorce.

In an action for divorce it is improper for counsel to exhibit the baby

of the defendant to the jury and state that if the divorce should be granted it would disgrace and bastardize the child.

3. Arguments of Counsel—Improper Remarks of Counsel—Divorce.

In an action for divorce it is improper for counsel in the argument of the case to state that witness of plaintiff had been bribed, there being no evidence of this fact.

4. Evidence—Hearsay Evidence—Divorce.

In an action for divorce, mere neighborhood rumors of improper relations between defendant and her alleged paramour are incompetent.

ACTION by R. B. Hopkins against Julia A. Hopkins, heard by *Winston, J.,* and a jury, at Spring Term, 1902, of PAMLICO. From a judgment for the defendant, the plaintiff appealed.

D. L. Ward for plaintiff.
L. J. Moore for defendant.

WALKER, J. This is an action brought by the plaintiff against defendant for divorce, on the ground of adultery committed with one J. T. Daniels. The plaintiff introduced evidence tending to show that illicit relations had existed for some time between the said parties. One of his witnesses, B. O. Rice, testified as follows: "I knew the plaintiff and defendant; have frequently seen them riding to- (26) gether; they worked together in the field; they rode together when Hopkins (plaintiff) was away at the lighthouse, but not when he was on shore." The defendant introduced as a witness Emil Ireland, who testified: "I had a conversation with the witness, B. O. Rice, at Parkin's Point, in which he stated he did not know anything against Mrs. Hopkins." The plaintiff's counsel, on cross-examination, proposed to ask this witness "if B. O. Rice did not state in the same conversation that if Tom Daniels did not have improper relations with Mrs. Hopkins it was his own fault, and he missed a good chance." The question was objected to by the defendant, the objection was sustained by the court, and the plaintiff excepted.

We think the court erred in excluding what the plaintiff proposed to prove. The testimony of B. O. Rice, while very slight as proof of illicit intercourse between the parties, was permitted without objection to be considered by the jury in connection with the other facts and circumstances already in evidence, in order to establish the charge of adultery made against the defendant, and it was competent for this purpose. This being so, when the defendant attempted by the testimony of her witness, Emil Ireland, to contradict the plaintiff's witness, B. O.

Rice, it was surely competent for the plaintiff to support and strengthen the latter's evidence by showing that, in the same conversation with Emil Ireland, he had made a statement entirely consistent with his testimony at the trial. This would be so, if the statement of B. O. Rice, proposed to be elicited, had been made in a separate and distinct conversation with Emil Ireland or any one else, as it would tend to corroborate the plaintiff's witness, B. O. Rice.

The evidence was competent also upon the familiar principle that where one of the parties introduces evidence as to part of a con-
(27) versation, the other party is entitled to have the whole conversation detailed to the jury, as the part already in evidence may be explained and qualified by the other part of the conversation. If this was not permitted to be done, the evidence would be fragmentary and misleading, and the very truth of the matter might be suppressed. The strict enforcement of this rule is demanded in the interest of a fair and impartial trial, and that equal and exact justice may be administered. *Paine v. Roberts,* 82 N. C., 451; *Roberts v. Roberts,* 85 N. C., 9.

The defendant's counsel, in his address to the jury, was permitted, over the objection of the plaintiff, to take the little child of the defendant in his arms and exhibit it to the jury, and, as is stated in the case, he "urged upon the jury not to find the defendant guilty as charged, because it would ruin her character and would disgrace and bastardize the child, and counsel repeatedly urged this view upon the jury"; and it is further stated that the defendant's counsel, in his address to the jury, after objection had been made by the plaintiff in apt time, "repeatedly and persistently charged that plaintiff had hired and bribed the witnesses to swear falsely in the cause, although there was no evidence to support the charge." In *McLamb v. R. R.,* 122 N. C., 862, it was said by this Court: "Much allowance must be made for the zeal of counsel in a hotly contested case, especially when the colloquy is mutual; and indeed much latitude is necessarily given in the argument of a case when there is conflicting evidence; but counsel should be careful not to abuse their high prerogative, and when the remarks are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere." To the same effect is *Perry v. R. R.,* 128 N. C.,
471. The language of the Court in *Coble v. Coble,* 79 N. C.,
(28) 590, 28 Am. Rep., 338, is quite as strong and forcible in stating the rule that should govern in such cases. In that case, *Bynum, J.,* said: "Some allowance should be made for the zeal of counsel and the heat of debate, but, here, the language and meaning of counsel were to humiliate and degrade the defendant in the eyes of the jury and bystanders—a defendant who had not been impeached

by witnesses, by his answer to the complaint or by his conduct of the defense, as it appears of record. Such an assault is no part of the privilege of counsel, and was well calculated to influence the verdict of the jury. The defendant's counsel interposed his objections in apt time and upon the instant, but they met with no response from the court, and for this error there must be a *venire de novo.*"

The rule which is so well stated in the extracts we have just made from the decisions of the Court, and which has frequently been commended to the judges for their guidance in the trial of cases, is directly applicable to the facts as they appear in this record. The plaintiff was entitled to a fair and impartial consideration of the case by the jury, and it was his unquestioned right to have all extraneous matter excluded therefrom, especially if it was calculated, as it was here, to seriously impair this right and to prejudice him in the minds of the jurors. What the counsel said about the child was nothing but an appeal to the sympathetic feelings of the jury, and was not justified in any view that we can take of the testimony. The jury had nothing to do with the consequences an adverse verdict would entail upon the defendant, nor with the effect of such a verdict upon the status of the child. This introduced into the case an immaterial issue which was calculated to divert the minds of the jury from the true and only question involved, that is, the adulterous intercourse of the defendant with her alleged paramour, and its evident tendency was to prejudice the plaintiff.

S. v. Woodruff, 67 N. C., 89, cited by the defendant's counsel, is not an authority in his favor. It has no application whatever (29) to the facts in this case. In that case there was an issue of bastardy, and the child was in its mother's arms when she testified, and was exhibited to the jury, without any objection from the defendant, for the purpose of proving the resemblance of the child to its putative father, and the comments of counsel related to this resemblance. It is needless to undertake to show the difference between that case and this, as a bare statement of the facts is quite sufficient for that purpose.

The defendant's counsel was also permitted, as we have already stated, to charge "repeatedly and persistently" that the plaintiff's witnesses had been bribed by him to testify falsely in his behalf. The case on appeal was prepared by plaintiff's counsel and served upon defendant's counsel and accepted by him as correct. The judge did not settle the case upon disagreement of counsel, but the counsel themselves agreed upon it; and the counsel for the defendant thereby admits that there was no evidence of this charge made by him, and emphasized, we have no doubt, with his usual force and eloquence.

Counsel should not be permitted to comment upon matter of which there is no evidence. It tends to confuse the jurors, and, as we have

said in discussing a former exception, to take their minds away from the true issue being tried, and in a case like this to give play to their passions and prejudices instead of their calm and deliberate judgment in passing upon the testimony.

It has recently been held by this Court that where comments by counsel substantially like those made in this case, though not involving so grave an accusation, were permitted to be made by counsel after objection, and the court failed to interfere and stop the counsel or to properly caution the jury in the charge, a new trial will be granted for the error thus committed. *S. v. Tuten,* 131 N. C., 701.

(30) The evidence as to rumors in the neighborhood of improper relations between defendant and J. T. Daniels, which the plaintiff proposed to introduce, was properly excluded by the court, but the errors committed in the respects we have indicated entitle the plaintiff to have the issues in the case again submitted to a jury.

PER CURIAM. New trial.

Cited: *S. v. Tyson,* 133 N. C., 696; *Moseley v. Johnson,* 144 N. C., 263; *Watson v. Lumber Co.,* 153 N. C., 388; *Barnes v. R. R.,* 161 N. C., 582; *S. v. Lane,* 166 N. C., 339.

SCULL v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 24 February, 1903.)

Insurance—Life Insurance—Beneficiaries—Children Born After Issuance of Policy.

Where children are born after the issuance of a life policy payable to the children of the insured, they take as beneficiaries pro rata with the children previously born.

ACTION by Bismarck Scull and others against the Ætna Life Insurance Company, heard by *Jones, J.,* at November Term, 1902, of BERTIE. From a judgment for the defendants, the plaintiffs appealed.

St. Leon Scull and Francis D. Winston for plaintiffs.
George Cowper for defendants.

WALKER J. This case comes to this Court by appeal from the judgment of the court below upon a case agreed on by the parties. It appears that in 1869 a policy of insurance was issued by the defendant

company to Mrs. Nannie Walton, widow of James Walton, by which her life was insured for the benefit of her children, she then having three children, the defendants, Jimmie Flythe and Lily (31) W. Scull, and Nannie Nichols, the intestate of the defendant E. L. Smith.

In 1870 Mrs. Nannie Walton married E. D. Scull, and the issue of that marriage were Bismarck Scull, born in March, 1871, and Von Moltke Scull, born in 1874, who are plaintiffs in this case.

On 9 April, 1873, Mrs. Nannie Walton, then Mrs. Scull, surrendered the said policy and received from the company in lieu thereof a paid-up policy for the sum of $712, which was issued in the name of Nannie Walton, although she was then Mrs. Scull, and was payable to her children within ninety days after due notice and proof of her death. She died in March, 1902, her husband, E. D. Scull, having predeceased her. The company paid the money due upon the last policy into court, under its order and by agreement of the parties, to await the decision as to the distribution of the fund.

The plaintiffs contend, upon the foregoing facts, that they are each entitled to one-fifth of this fund, and the defendants resist this contention and claim the whole; so that the question presented is, whether the children of the first marriage are the sole beneficiaries under the policy, or are the children of the second marriage entitled to participate ratably with them in the fund now in court? The court below held that the children of the first marriage were entitled to the fund to the exclusion of the children of the second marriage, and entered judgment accordingly; and in this ruling we think there was error.

It was contended by counsel for the plaintiffs, on the argument before us, that Bismarck Scull was surely entitled to share in the avails of the policy, as he was born before the last policy was issued; but, in the view we take of the case, it is not necessary to consider this question.

A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance (32) the beneficiary acquires a vested interest when the policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while, in the case of a gift by will the interest does not vest until after the death of the testator. In other respects, and for all practical purposes, they are alike. If a bequest is made to A for life, with remainder to his children, those *in esse* at the death of the testator take a vested estate, which will open, however, and let in any after-born child during the life of A; and so it is with a policy of insurance payable to children: the interests of the beneficiaries become vested at the time of the delivery of the policy or when it takes effect, as a contract between the company and the assured, as to those then

in esse, but will open and let in any after-born children, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy.

The interests are said to be vested, but not in the sense that the children then *in esse* will take exclusively, but rather in the sense that the interest of any one of the children, already vested, shall not be divested by his or her subsequent death, and the share of such deceased child will go to his or her personal representative. The late *Chief Justice Smith* evidently had this distinction in mind when in *Hooker v. Sugg,* 102 N. C., 115, 3 L. R. A., 217, 11 Am. St., 717, which is relied on by the defendant's counsel, he used the following language: "So, if *children* be designated in a life policy as beneficiaries, the interest *vested at once* is in such as then meet the description, and is not divested in favor of survivors by a death afterwards." He certainly did not intend by that language to say that after-born children would be excluded and those *in esse* at the time of the delivery of the policy would be the sole beneficiaries. This is made perfectly
(33) clear by the following passage taken from the opinion: "It is unnecessary to consider the possible effect of a future marriage upon the interests of the children, since the event did not take place." 102 N. C., 120. So that the question presented in this case, and stated hypothetically by the Chief Justice in that case, was left open for consideration and adjudication when it should arise.

It seems to us that the question has virtually been settled in favor of the plaintiffs by *Conigland v. Smith,* 79 N. C., 303, in which it is held that a policy of insurance for the benefit of children, like a gift by will to them, will vest an interest in the children then *in esse,* at the time of the delivery of the policy or when the contract of insurance is complete, but will open and let in any after-born children during the life of the assured. As in the case of wills, a policy of insurance should receive a liberal construction, so as to take in as many of the objects of the assured's bounty as possible. 3 A. & E. (2 Ed.), 961, 964. This, in our opinion, is the just and reasonable rule of interpretation. The question seems to have frequently been under consideration by the courts of some of the other states. In *Koehler v. Ins. Co.,* 66 Iowa, 325, the policy upon which the suit was brought was payable to the assured's wife and children, there being at the time children by a former marriage; and it was held that the children of both marriages were entitled to share in the avails of the policy. Upon a substantially similar state of facts to those in this case it was held, in *McDermott v. Life Assn.,* 24 Mo. App., 73, that in the absence of an expression of a purpose to limit the benefit to a particular class of children, it was clearly the intention of the assured

to extend it to all his children, and that this intention should prevail. "It would be so held," says that Court, "in the interpretation of a will; and a policy of insurance being a *post-mortem* provision for persons dependent upon the assured, is to be interpreted upon similar principles."
In *Thomas v. Leake,* 67 Tex., 471, the Court held that under (34) the construction the law gives to the word "children," as used in policies of insurance, it does not mean certain *named* children then in existence, but these together with such as may thereafter be born to the assured. (See, also, *Stigler v. Stigler,* 77 Va., 163; *Trust Co. v. Ins. Co.,* 115 N. Y., 152; *Ricker v. Ins. Co.,* 27 Minn., 193, 38 Am. Rep., 289.)

We have carefully examined the authorities cited by the learned counsel for the defendants, and are unable to see that they militate against the views we have expressed. In *Ins. Co. v. Baldwin,* 15 R. I., 106, so much relied on by him, the policy was payable to the wife and children of the assured, and the Court held that the children living at the time the policy was delivered were entitled to the money due thereon, to the exclusion of after-born children; but the Court placed its decision upon the ground that the wife was a joint beneficiary with the children. We do not think this fact was sufficient to change the general rule of construction in its application to the facts of that case; but however this may be, the Court clearly intimates that the decision would have been different if the name of the wife had been omitted and the policy had been payable to the children as a class. "Possibly," says the Court, "if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary bequests to children payable *in futuro,* namely, that the bequests are payable to them as a class, and that the class will open to let in after-born children to participate in the bequests, might be applied." This is a statement of our case, and a strong intimation that the rule of construction which we have laid down should apply to it.

In *Herring v. Sutton,* 129 N. C., 107, also cited by defendant's counsel, the beneficiaries were designated by name, and it necessarily followed that those children who were thus named took a vested interest in the policy, to the exclusion of all other children, for the intention to restrict the benefit of the policy to them was clearly (35) expressed.

It was suggested that the assured had no legal right to surrender the old policy for the new, but we do not think that this should change the rule of construction. Indeed, if the second policy had not been issued, and the money had been paid under the first, the result would be the same. The first policy was payable to the children, and this,

as we have already shown, includes after-born children. The change, therefore, from the one policy to the other, whether it was in law a continuation of the old policy or a substitution of the new one for it, is immaterial.

Upon a review of the whole matter, we think there was error in the ruling and judgment of the court below, and that judgment should be entered in that court for the plaintiffs in accordance with the agreement of the parties.

PER CURIAM. Judgment reversed.

Cited: Deans v. Gay, post, 230.

---

(36)

HOLLEY v. SMITH.

(Filed 24 February, 1903.)

1. Rehearing—Appeal.

When 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. Grants—Water and Water-courses—Navigable Waters—Laws 1891, Ch. 532—Laws 1893, Ch. 4.

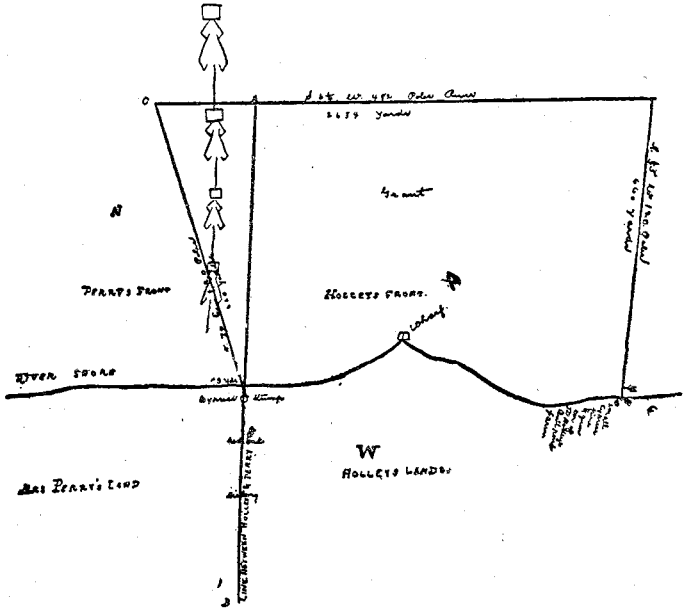
A person making an entry of land covered by navigable waters is confined to straight lines, including only the fronts of his own land.

ACTION by Thomas D. Holley against William Smith, heard by *Jones, J.,* and a jury, at November Term, 1902, of BERTIE. From a judgment for the defendant, the plaintiff appealed.

J. B. Martin, Day & Bell, and Battle & Mordecai for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

CLARK, C. J. This is the same case that was before us in 130 N. C., 85. The plaintiff avers that the Court, in that decision, overlooked chapter 532, Laws 1891. But if so, his remedy was by petition to rehear. The former decision is the law of this case, and the appellant cannot escape the safeguards and requirements exacted for rehearings by simply taking another appeal presenting exactly the same proposition of law to the Court. *Perry v. R R.,* 129 N. C., 333, and cases there cited.

But, treating this as an original appeal, there is no error. Laws 1891, ch. 532, which was repealed by Laws 1893, ch. 4, especially provided that persons making entry of land covered by navigable water



should be "confined to straight lines, including only the fronts of (37) their own lands." The *locus in quo* is not in front of the plaintiff's land, but in front of another's, and as to such land the entry was unauthorized by law and void.

No error.

Cited: Carter v. White, 134 N. C., 479; *Harrington v. Rawls,* 136 N. C., 67; *Britt v. R. R.,* 148 N. C., 42; *Riley v. Sears,* 156 N. C., 269; *Hospital v. R. R.,* 157 N. C., 461.

(38)

DUFFY v. SMITH.

(Filed 3 March, 1903.)

1. Mortgages—Trust Deeds—Commissions—Estoppel.

A statement by a trustee in a deed of trust, that the amount due thereunder is the principal and interest, does not estop him from afterwards receiving the commissions stipulated in the deed of trust.

2. Mortgages—Trust Deed—Commissions—Auctioneers.

When a trustee in a deed of trust sells property, the fees of an auctioneer must be paid by the trustee out of his own commissions.

3. Mortgages—Trust Deeds—Fees—Attorney and Client.

When there is no evidence that counsel was necessary in a sale under a trust deed, no allowance therefor should be made from the proceeds of such sale.

ACTION by Juliet C. Duffy against Isaac H. Smith, heard by *Brown, J.,* and a jury, at September Term, 1902, of CRAVEN. From a judgment for the plaintiff, the defendant appealed.

W. D. McIver for plaintiff.
D. L. Ward and Simmons & Ward for defendant.

MONTGOMERY, J. The question as to whether a trustee, in a deed made to secure a debt and containing a power of sale, in case of default, will be allowed to recover from the proceeds of the sale the amount stipulated for in the deed, irrespective of inequity in the contract, is not before us for decision. It is admitted by the defendant that if the plaintiff is entitled to recover any amount on account of compensation due to the trustee, she has a right to the amount mentioned in the deed—5 per cent on the amount of the sale. The contention of the defendant is that the trustee ought not to receive any commissions whatever: first,

(39) because the sale is alleged to have been a mere formality and for purposes well understood between the parties; and, second, because that just immediately preceding the sale—the same day—the trustee, who was the general agent of the creditor (the plaintiff), upon being requested to furnish the amount due, stated the same to be the principal and interest of the note, and that therefore the plaintiff and the trustee are estopped from claiming anything more than the amount for which the property was sold by the trustee.

Upon an examination of the evidence, however, it is seen that the trustee was not requested to find out the amount due for commissions

and expenses of the sale. The defendant, as a witness for himself, testified that he requested Green to learn how much was due, and Green testified that he asked the trustee how much was due *on the notes*. There is no discrepancy or contradiction in the evidence. The sale was made and the trustee applied the proceeds of the sale, less his commissions and the counsel fees and auctioneer's fees, on the debt. It left a balance due on the notes for which this action was brought.

Upon the evidence, the plaintiff was entitled to 5 per cent commissions on the amount of the sale. As to the amount allowed and embraced in the judgment for counsel fees and auctioneer's fees, we are of the opinion that such should not have been allowed. The fees of an auctioneer in cases like this are embraced in the commissions of the trustee, that is, the trustee is expected in law to conduct his own sale, and if he prefers procuring the services of another for that purpose, he must bear the expense.

There was no evidence that counsel fees were necessary to the proper administration of the trust, and there was no finding in the case to that effect. For these reasons, the amount embraced in the judgment for counsel fees ought not to have been included.

The judgment will be affirmed as to the 5 per cent on the sales, commissions under the deed, and reversed as to the balance, that balance embracing counsel fees and auctioneer's fees. (40)

Modified and affirmed.

Cited: Banking Co. v. Leach, 169 N. C., 709.

MEADOWS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 3 March, 1903.)

1. Contributory Negligence—Negligence—Telegraphs—Mental Anguish.

In this action to recover damages for a failure to deliver a telegram, the evidence does not show contributory negligence on the part of the plaintiff.

2. Telegraphs—Telegrams—Relationship of Parties—Notice.

In an action to recover damages for a failure to deliver a telegram, the relationship of the parties need not be disclosed in the message when the same relates to sickness or death.

3. Mental Anguish—Telegraphs—Damages—Negligence.

The doctrine is reaffirmed herein that telegraph companies are liable in damages for mental anguish or suffering.

ACTION by W. D. Meadows against the Western Union Telegraph Company, heard by *Brown, J.*, and a jury, at November Term, 1902, of CRAVEN. From a judgment for the plaintiff, the defendant appealed.

D. L. Ward and L. J. Moore for plaintiff.

W. W. Clark, F. H. Busbee & Son, and George H. Fearons for defendant.

CLARK, C. J. The plaintiff went to New Bern, N. C., to see his sister, who was ill, and on leaving for home asked her husband, Will Phillips, to let him know if she took a turn for the worse. The
(41) next week, Mrs. Phillips' condition becoming critical, her husband went to the telegraph office at 4:15 p. m., at New Bern, and, being illiterate, the operator wrote out for him the following message, addressed to plaintiff at Pollocksville, N. C.: "Will Phillips' wife at point of death. Will Phillips." The charges for sending message were prepaid. The only train for New Bern passed Pollocksville at 5:04 p. m., forty-nine minutes after the company received the message at New Bern. The plaintiff lived in about half-mile of the station of Pollocksville, his house being in full sight, and that afternoon he was at work in the field near the house; he was well known to the telegraph messenger boy, and the message could have been delivered within fifteen minutes. It was not delivered until 8:30 p. m. The plaintiff testified he was too unwell to walk to New Bern after dark, and had no horse, and gave his reasons why he could not obtain one that night. He got a team and went next morning, but his sister had then become unconscious. He testified that had he received the message in time he would have gone in five minutes and would have reached New Bern several hours before his sister became unconscious, which witnesses showed was between 1 and 2 o'clock a. m. next after the message was sent. The defendant introduced no evidence to contradict the above, and asked no instruction as to its own negligence, which, indeed, was not controverted, and rests its defense on three grounds:

1. That the judge charged there was no evidence of contributory negligence.

In this there was no error. Had the message been delivered after negligent delay by defendant, but still in time for plaintiff to have caught the train, and he failed to do so, this would have been contributory negligence; but the burden of contributory negligence was on the defendant, and it was not shown that the plaintiff's failure

to get a team and go that night through the country was a (42) fault of his. He did go the next morning, which he testified was as soon as he could get a conveyance, and that the feeble state of his health would not have permitted him to go by night, even if he could have procured a conveyance, and that he went as soon as he could get one. These statements are not contradicted by any evidence.

2. The second ground of defense is that the message, on its face, did not show the relationship of the dying person to the plaintiff.

The message on its face showed urgency. The defendant was put on notice that immediate delivery was desired. It took, instead, four hours and fifteen minutes to deliver the message thirteen miles away to one in half-mile of the office at that point. In *Sherrill v. Telegraph Co.,* 109 N. C., 527, the words were, "Tell Henry to come home; Lou is bad sick." In *Cashion v. Telegraph Co.,* 123 N. C., 267, the words were these: "Come at once; Mr. Cashion is dead." In these and many other cases in which a recovery for negligence has been sustained, the relationship was not disclosed. But the message, being a "death message," of itself showed that the sendee was interested, and that prompt delivery was required. In *Lyne v. Telegraph Co.,* 123 N. C., 129, the message was on all fours with this: "Gregory met accident; not live more than twenty-four hours." Nothing indicated the relationship, nor that the presence of the sendee was desired. The sender very rarely informs the sendee of the relationship, which he already knows. The telegraph company knows that from the nature of the telegram prompt delivery is desired, and it contracts with that knowledge, and is fixed with notice that failure to communicate the message promptly will cause grief and anguish. *Bennett v. Telegraph Co.,* 128 N. C., 103. It is responsible for such injury as directly results from its negligence to discharge the duty it had undertaken.

3. The last and principal ground is to ask the Court to over- (43) rule its long and unbroken line of decisions sustaining a recovery of damages for mental anguish and suffering, caused by the negligence of telegraph companies in such cases.

Damages for mental suffering have always been allowed when they accompany physical injury sustained by the tort of another, and it would be a virtual denial of all redress if a corporation holding a public franchise for the prompt dispatch of intelligence should be absolved from all liability for its negligent failure to deliver messages which, on their face, indicate to the telegraph company that mental anguish will be the direct result of its failure to discharge its duty of prompt delivery. See cases collected in 8 A. & E. (2 Ed.), 658, 662, 663. But we will not discuss over again the reasoning which has commanded the unanimous

opinions of this Court in an unbroken line of decisions from *Young v. Telegraph Co.,* 107 N. C., 370, down to the present, and which have received, without a single exception, the support of all of the judges who have occupied the bench in this Court from the time the point was first presented here. It is sufficient to rest the decision upon the doctrine of *stare decisis.*

It is argued to us that the decisions in other jurisdictions are divided on this subject. Such was the case when our first decision was rendered, and the division was again referred to, and the conflicting decisions elsewhere were summed up in *Sherrill v Telegraph Co.,* 116 N. C., at page 658, and the Court decided it would adhere to our own precedents. This has been reiterated since, *Lyne v. Telegraph Co., supra,* and in other cases. Our decisions have been numerous, uniform, and by unanimous courts. But we are informed that some other courts have changed their views. The telegraph business in this country is practically in the hands of one great corporation (or possibly two), which commands the best legal talent, and, through their control of press dispatches and otherwise, has means of impressing views in accordance with their own
(44) interests, imperceptibly almost, upon the minds of courts as well as the public. Judging by our experience, their counsel have been persistent and urgent to secure a reversal of the decisions wherever unfavorable to the company on this point. If, by reason of this, or statutory changes, or other causes, the decisions in any other jurisdiction have changed, there is none the less reason to adhere to the rule which has commanded the adherence of every judge who has ever passed upon the question in this Court. The Legislature has not seen fit to change the law. Every message of this nature in our State is sent, relying upon the guarantee of prompt delivery which is called for by our settled line of decisions.

We do not deem it necessary, therefore, to go over and again reiterate the reasoning on which is based so long and uniform a line of decisions.

In South Carolina the Supreme Court at first took a somewhat different view from ours, allowing damages for mental suffering only when the failure to deliver messages promptly was wanton, wilful or gross. *Butler v. Telegraph Co.,* 62 S. C., 222. But the Legislature of that State, 20 February, 1901, passed the following act as a declaration of public policy, which is practically a codification of the law as held in this and other courts which take the same view, to wit:

"All telegraph companies doing business in this State shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury, for negligence in receiving, transmitting and delivering messages. . . . In all actions under this act the jury may award

such damages as they conclude resulted from the negligence of said telegraph companies."

This statute was held constitutional by the Supreme Court of South Carolina. *Simmons v. Telegraph Co.*, 63 S. C., 425.

In the division of opinion among the courts of this country, we are unable to refer to the courts of the mother country, because, since 1868, in England, the telegraph has been a part of the (45) Postoffice Department, and has been owned and exclusively operated by the Government, as is also the case in all other great countries of the world, except ours.

No error.

Cited: Higdon v. Tel. Co., post, 728; *Bryan v. Tel. Co.,* 133 N. C., 608; *Hunter v. Tel. Co.,* 135 N. C., 466, 469; *Kernodle v. Tel. Co.,* 141 N. C., 444; *Harrison v. Tel. Co.,* 143 N. C., 153; *Holler v. Tel. Co.,* 149 N. C., 344; *Helms v. Tel. Co., ib.,* 395; *Poe v. Tel. Co.,* 160 N. C., 316.

RODWELL v. HARRISON.

(Filed 3 March, 1903.)

1. Elections—Municipal Corporations—Towns and Cities—Private Laws 1893, Ch. 171, Sec. 3—Laws 1901, Ch. 750, Sec. 19.

The effect of Laws 1901, ch. 750, sec. 19, is to repeal Private Laws 1893, ch. 171, sec. 3, and an election held on the first Monday in May, 1902, in the town of Littleton, was invalid.

2. Statutes—Construction—Retroactive—Declaratory Act—Act 20 February, 1903.

An act of the Legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions arising prior to the declaratory act.

THE STATE on relation of T. O. Rodwell against T. N. HARRISON, heard by *Jones, J.,* at November Term, 1902, of HALIFAX. From a judgment for the defendant, the plaintiff appealed.

E. L. Travis, Walter E. Daniel, and Thomas N. Hill for plaintiff.
No counsel for defendant.

CONNOR, J. The General Assembly, by chapter 171, Private Laws 1893, amended the charter of the Town of Littleton. The third section of said act provides: "That there shall be, on the first Monday in May, 1893, and on the first Monday in May annually there- (46)

after, elected a mayor and seven commissioners for the said town, who shall hold their offices until their successors are qualified." This act was amended by chapter 193, Private Laws 1901, providing for the appointment of a board of elections and of judges of elections, pollholders, and prescribing the time, method, etc., of registration, etc. *Section 3* of the act of 1893 was not amended or in any way referred to in this act.

An election was held on the first Monday in May, 1900, and on the first Monday in May, 1901, at both of which elections the defendant received a majority of the votes cast, and was duly declared elected, and inducted into office. On the first Monday in May, 1902, an election was held in said town, at which the plaintiff received a majority of the votes cast and was duly declared elected, and qualified by taking the oaths of office. He demanded possession of said office of the defendant, who refused to surrender the same. This action was begun 13 October, 1902, for the purpose of ousting the defendant and putting the plaintiff into possession of said office.

The General Assembly, at the session of 1901, passed an act entitled "An act to provide for the holding of town and city elections and special elections in counties and townships." Chapter 750, Laws 1901. "Section 1. That all elections held in any city or town in this State shall be held under the following rules and regulations, except as otherwise provided in the charter of such city or town." Sections 2 to 18, inclusive, prescribe rules and regulations for holding such elections. Section 19 provides that "In all cities and towns an election shall be held on Tuesday after the first Monday in May, 1901, and biennially thereafter (except as to the city of Fayetteville), for such other officers as
(47) the charter of such city or town shall provide for, and any provision to the contrary in any charter of any city or town is hereby expressly repealed." This act was ratified 15 March, 1901. The time for holding elections in Littleton was fixed by section 3, chapter 171, Private Laws 1893. The "rules and regulations" for holding such election were prescribed by chapter 193, Private Laws 1901. The effect of section 19, chapter 750, Laws 1901, was to repeal section 3, chapter 171, Private Laws 1893, and to fix the time of holding said election on the Tuesday after the first Monday in May, 1901, and biennially thereafter. *Loughran v. Hickory,* 129 N. C., 281. The election, therefore, held on the first Monday in May, 1902, under which the plaintiff claims title to the office of mayor, was invalid. The defendant was elected on the first Monday in May, 1900, and was entitled to hold said office until his successor was duly elected and qualified.

We are not called upon to pass upon the validity of the election held on the first Monday in May, 1901. This may be likewise invalid, but

unless the plaintiff has been duly elected and qualified, he cannot maintain his action.

This construction which we put upon the several acts referred to would entitle the defendant to judgment; but the plaintiff says that the General Assembly, at its present session, has declared that the election held on the first Monday in May, 1902, is "legal and valid." He calls our attention to an act ratified 20 February, 1903, entitled "An act to regulate elections in the town of Littleton, North Carolina." This act is in the following words:

"Whereas, on the first Monday in May, 1902, an election was held in the town of Littleton for mayor and town commissioners of said town, in accordance with the provisions of chapter 193, Private Laws 1901; and whereas it has been questioned whether said election should have been held under said chapter 193, Private Laws 1901, or under the general law, chapter 750, Laws 1901; and whereas it was the intention of the General Assembly of 1901, by the passage of said (48) chapter 193, Private Laws 1901, to except the town of Littleton from said general act, and that its election should be held under and regulated by said special act, and not under the general law: Now, therefore,

"The General Assembly of North Carolina do enact:

"SECTION 1. That the election for mayor and commissioners for said town of Littleton, held on the first Monday in May, 1902, in accordance with chapter 193, Private Laws 1901, be and the same is declared to have been legal and valid."

The other sections of said act relate to future elections, etc.

It is very doubtful whether, upon a fair construction of this act, there is any conflict with chapter 750, Laws 1901. As has been pointed out, the said act (section 1) expressly excepts from its operation cities and towns the charters of which provide other "rules and regulations" for holding elections; hence, the election in Littleton must be held under the "rules and regulations" prescribed by its charter as amended. Private Laws 1901, ch. 193, does not prescribe any time for holding elections in said town, and as section 3, chapter 171, Private Laws 1893, is expressly repealed by section 19, chapter 750, Laws 1901, no time other than that provided by said section 19 is fixed for holding such elections. However this may be, we are confronted with the legislative declaration or enactment that such election is "legal and valid." This Court, in case of doubt as to the meaning of language used by the General Assembly, would treat with much consideration and respect an act declaring its intention in the use of the language in question. In respect to

(49) suits upon controversies arising after the passage of the declaratory act, the Court would feel constrained to treat the declaratory act as establishing the law or rule of action. The duty of construing and declaring the law is imposed upon the judicial department of the Government. The duty of making the law as a future rule of action is imposed upon the legislative department. It is only by a strict adherence to the fundamental principle that the several departments of the Government are to be kept forever "separate and independent," to move within their separate and distinct spheres as prescribed by the Constitution, that the symmetry of our political system is preserved. When the legislative departs from its appointed domain and undertakes to declare what the law was and is, and the judiciary undertakes to make the law, there is confusion, uncertainty, and discord; the rights of the citizen are uncertain, unsettled, and insecure; no man will know what is his own, or by what rule of action his rights are fixed and determined. To declare what the law is or has been, is a judicial power; to declare what the law shall be, is legislative. "One of the fundamental principles of our Government is that the legislative power shall be separated from the judicial." *Ogden v. Blackledge,* 2 Cranch, 272.

"A declaratory act, or an act declaring the true intent of a previous act, does not control the judiciary in deciding on the true construction of the first act, except in cases arising subsequent to the act, or except in cases where a retrospective act can properly be passed." Sedgwick Stat. and Const. Law, page 252.

"It is always competent to change an existing law by a declaratory statute; and when the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to
(50) reverse decisions which the courts, in the exercise of their undoubted authority, have made." Cooley Const. Lim., pp. 111, 112.

We cannot adopt the construction of the several statutes referred to, put upon them by the act of 1903. It is not free from doubt whether section 2 of the act of 1903 accomplishes the purpose which the law evidently intended. The *time* of holding elections in Littleton is not fixed by chapter 193, Private Laws 1901, while the *"provisions"* therefor are clearly set forth therein. Section 3, chapter 171, Private Laws 1893, having been repealed by section 19, chapter 750, Laws 1901, it would seem that, by a fair construction of the act of 1903, the time of holding such elections is still fixed by the general law, notwithstanding the language of section 2 of the act of 1903. The judgment is

Affirmed.

HUGHES v. GAY.

(Filed 3 March, 1903.)

1. Mortgages—Foreclosure of Mortgages—Ejectment—Parties—Executors and Administrators—Heirs at Law.

Where the plaintiff in a foreclosure or ejectment action dies, his heirs at law must be made parties.

2. Mortgages—Foreclosure of Mortgages—Parties—Executors and Administrators—Laws 1887, Ch. 147—Laws 1901, Ch. 186.

Laws 1887, ch. 147, as amended by Laws 1901, ch. 186, provides that a personal representative can sell under a mortgage, but does not confer any right to maintain an action of ejectment nor for foreclosure.

ACTION by W. H. Hughes against L. D. Gay and others, heard by *Jones, J.*, at September Term, 1902, of NORTHAMPTON. From an order refusing a motion to dismiss the action for defect of parties, the defendants appealed. (51)

Gay & Midgett and W. J. Peele for plaintiff.
Peebles & Harris for defendants.

CLARK, C. J. This action was begun by W. H. Hughes, the mortgagee, as an action of ejectment against H. B. Gay and W. H. Hyatt, who, he alleged, were in possession, and who, by answer, denied the title of the mortgagor and the Cummer Company, purchasers from them of part of the timber thereon, and against L. D. Gay, the mortgagor, for possession and foreclosure. Upon the death of the plaintiff his executor attempted to carry on the action without making his heirs at law parties. The motion to dismiss for such defect should have been treated as a demurrer and sustained.

Upon the death of the mortgagee the legal title descended to his heirs at law. A foreclosure could not be decreed without making them parties. *Pullen v. Mining Co.*, 71 N. C., 567; *Hughes v. Hodges*, 94 N. C., 56; *Graves v. Trueblood*, 96 N. C., 495. Nor could the personal representative maintain an action of ejectment. By a late English statute (Land Transfer Act, 1897), lands descended not to the heirs at law, but to the personal representative, to be applied first as assets and then to hold the surplus in trust for the heirs at law. We have as yet no such statute in this State. Chapter 147, Laws 1887, now corrected and amended by chapter 186, Laws 1901, has no such effect. It is simply provided thereby that when a mortgagee or trustee, in a mortgage or trust deed containing a power of sale, shall die before payment of the debt secured,

"all the rights, powers, and duties of such mortgagee or trustee" shall pass to their personal representatives—that is, the power of sale passes.

This act was not intended to confer any right of action in eject-
(52) ment, but simply to avoid going into court to obtain the appointment of a new trustee, as was formerly necessary. A mortgage with power of sale holds in two capacities: first, the legal title which passes at his death to his heirs at law; and, secondly, the superadded power of sale, which, under the statute, now passes to his personal representative.

There being no authority in the personal representative to maintain this as an action of ejectment, nor for foreclosure without making the heirs at law parties, the demurrer should have been sustained.

As the case goes back, it will be in the discretion of the judge below to permit additional parties to be made, and an amendment of the pleadings.

Error.

NORWOOD v. LASSITER.

(Filed 3 March, 1903.)

1. Mortgages—Trust Deeds—Estoppel—Sales—Minor—Election—Infants.

Where a minor, after attaining his majority, accepts the proceeds of a sale under a deed of trust, he is estopped from disputing the validity of the sale on the ground that the trustee sold without a previous request from the creditor, as required by the trust deed.

2. Advice of Counsel—Attorney and Client—Estoppel—Mortgages—Election—Infants—Minor.

Where a minor, after attaining his majority, accepts the proceeds of a sale of land under a deed of trust, he is estopped from denying the validity of the sale, though he was advised by counsel that he would not be estopped thereby.

ACTION by Arthur Norwood against S. M. Lassiter and others, heard by *Brown, J.*, and a jury, at March Term, 1902, of NORTHAMPTON.
(53) From a judgment for the defendants, the plaintiff appealed.

Day & Bell, Thomas N. Hill, Thomas W. Mason, F. H. Busbee & Son for plaintiff.

B. B. Winborne, B. S. Gay, S. J. Calvert, and W. E. Daniel for defendants.

WALKER, J. This action was brought for the purpose of having a deed canceled, and for the recovery of the possession of one of the tracts of land known as the "Josey tract," therein described.

It appears that on 8 September, 1880, W. S. Norwood and wife executed to W. C. Bowen a deed of trust for said land, which was then the property of Mrs. Norwood, to secure a debt of $3,000 owing by her husband to W. H. Farmer. The deed contained a power of sale, which was to be exercised only upon the request of Farmer. In 1883 Norwood and his wife died, the latter leaving a will, in which she devised the "Josey tract" to the plaintiff, and he is the owner thereof, unless he has in some way lost his title by reason of the facts hereinafter stated.

W. C. Bowen, on 12 January, 1885, without having been requested so to do by W. H. Farmer, as plaintiff alleges, sold the land under the power of sale, and it was purchased by the defendants, E. Baugham and E. E. Lassiter.

The principal question in controversy between the parties was whether Farmer had before the sale requested Bowen to sell the land, and an issue presenting this question was submitted to the jury.

There was evidence tending to show that W. H. Farmer was present at the sale which was made by Bowen, the trustee, and "did not then and there give any notice of his objection to it, but bid himself on the land"; and the court charged the jury with reference to (54) this evidence, that if they found the facts to be in accordance therewith, they should give their verdict in favor of the defendants; otherwise, for the plaintiff. The jury returned a verdict for the defendants upon the issue submitted, and judgment was entered in accordance therewith.

In order to show that the preliminary request for the sale of the land had not been made by Farmer, the plaintiff proposed to ask his witness, Granville Josey, if he had seen Farmer and Bowen talking with each other before the sale, and if he did not hear Farmer say to Bowen, "I don't want it sold." Plaintiff then proposed to prove by this witness, "that immediately, but after Bowen was out of hearing, the witness asked Farmer what they had been talking about, and that Farmer replied that they had been talking about the sale of the Josey tract of land." This evidence was objected to by defendant, and was excluded by the court. Plaintiff then proposed to prove by one of his witnesses, Mrs. Etheridge, that Farmer frequently told her "that he did not want the land to be sold, and did not authorize Bowen to sell it, and that he had so instructed Bowen." Bowen was not present at the time of the alleged conversation. This evidence was also excluded by the court upon objection by defendants. Plaintiffs entered exceptions to these rulings of the court, including the instruction to the jury, in apt time.

We think that the rulings of the court upon the testimony were all correct, as the evidence proposed to be elicited was manifestly hearsay;

but for the reason which will presently appear, it is not, in our opinion, necessary that we should pass upon these matters nor upon the exception of the plaintiff to the charge of the court, given upon the issue submitted to the jury, which also seems to be correct. The decision of the
(55) case must turn upon a very different question.

It is admitted that so much of the proceeds of the sale as was necessary for that purpose was applied to the payment of the debt due to Farmer, and the balance was paid to the guardian of the plaintiff, who was then a minor, and that part of that balance was expended by the guardian for the plaintiff's support and maintenance. The guardian resigned and a receiver of the estate of the minor was appointed, under the statute, and the balance of the proceeds of the sale remaining in the guardian's hand was paid to him. When the plaintiff attained his majority the receiver settled with him and paid over the balance in his hands. The plaintiff admits the receipt of the money from the receiver, but he says that, upon taking it from him, he asked him if receiving the money would be a ratification of the sale made by W. C. Bowen, and that the receiver referred him to his attorney, a lawyer of high standing who was familiar with all of the facts, and who advised him that it would not be a ratification of the sale, and that, acting upon the advice of the attorney, and with no actual intention of ratifying the sale, he accepted the money, and at the time of doing so he expressed his intention to bring this suit. This, it seems to us, is a fair and full statement of the facts to be gathered from the record in the case.

It is perfectly clear that, notwithstanding what the plaintiff may have said or what he intended at the time he took the money, which was a part of the proceeds of the sale, his receipt of it was a ratification of the sale to the defendant and a complete waiver in law of all irregularities in the conduct of the sale and of any lack of authority in Bowen there may have been, for the reason assigned, that is, the absence of any request from Farmer to make the sale. When the plaintiff received the money he did something that was utterly inconsistent with his right to repudiate or disaffirm the sale. When a party has the right to
(56) ratify or reject, he is put thereby to his election, and he must decide, once for all, what he will do; and when his election is once made, it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart,* 126 N. C., 525. He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale. *Keer v. Sanders,* 122 N. C., 635; *Mendenhall v. Mendenhall,* 53 N. C., 287. It is familiar learning that when two inconsistent benefits or alternative rights are presented for the choice of a party, the law imposes the duty upon him to decide as between them,

which he will take or enjoy, and after he has made the election he must abide by it, especially when the nature of the case requires that he should not enjoy both, or when innocent third parties may suffer if he is permitted afterwards to change his mind and retract.

The doctrine of election frequently, though not exclusively, arises in case of wills; but the principle in its very nature seems to apply equally to other instruments and transactions. 2 Story Eq. Jur., sec. 1075, and notes. In that section Judge Story defines the doctrine most clearly: "Election in the sense here used is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one (or of the law), that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both (or of the law) that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both."

When the plaintiff elected to take the proceeds of the sale, this was an unequivocal act from which the law conclusively infers an intention to ratify the sale. It is what a party does, and not what he may actually intend, that fixes or ascertains his rights under the law. (57) He cannot do one thing and intend another and very different and inconsistent thing. The law will presume that he intended the legal consequences of what he does, or, in other words, that his intention accords in all respects with the nature of his act. It is therefore the thing done and not the motive with which it is done that must afterwards determine the rights of the party as against third persons whose interest may be affected. It can make no difference whether the doctrine of election applies strictly and technically to the facts of this case. The reason underlying it does apply, and when there is the same reason there should be the same law. Besides, Bowen was, in fact, the agent of both parties, the plaintiff as representing the original trustor, and the creditor, W. H. Farmer, and when he acted contrary to the terms of the deed by which his agency was created, the plaintiff could affirm or repudiate his act, and having chosen not to repudiate, he must be bound by it. Every principle of fair dealing requires the strict enforcement of the rule binding him to the ratification which results from his election to take the money.

We should need no argument or authority to establish the proposition just stated, but many decided cases can easily be cited to support it. An apt illustration of the principle, which is peculiarly applicable to the facts of our case, will be found in *Smith v. Gray,* 116 N. C., 311, where

it was held by this Court that an infant who, after reaching his majority, acquires knowledge of irregularities rendering the sale of his lands voidable by him, and nevertheless receives the residue of the purchase price, thereby ratifies the sale and validates the purchaser's title, as much so as if the sale had been regularly conducted in strict conformity with the terms of the power or authority under which it was sold.

(58) In *Moore v. Hill,* 85 N. C., 218, the Court said that if the owner of a chattel which has been sold as the property of another, accepts or retains to his own use a note which he knows the vendee has given for the purchase money, he is as surely estopped by his act of acceptance as if he legally sold and transferred the chattel to the vendee. In accordance with the same principle, it has been held that the acquiescence of a mortgagor in the conduct of a sale under a power contained in the mortgage, and particularly in the terms of it, will cure any defect or irregularity in the sale, resulting from the failure of the mortgagee to comply with the directions of the power, and will give validity to the sale, and consequently a perfect title to the purchaser. *Lunsford v. Speaks,* 112 N. C., 608. What stronger evidence of acquiescence and ratification can be furnished than the receipt of the purchase money? *Sanderlin v. Thompson,* 17 N. C., 539; *Syme v. Badger,* 92 N. C., 706.

The fact that the plaintiff relied upon the advice of counsel does not improve his condition. He cannot visit the evil consequences of that advice upon the defendants, who were not in any way responsible for it. If he was induced by it to adopt a course of action which he would not have taken but for the advice, it is his misfortune and not their fault, and they cannot be made to suffer for it. *Oates v. Munday,* 127 N. C., 439; *S. v. Downs,* 116 N. C., 1064. The advice of counsel excuses no man, unless, perhaps, in cases where the question involved is whether he acted in good faith or with reasonable prudence, and perhaps in some other instances not now necessary to be mentioned, but never in a case like the one at bar. In such a case he takes and acts upon the advice at his peril, for it can change neither the facts nor the law to the prejudice of other interested parties.

It has been held by this Court that when a party disobeys an injunction under advice of counsel, he cannot thereby discharge himself from the penalty for the disobedience even though he may have acted in

(59) good faith. *Green v Griffin,* 95 N. C., 50.

The decisive act of receiving the money with knowledge of the facts determines his election, and estops him now to say that no request was made previous to the sale, if such is the fact. He has ratified and confirmed the sale, and, as to him, the defendants have a good and un-

impeachable title. W. H. Farmer, by his conduct at the sale, and by receiving the amount of his debt out of the proceeds, also ratified the sale. *Cassidy v. Wallace,* 102 Mo., 580.

PER CURIAM. Judgment affirmed.

Cited: Vick v. Tripp, 153 N. C., 94; *McCullers v. Cheatham,* 163 N. C., 64; *Brewington v. Hargrove,* 178 N. C., 145; *Wilkins v. Welch,* 179 N. C., 268.

LINDSAY v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 3 March, 1903.)

Negligence—Contributory Negligence—Master and Servant—Railroads.

Where the duties of a brakeman require him to be on top of a car, and while reclining with his feet hanging over the car he is caught and jerked from the car by a loop in a rope hanging from a water-pipe, negligently left over the track, the railroad company is liable for injuries thereby sustained.

ACTION by Ambrose Lindsay against the Norfolk and Southern Railroad Company, heard by *Winston, J.,* and a jury, at Special (December) Term, 1902, of CURRITUCK. From a judgment for the plaintiff, the defendant appealed.

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

DOUGLAS, J. This is an action to recover damages alleged to (60) have been received through the negligence of the defendant. The defendant denies its own negligence, and alleges contributory negligence on the part of the plaintiff. The defendant introduced no evidence, and, at the conclusion of the plaintiff's testimony, moved for judgment as of nonsuit. There is practically no contradiction as to the material facts. It appears that the plaintiff was a flagman and brakeman, and that his duties required him to be on top the cars or between them. The brake wheel was halfway between the middle and edge of the car, and about four feet from the plaintiff, who was sitting, or rather reclining, on top of the car with his feet hanging over the side. The conductor and another brakeman to whom the plaintiff was talking were sitting on the running-board a few feet distant. While in this situation, the plaintiff being suddenly warned by the conductor to "look out,"

raised himself on his arm, and was caught and jerked from the car by a rope hanging in a loop from a water-pipe which projected over the car.

The plaintiff alleges two distinct acts of negligence on the part of the defendant—needlessly permitting the pipe to remain over the track, and looping the rope in such a way as would naturally pull off anything with which it should come in contact. We think that either act of itself would have constituted actionable negligence, while the absence of either would have prevented the injury. If the pipe had been pushed back where it belonged when not in use, the rope could not have caught the plaintiff; while if the rope had been cut in two, which would not have impaired its usefulness, it could not have held him. Judgment of dismissal as of nonsuit was therefore properly refused. *House v. R. R.*, 131 N. C., 103.

The defendant lays great stress upon the fact that the plaintiff was sitting on the side of the car with his feet hanging over the edge, which it characterizes as "desperately reckless." To the ordi-
(61) nary man, any position on the top of a car would be dangerous, but it would seem that sitting down anywhere would be less dangerous than standing on the running-board, as it would be easier to preserve the center of gravity. But admitting that the plaintiff's position was one of increased danger, that of itself would not constitute contributory negligence, unless it were the proximate cause of the injury. He might have been in a position of equal danger on the other side of the car, and would not have been hurt, simply because the rope did not reach that far. The same reason would have produced the exemption from injury had he been sitting on the running-board. Had he been caught by his feet, the matter would be different; but it was stated by counsel, without contradiction, that he was caught by his neck. Hence, those cases cited by the defendant where the plaintiff was caught by his feet in a cattle-guard, or struck on some projecting part of his body, have no application to the case at bar. Of course, the personal presence of the plaintiff at the scene of the accident is a necessary condition to his injury, but it is not regarded as the legal cause thereof unless a man of ordinary prudence would, under like circumstances, have reasonably anticipated the danger likely to accrue. Moreover, mere negligence, either on the part of the defendant or of the plaintiff, has no legal effect, unless, separately and concurrently, it is the proximate cause of the injury. *Edwards v. R. R.*, 129 N. C., 78.

What we have said practically disposes of the case. There are several exceptions to the charge, but they are without merit and do not seem

to have been relied on by the defendant. The judgment of the court below is

Affirmed.

Cited: *Howard v. R. R., post,* 711; *Graves v. R. R.,* 136 N. C., 6.

---

(62)

RICAUD v. ALDERMAN.

(Filed 10 March, 1903.)

1. Courts—Records—Judgments.

The power is inherent in every court to correct its record so as to speak the truth.

2. Findings of Court—Evidence.

The findings of the trial judge before whom a motion is made to correct a judgment are conclusive on appeal, provided there is any evidence to sustain them.

3. Judgments—Records—Findings of Court.

Where a judgment states that a summons had been served, but the court records show that it had not been served, and the trial judge so finds, the original judgment will be corrected so as to show that the summons was not served.

4. Judgments—Assignments—Assignee.

The assignee of a judgment for value acquires no greater rights than the assignor had.

ACTION by A. G. Ricaud, receiver of the First National Bank of Wilmington, against Alderman & Flanner, heard by *Peebles, J.*, at February Term, 1903, of NEW HANOVER.

Homer J. Clark, who is referred to in the opinion, was appointed receiver in place of A. G. Ricaud, resigned. E. K. Bryan was counsel for plaintiff in the action from its commencement. He purchased the judgment in question from Homer J. Clark, as receiver, along with other assets of the bank.

From an order setting aside a judgment as to A. J. Flanner individually, the plaintiff appealed.

E. K. Bryan and Junius Davis for plaintiff.

Rountree & Carr, J. D. Bellamy, and Stevens, Beasley & Weeks for defendant.

(63) CONNOR, J. This is a motion made by the defendant A. J. Flanner to set aside a judgment rendered at January Term, 1897, of the Superior Court of New Hanover. His Honor, upon affidavits, inspection of the record, and other competent testimony, found the following facts:

The summons was issued 3 November, 1894, against the defendants, Alderman & Flanner, and returned with the following endorsement thereon: "Executed 3 November, 1894, on W. H. Alderman. A. J. Flanner not to be found in county. Received my fees, 60 cents," signed by the sheriff; that said summons was not served on defendant A. J. Flanner; that no other summons ever issued in said action. The rough minutes of April Term, 1895, show, in the handwriting of the deputy clerk, this entry, "Alias continued." The bound minute-book shows this entry, "Continued." There was no evidence that any alias was ever issued. Said action was continued until January Term, 1897, of said court, when a verified complaint was filed, and at said term judgment was signed by the judge presiding, containing the following recital: "And it appearing to the court that the summons in this action was duly served on each of the defendants," etc. Judgment was rendered that the plaintiff recover of the defendants the sum of $18,527.26, etc.; that when the judge signed said judgment, he did so inadvertently, not having before him any evidence to sustain the finding of service of summons on the defendant A. J. Flanner.

There was evidence before his Honor in regard to the motion to issue execution, and the petition filed by Alderman & Flanner in bankruptcy, which we deem immaterial.

E. K. Bryan purchased at public sale the judgment from H. J. Clark, who succeeded to the plaintiff's rights; that he purchased at the same time from said Clark other judgments aggregating, with the one in question, about $150,000, for the sum of $59; that said purchase was made at a sale made for the purpose of closing out the assets of
(64) the First National Bank, which was insolvent and in the hands of a receiver.

This motion is properly made, and is a direct attack upon the integrity of the judgment. It is, in fact, a motion to correct the record so that it may speak the truth. This power is inherent in every court, and its exercise has been so frequently approved by this Court that it would seem unnecessary to cite authorities to sustain it in this case. *Phillips v. Higdon,* 44 N. C., 380; *Walton v Pearson,* 85 N. C., 34. The findings of the judge before whom the motion is made are conclusive upon this Court, provided there be any evidence to sustain them. *Finlayson v. Accident Co.,* 109 N. C., 196. In this case we think there was ample evidence to sustain his Honor's conclusions of fact. The return on the

summons shows clearly that it was not served upon Flanner, and the absence of any other summons or entry on the record would seem to negative the idea of service of any process on him, or any waiver by him thereof. The recital in the judgment makes it, *upon its face,* valid, but it was competent for the defendant, in a direct proceeding, to show that in fact and in truth there had been no service, or, as found by his Honor, was inadvertently made. We can easily understand how it occurred, without the slightest reflection upon counsel or court. When the record was thus corrected, it showed a judgment without the service of process, or a waiver thereof, and of course should have been set aside.

The purchaser, however, says that, conceding this, he was a purchaser for value of the judgment, and that relying upon the recital in the judgment, in purchasing it, he is protected; that no action now taken by the court can affect his rights. It is well settled that a judgment is assignable, and that the assignee for value acquires all of the rights and remedies of the original plaintiff. *Smith v. Powell,* 2 N. C., 452 (520); *Moore v. Nowell,* 94 N. C., 265. It is equally well settled that he acquires no other rights or superior remedies than his assignor (65) had. *McJiltor v. Jove,* 13 Ill., 486, 54 Am. Dec., 449; *Graves v. Woodbury,* 4 Hill (N. Y.), 559, 40 Am. Dec., 296; Black on Judgments, sec. 953.

We think it doubtful whether the purchaser of $150,000 of judgments for $59 can be said to be a purchaser for value within the meaning of that term, as defined by this Court, but it is not necessary to decide this question, as we are of the opinion that he takes the assignment subject to all rights and defenses attaching to the judgment against his assignor. We do not think that there has been such laches on the part of Flanner as to bar him from seeking relief by motion to amend the record. The court should, and will at any time, correct its records. It may be, and often is, that innocent third persons have acquired rights of property under process or decrees made to enforce the judgment which will be protected by the court. *Harrison v. Hargrove,* 120 N. C., 96, 58 Am. St., 781, is one of many such cases. There is no such question presented in this case. The judgment of his Honor must be

Affirmed.

Cited: Reynolds v. Cotton Mills, 177 N. C., 424; *White v. White,* 179 N. C., 597; *Chatham v. Realty Co.,* 180 N. C., 507.

(66)

PORTER v. ARMSTRONG.

(Filed 10 March, 1903.)

1. Injunctions—Water and Water-courses.

An injunction will not lie to restrain the threatened blocking up of a depression into which the water from the land of the plaintiff naturally drains, there being adequate remedies at law.

2. Injunction—Complaint—Insolvency—Damages.

A complaint for an injunction must allege that the defendant is in solvent and unable to respond in damages.

3. Injunction—Complaint—Suffering—Injury—Damages.

The complaint for an injunction must set out such specific facts as will enable the court to see that the apprehended damages will be irreparable.

ACTION for an injunction by E. Porter and wife against T. J. Armstrong and others, heard by *Bryan, J.*, at September Term, 1902, of PENDER. From a judgment for the defendants, the plaintiffs appealed.

John D. Bellamy and Stevens, Beasley & Weeks for plaintiffs.
J. T. Bland and E. K. Bryan for defendants.

CLARK, C. J. The court below dismissed the action because the complaint did not state a cause of action. The averments are that the defendant threatens to block up a natural depression into which the water from the plaintiff's land naturally drains, and that this will pond the water back upon the plaintiff's land to his irreparable damage, wherefore he asks for an injunction.

An injunction will not lie when there is an adequate remedy at law, and the plaintiff has at least two, *i. e.*, an action for damages after the apprehended act has been committed, or to clean out and deepen, or excavate if necessary, the channel on the defendant's land, as authorized by The Code, ch. 30, as intimated by us to be the proper remedy
(67) whenever the natural outlet is inadequate or choked up, in *Porter v. Armstrong*, 129 N. C., at p. 107; *Mizzel v. McGowan, ib.*, 93, 85 Am. St., 705.

It is true that the plaintiff is not restricted to the relief demanded in his complaint, but may have any remedy which the facts alleged and proved entitle him to receive. Clark's Code (3d Ed.), sec. 233 (3), and cases cited. But the allegations here are not of any act done, nor of any damages actually sustained, but of acts threatened to be done,

from which damage is apprehended. Apart from the fact that an injunction will not lie because there is full remedy at law, the complaint does not state a cause of action on which to procure an injunction, in that it is not alleged that the defendant is insolvent and unable to respond in damages. *Wilson v. Featherston,* 120 N. C., 449; *Land Co. v. Webb,* 117 N. C., 478. Nor is it sufficient to allege, as here, in general terms that the injury will be irreparable, but the complaint must set out such specific allegations of fact which will enable the court to see that the apprehended damages will be irreparable, and therefore that there will be no adequate remedy at law. *Frink v. Stewart,* 94 N. C., 484; *Land Co. v. Webb, supra.*

No error.

Cited: Yount v. Setzer, 155 N. C., 217; *Rope Co. v. Aluminum Co.,* 165 N. C., 576.

---

(68)

BEAMAN v. WARD.

(Filed 10 March, 1903.)

1. Exceptions and Objections—Appeal—Evidence.

An objection to evidence interposed after its admission is not in apt time and will not be considered on appeal.

2. Negotiable Instruments—Commercial Paper—Assignments—Presumption—Possession.

The possession of a non-negotiable instrument by one claiming to be assignee thereof is presumptive evidence of ownership.

3. Negotiable Instruments—Evidence—Fraud—Consideration.

The evidence herein as to fraud and want of consideration in the obtaining of a negotiable instrument is not sufficient to be submitted to the jury.

4. Negotiable Instruments—Pleadings—Answer—Fraud.

In an action to recover on a negotiable instrument, it is not sufficient for the defendant merely to allege fraud, but the facts constituting the fraud must be alleged.

ACTION by W. J. Beaman and others against Clifton Ward, heard by *Timberlake, J.,* and a jury, at May Term, 1902, of SAMPSON. From a judgment for the plaintiffs, the defendant appealed.

George E. Butler and John D. Kerr for plaintiffs.
F. R. Cooper and Faison & Grady for defendant.

WALKER, J. This action was brought to recover the amount of a note made by the defendant to B. P. Robinson, and having on its face the word "non-negotiable." It appeared to have been endorsed by Robinson to Walter McDraughan and by the latter to the plaintiff, the last endorsement having been attested by H. I. Lee. The defendant admitted the execution of the note, but denied the assignment or endorsement of it to the plaintiff; and in order to prove his ownership of the note the plaintiff, who had it in his possession, produced it at the trial, and then introduced one J. A. Beaman, who testified that he was present and saw Robinson transfer the note to McDraughan, and, also,
(69) that he saw McDraughan execute the transfer to the plaintiff and saw H. I. Lee witness it.

It seems from the case that the defendant's objection to this evidence was not made until after the witness had testified to the facts in regard to the endorsement, and we must hold that this objection was not interposed in apt time, because the case does not show that it was, and the court below may have based its ruling upon the ground that the objection came too late. For this reason, there is no error in the ruling of the court upon the defendant's objection to this evidence. *McRae v. Malloy,* 93 N. C., 154; *Wiggins v. Guthrie,* 101 N. C., 661; *Blake v. Broughton,* 107 N. C., 220.

Counsel must make known their objections to evidence in apt time, and it must appear from the case on appeal that this was done; otherwise, the exception to the overruling of the objection will not be sustained in this Court, as some presumption is made in favor of the correctness of the ruling of the lower court, and we must therefore infer that the objection came too late and that the court, in the exercise of its discretion, refused to entertain it.

But if the objection had been made in apt time, it seems that under the facts and circumstances of this case the ruling of the court was correct, as there was a presumption of ownership of the note by the plaintiff (*Jackson v. Love,* 82 N. C., 405, 33 Am. Rep., 685), and this was not rebutted in any way. In the case just cited, the note was payable to W. W. Stringfield, and the action upon it was brought by the plaintiff, who was not a party to the note. The Court held that he could recover if he produced the note at the trial, upon the principle that "as men generally own the personal property they possess, the possession of the property is presumptive proof of ownership"—citing 1 Greenleaf Ev., sec. 34.

It seems that it was not necessary to call H. I. Lee, as he was (70) not the witness of the law, but attested the assignment of the note only for the convenience of the party. But it is not necessary to decide this question.

The defendant alleged that the note was "fraudulent and void" and introduced evidence tending to show that the note was given for the right to sell a patented process, known as the "Up-to-date Washing Compound," in one-half of the State of Alabama, and that a deed was duly executed to him for the same by Robinson. There was further evidence that no one had infringed upon his patent right, or interfered in any way with his sale of the compound. The plaintiff testified that he had been told by Robinson that one Parker would take the other half interest, and that he (Robinson) was to have one-half of Parker's profits, and Parker told the plaintiff that Robinson had let him have said half interest, and that he would go to Alabama and prosecute the business. Parker was not to pay anything to Robinson for his half interest, except the one-half of the profits realized by him, but he was to accompany the plaintiff and another man, not named, to Alabama and sell the compound, and they did go for that purpose. The plaintiff also testified that he had purchased the right to sell the compound in certain counties in this State and had made money out of it; and there was other evidence tending to show that the compound was what it was represented to be and had given satisfaction, and that the sale of it was profitable.

At the close of the testimony the court held that there was not sufficient evidence to be submitted to the jury, upon the issues tendered by the defendant, as to fraud and the want of consideration, and instructed the jury, if they believed the evidence, to find the other issues in favor of the plaintiff; and the jury returned a verdict for the plaintiff, upon which judgment was accordingly entered.

If we treat the note as non-negotiable in the sense that the (71) defendant can set up any defense against the plaintiff which he could have pleaded against the original payee, we do not think that the defendant has sufficiently pleaded the fraud. It will not do merely to allege fraud; the pleader must allege the facts constituting the fraud. But if the fraud had been properly pleaded, we are unable to discover any evidence to support the allegation that the note was obtained fraudulently or upon a false or fraudulent representation, and we were not informed by the learned counsel, in the argument of the case before us, in what the fraud consisted; nor was any authority cited to aid us in our investigation of the matter. The same may be said in regard to the defense of want of consideration. The burden being on the defendant, he has failed to allege and show fraud or any good defense to the action. *Triplett v. Foster,* 115 N. C., 335.

We do not see how the court could well have decided otherwise than it did under the circumstances. Judgment
Affirmed.

Cited: Bank v. Walser, 162 N. C., 63; *Bank v. Seagroves,* 166 N. C., 610; *Galloway v. Goolsby,* 176 N. C., 639; *S. v. Stancil,* 178 N. C., 685.

PORTER v. RALEIGH AND GASTON RAILROAD COMPANY.

(Filed 10 March, 1903.)

1. Carriers—Negligence—Evidence—Sufficiency—Railroads.

The evidence in this case as to the negligence of a railroad company in failing to ship goods is sufficient to be submitted to the jury.

2. Carriers—Contracts—Agency.

When a railroad company agrees to ratify a contract for the shipment of goods, made by a local agent in violation of its rules, it is required to perform such contract.

ACTION by Albert N. Porter against the Raleigh and Gaston Railroad Company, heard by *Winston, J.,* and a jury, at October Term, 1902, of VANCE. From a judgment for the defendant, the plaintiff
(72) appealed.

T. M. Pittman for plaintiff.
J. H. Bridgers and W. H. Day for defendant.

MONTGOMERY, J. The plaintiff brought this action to recover damages of the defendant company on acount of alleged negligence on its part in failing to ship on its railroad certain household goods and furniture belonging to the plaintiff. He, at the time of the alleged negligence, was living in Illinois. One of his friends in Henderson, N. C., at his request carried the goods and furniture to the agent of the defendant company in that town to be shipped to the plaintiff at his home in Illinois. Prepayment of the freight charges was demanded by the company's agent, and that demand was not complied with.

The plaintiff introduced evidence tending to show that in a conversation between the station agent and the plaintiff's agent, it was agreed that upon the payment by the plaintiff of the amount of the freight charges (about $50) to the railroad agent, at Alexis, in Illinois (agent of C. B.

and Q. Railway Company), that the defendant would at once ship the goods upon the defendant's being notified of the deposit; that the plaintiff was notified of the arrangement, and on 19 or 20 July, 1900, the required amount was paid to the agent at Alexis by the plaintiff; that on the same day J. G. Cantrell, the general western agent of the defendant company, was properly notified of the transaction by H. D. Mack, division freight and passenger agent of the C. B. and Q. Railway Company, Alexis, Ill., being in his division; that Mack on the same day, 20 July, by telegram informed the agent at Alexis that he might advise Porter that the necessary steps had been taken towards having his goods forwarded; that on 23 July, Cantrell notified the general freight agent of the defendant company of the whole arrangement, (73) with request to forward the shipment of the goods from Henderson to Alexis; that the defendant did not repudiate the agreement, but took steps to carry it out; that the goods were never shipped, but were consumed in the burning of the warehouse of the defendant company on 26 July.

His Honor was of the opinion that upon the evidence the plaintiff could not recover.

The defendant, in this Court, contended that the complaint did not set out a cause of action as to the relation of shipper and carrier, and that there was no allegation of the relation of shipper and carrier. We think that relation was sufficiently stated in the second, fourth, fifth and sixth allegations of the complaint. As will be seen from a statement of the evidence of the plaintiff, the amount of the charges for the shipment of the goods from Henderson to Alexis was paid by the plaintiff at Alexis according to agreement; that a division freight agent of the line of destination notified the general western agent of the defendant company, whose division extended over Alexis, of the entire arrangement; that the general freight agent of the defendant company was also notified of the same three days later (on the 23d); that the defendant acquiesced in the agreement and took steps to carry it out, and that the goods were burned on the 26th.

The question now is, Was this evidence of sufficient consequence (more than a scintilla) to be submitted to the jury on the question of the defendant's negligence? We are of the opinion that it was, if the station agent at Henderson had the authority and right to make the agreement with the plaintiff's agent, or if the defendant ratified the agreement by accepting its terms. It was not contested on the part of the defendant that the station agent at Henderson could make an agreement to ship goods by freight from Henderson to Illinois over connecting lines, upon the prepayment of the freight. The objection urged was that he could not, in violation of the rules of his company, (74)

contract to ship the goods without the prepayment of the freight charges at Henderson, including those of the connecting lines.

It is not necessary to the decision of this case to consider whether the station agent had the right, the authority, to make the freight charges payable at Alexis instead of at Henderson, as the rule of the company required (the plaintiff having been acquainted with that rule). There was evidence, as we have seen, that the general freight agent received official knowledge of the agreement made between the station agent at Henderson and the agent of the plaintiff, and of the payment by the plaintiff of the freight charges at Alexis under the agreement; that the agreement was acquiesced in and plans begun to have the agreement carried out, and that the defendant was in treaty with other railway systems as to which connecting lines the goods should be carried over to their destination. The general western agent of the defendant, five or six days after having been notified of the agreement, in a communication to Mack, said:

"DEAR SIR:—Further, your letter of 20 July and my reply of yesterday. I have just received the following wire from C. R. Capps, our general freight agent: 'Your wire 23 July regarding household goods for Rev. Albert N. Porter, of Alexis, it will be necessary for Mr. Mack to wire the Big Four and have them in turn wire the C. and O., who should telegraph us that they will accept from us without prepay the shipment of household goods in question. We could not consent to handle the business up to Portsmouth and have it turned down by our connection here.' Will you please take this matter up with the Big Four people by telegraph and have them in turn wire the C. and O. instruction to accept this shipment from Portsmouth, Va. Freight charges collect on your guarantee. We will then issue instructions for shipment to be
(75) forwarded at once to your care at such gateway as you prefer."

There was no evidence to the effect that the plaintiff had any knowledge of the rule of any of the connecting or intermediate roads, requiring prepayment of freight charges upon freight received from the others, if any such rule or rules did in fact exist.

There was error in the judgment of nonsuit, for which there must be a New trial.

Cited: Lyon v. R. R., 155 N. C., 145; *Starnes v. R. R.*, 170 N. C., 224.

INSURANCE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 March, 1903.)

1. Negligence—Right of Way—Fires—Railroads.

Where a railroad company negligently permits bales of cotton to stand on its platform until the bagging comes off and the lint bulges out and it is ignited by fire, the company is liable for the destruction of property by fire communicated by sparks from a passing engine to the cotton.

2. Parties—Subrogation—Insurance—Assignments—The Code, Sec. 177—Laws 1899, Ch. 54, Sec. 43.

When property is burned by the negligence of a railroad company and the insurance company pays the loss, it may sue the railroad company, and no assignment by the insured is necessary.

ACTION by the Hamburg-Bremen Fire Insurance Company against the Atlantic Coast Line Railroad Company, heard by *Winston, J.*, and a jury, at October Term, 1902, of EDGECOMBE. From a judgment for the plaintiff, the defendant appealed.

G. M. T. Fountain for plaintiff.
John L. Bridgers and George B. Elliott for defendant.

CLARK, C. J. The complaint alleges that "the defendant negligently allowed and permitted inflammable material to be and remain on its right of way, and the same so remaining on its said right of way on the night of 4 February, 1901, said inflammable material (76) was set on fire by sparks falling from one of its engines passing over its said right of way, or otherwise, between the hour of 10 o'clock p. m. and the hour of 4 o'clock a. m. of the said night preceding 5 February, 1901, and the said fire so started, spread to the property of the said Hearne Bros. & Co. and the same was burned and destroyed to the value of $750, which the plaintiff had to pay under its insurance policy as aforesaid, to their great damage, to wit, the sum of $742.50 aforesaid."

The judge sets out in the judgment the following findings of fact: "It being admitted by the defendant that the facts alleged in the complaint are true, reserving the question of liability arising upon these facts to be hereafter determined, except the negligent burning, and it being further agreed that his Honor should submit to the jury the following issues: First, did the defendant negligently set fire to and burn the property described in the complaint, as alleged therein; second,

if so, what damage has the plaintiff sustained thereby? and it being further agreed that, upon the jury finding the first issue yes, his Honor should answer the second issue, $742.50, with interest from 5 March, 1901, until paid, and the jury having found the first issue "yes," judgment was accordingly entered in favor of the plaintiff for said amount. It was in evidence that the defendant allowed cotton bales three rows deep, standing on end, to remain several weeks on its open platform close to the track, said cotton being "in bad condition, heads off, bagging off, naked lint standing right up on five or six or probably ten bales of it, twenty-three bales in lot on that end, three bales deep in rows; cotton in ten feet of west edge of platform," the defendant's train passed about 20 minutes before the alarm of fire; wind blowing from northwest, trains passed on west side of warehouse, the cotton on platform caught, then warehouse, whence flames were communicated
(77) to Hearne Bros. & Co.'s property fifty feet west of the defendant's warehouse. The jury found that the fire was caused by the negligence of the defendant, as alleged in the complaint, as above set forth. This was a question of fact, and on examining the instructions given and refused, we find no error of which the defendant could complain.

The 13th instruction requested by the defendant contained the following admission: "If you believe the evidence, the firing of the cotton led to the burning of Hearne's property; if the cotton had not been on the platform, the fire would not have occurred. So the question arises, Was the defendant negligent because the cotton was there in the condition it was in?" There being no objection to the evidence, but only to the charge, this practically narrows the controversy down to the question, If the fire was caused by sparks from the engine, or cinders, creating a flame which reached the cotton in this exposed or dilapidated condition, was the defendant liable therefor? On this point we think the judge charged correctly, to wit, "If the defendant company permitted baled cotton to remain on its platform, no matter to whom it belonged and no matter whether put there for shipment or not, until the bagging came off and the lint bulged out so as to be easily ignited, and a spark from its passing engine caught such cotton and set it on fire, and the fire finally communicated to the factory and the factory burned, then the company was negligent, and you will answer the issue 'Yes'."

The court gave the defendant's prayers for instructions, 2, 5, 6, 9, 12, 15, which were carefully drawn, and fully protected its rights; also prayers 7 and 8 were given, with slight modifications properly inserted, and the other prayers were properly refused, in form as asked, except as given in the charge.

The rejected prayers were requests to charge substantially that the defendant was not liable if the fire was caused by sparks or otherwise from its engine, communicating flame through the (78) medium of cotton on the defendant's platform in the bad condition stated, and were properly refused. *Black v R. R.*, 115 N. C., 667; *Blue v. R. R.*, 117 N. C., 644; *Moore v. R. R.*, 124 N. C., 338.

Prayer No. 3, given at the request of the plaintiff, was: "If you find that the defendant permitted cotton to remain on its platform near its railroad track, with the bagging off, the upper end of the bales with lint bulged out and exposed to fire from its engines passing over its said road, as described by the witnesses, this was negligence; and if you are further satisfied that the cotton caught fire from sparks from one of defendant's engines, and Hearne's factory was thereby burned as the direct result of such cotton catching on fire, then I charge you to answer the first issue Yes"; and prayer 15, given at request of defendant, was: "The court instructs the jury that the burden is on the plaintiff to prove affirmatively that the fire was set by sparks from the defendant's engine. They are not at liberty to guess as to the origin. To justify a finding that the fire did start from the engine, the facts must be such as to support this theory; that is to say, if from the evidence it appears that the fire may have started in some other way than from the engine, the jury is not justified in assuming that the engine set the fire, but the jury must be satisfied by the greater weight of the evidence that the fire originated from a spark from the passing engine."

The court in its charge further instructed the jury, among other things: "The burden of proof is on plaintiff to show by the greater weight of the evidence that a spark from the engine set fire to the cotton, and that as a natural result the house was burned, and that the company could have foreseen that the cotton in the condition it was in was likely to catch fire from passing trains. If it so appears, the company was negligent, and you will answer 'Yes'; (79) otherwise, you will answer 'No.' Proximate cause is the direct cause which produces a result without any other cause supervening and bringing about the result. The defendant admits the insurance, and the burning, and the payment by the plaintiff to Hearne; but says it was in no way responsible for the fire, and that the fire was not the result of any act of negligence on the part of the defendant or its agents, and for that reason they are not responsible. The special negligence complained of by the plaintiff is alleged that the company permitted baled cotton, highly inflammable, to remain for some weeks on its platform near the passing trains; that the cotton had got in bad condition, bagging off the ends and the lint cotton bulged out and

standing up so as to be easily fired; that this was left so, and that the trains were constantly passing; that on the night in question a train passed near the spot; that in some minutes fire broke out; that it was discovered in this cotton; that it communicated to the warehouse and thence to the Hearne factory; and as indicating that the engine set it on fire, it is contended that the wind was blowing from the engine over the cotton and onto the factory from a northwest direction, and that the sparks from the engine set it on fire and was carried by the wind to this factory. The defendant denies that the fire occurred in that way."

The court thereupon gave very fully the defendant's contentions, and added: "It is the duty of a railroad company to keep its right of way free from such inflammable material as is likely to catch fire from the running of its trains, and communicate it to adjacent property. If defendant permitted baled lint cotton to remain on its platform, no matter to whom it belonged, and no matter whether put there for shipment or not, until the bagging came off the end and the lint bulged out so as to be easily ignited, and a spark from its passing engine caught such cotton and set it on fire, and the fire finally
(80) communicated to the factory and the factory was burned, then the company was negligent, and you will answer the issue 'Yes'; but no matter how negligent the company may have been in having cotton on its right of way, and no matter what condition that cotton was in, if the spark that caused the fire did not come from defendant's engine, there can be no recovery, and you will answer the issue 'No'; if some one in passing dropped a cigar there, and that caused the fire, there can be no recovery. If the sparks came from the factory smokestack, then there can be no recovery. In no event is the company liable unless a spark from its engine set the cotton on fire."

We think the sole issue of fact was intelligently and correctly submitted to the jury by his Honor.

It was further contended that the plaintiff could not recover, but that Hearne Bros. & Co. were the proper parties plaintiff. It will be seen by the averments in the compaint and the admissions in the answer that they have no interest in this action, and that the plaintiff is the sole party in interest for the recovery of the $742.50 sued for, and, therefore, under our Code system, the only party authorized to bring this action. It is insisted, however, that section 177 of The Code expressly provides that "Every action must be prosecuted in the name of the real party in interest, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." If this exception applied to a case of this kind, it has been

repealed so far as actions of this nature are concerned, by the following provision in section 44, chapter 54, Laws 1899 (at p. 168), that if the insurance "company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall *on payment of the loss be subrogated to the extent of such payment to all right of recovery* by the insured for the loss resulting therefrom"; and it is further pro- (81) vided that the insured shall make an assignment to the company on receiving such payment. Whether the insured here made an actual assignment or not is immaterial, as the subrogation was complete upon the payment, and the sole right of recovery thereupon passed to the company. The actual assignment would only be evidence of the fact. This statute repeals any nonassignability which may have been imposed by the exception in section 177 of The Code, and this cause of action comes under the general provision that all actions "must be prosecuted in the name of the real party in interest."

After careful examination of the exceptions we find

No error.

Cited: Craft v. Timber Co., post, 154; *Simpson v. Lumber Co.,* 133 N. C., 101; *Cunningham v. R. R.,* 139 N. C., 434; *Bowers v. R. R.,* 144 N. C., 688; *Fidelity Co. v. Grocery Co.,* 147 N. C., 513; *Kemp v. R. R.,* 169 N. C., 733; *Powell v. Water Co.,* 171 N. C., 297; *Cashwell v. Bottling Works,* 174 N. C., 327; *Matthis v. Johnson,* 180 N. C., 133.

PITTMAN v. WEEKS.

(Filed 10 March, 1903.)

1. Instructions—Trial.

Where the trial court uses the word "plaintiff" for "defendant," but the context shows that it was a mistake, and a correction is made in another part of the charge, such mistake was not prejudicial.

2. Instructions—Harmless Error—Ejectment.

In ejectment, an instruction as to color of title, the only issues involved being the location of a boundary and adverse possession, is not prejudicial.

3. Adverse Possession—Ejectment—Limitations of Actions.

In an action to recover land which had been occupied adversely by defendant for twenty years, the fact that the plaintiff did not know the location of his line or that the land was his until a few months before the suit was commenced, is immaterial.

4. Ejectment—Issues—Instructions—Limitations of Actions.

Where, in ejectment, four issues are submitted, one being as to the statute of limitations, an instruction as to facts bearing on this issue alone should be limited thereto.

ACTION by W. M. Pittman against George W. Weeks, heard by *Winston, J.,* and a jury, at October Term, 1902, of EDGECOMBE.

(82) From a judgment for the defendant, the plaintiff appealed.

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

WALKER, J. This is an action for the recovery of real property. In his complaint, which is in the usual form, the plaintiff alleges that he is the owner of forty acres of land, it being a part of a larger tract, and that the defendant is in the possession and unlawfully and wrongfully withholds the possession from him. These allegations are denied by the defendant in his answer, and he pleads specially that the plaintiff did not commence his action within twenty years, nor within seven years after the accrual of his right of action, and relies on the statute of limitations as a bar to his recovery. It was not necessary to plead the statute of limitations, because the defendant could have had the benefit under the general denial of the plaintiff's title and right of possession, as this Court has often decided. *Cheatham v. Young,* 113 N. C., 161, 37 Am. St., 617.

It appears that on and prior to 28 January, 1881, the defendant and one W. S. Weeks were tenants in common of a tract of land, a part of which is the land in controversy, and that on said day they divided the land equally between them, each receiving a deed from the other for his share, and on the same day W. S. Weeks conveyed his half to the plaintiff. In the said deeds the land allotted to each in the division was described by metes and bounds. These facts seem not to have been disputed.

There was evidence tending to show that the plaintiff did not know where the line dividing the two tracts was located, and that in the fall of 1881 the defendant told the plaintiff that the dividing line was where the defendant now claims it to be, and that the

(83) plaintiff, having confidence in the defendant and believing the line to be at the place where the defendant had pointed it out to him, helped the defendant to mark the line. There was further evidence on the part of the plaintiff tending to show that this is not the true dividing line, as was afterwards shown by a survey made of the two tracts in accordance with the calls of the deeds, and that the plaintiff did not discover the mistake until a few months before bringing this

action, when he found that the line pointed out by the defendant was five chains distant from the true line and that it cut off a part of his land.

There was evidence on the part of the defendant tending to show that the line alleged to have been pointed out by him to the plaintiff is the true line, as located by the calls in the deeds, and that he has been in the open, notorious, and adverse possession of the *locus in quo* for more than twenty years claiming it as his own, and while he alleges that his deed covers the disputed land and that he is entitled for that reason to recover in this action, yet, if it does not, he insists that by said adverse possession he has acquired the title as against the plaintiff and, consequently, that his possession is rightful.

The court without any objection, so far as appears from the record, submitted four issues to the jury, as follows:

1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint?

2. Does the defendant wrongfully detain possession thereof from the plaintiff?

3. What damage, if any, has the plaintiff sustained?

4. It the plaintiff's cause of action barred by the statute of limitations?

The exceptions of the defendant relate to the instructions of the court to the jury.

The court substantially charged, (1) that the plaintiff must (84) recover, if at all, upon the strength of his own title, and therefore, if he has failed to satisfy the jury by a preponderance of the evidence that the land claimed by him is covered by his deed, they should answer the first issue "No"; (2) if the jury find that the plaintiff's deed covered the land in dispute, they should answer the first issue "Yes," unless the defendant has satisfied them by a preponderance of the evidence that he has been in the actual and adverse possession thereof under known and visible boundaries for twenty years next prior to the date of the commencement of this action; and the court fully explained to the jury the nature of the adverse possession required to confer or ripen title.

The jury answered the first issue "No," and thereby found as a fact, under the evidence and the instructions of the court, either that the plaintiff's deed did not cover the land, or that, if it did cover the land, the defendant had been in the adverse possession of it for twenty years prior to 20 March, 1901, the date of the issuing of the summons.

The defendant assigns five errors, which we will consider in the order in which they are presented in the record:

1. The court in giving the instructions requested in the defendant's third prayer, explained to the jury what is meant by color of title and adverse possession thereunder sufficient to ripen the color into a good or perfect title, and then proceeded as follows: "By colorable title the law means that the deed under which the plaintiff claims the land covers and includes it, and he had the title and possession spoken of, adverse, as I have and shall explain, seven years before 20 March, 1901, the time when plaintiff brought his action; and if the jury find that he had such possession under colorable title for seven years, they must answer the first question 'No'." It will be seen that by inadvertence the court used the word "plaintiff" for the word "defendant"; but when we look at the context of the particular instruction, we
(85) do not see how the jury could fail to understand the meaning of the court, as it is perfectly plain and unmistakable. Besides, in the instructions given afterwards the court corrected the mistake, very slight though it was, and clearly and distinctly told the jury that it is the defendant who must have had the adverse possession under colorable title, and that if the "defendant's deed covered the land in dispute and he has had such adverse possession of it, as had been described, up to well-known and visible metes and bounds under a deed purporting to convey it, then he is the owner by lapse of time which would ripen the deed into a perfect title"; and again the court told the jury that "if the line made by the surveyor is where Pittman claims it, then he can recover, unless Weeks has had such possession since the date of his deed as ripened into a title, as I have indicated. If he had not such possession you must answer 'Yes'." How could the jury have misunderstood the meaning of the court under the circumstances?

2. The court charged the jury that if the defendant's deed covered the land, it would be color of title, and if he had had the necessary adverse possession for seven years, he had become the owner of the land by lapse of time, and this charge was excepted to by the plaintiff. If the question of color of title entered into the case at all, we can see no objection to the instruction. It was in exact accordance with the law as laid down in numerous decisions of this Court. But we do not think that the question of color of title and adverse possession for seven years was involved in the controversy, nor that it had anything to do with the case. If the plaintiff's deed did not cover the land, he was clearly not entitled to recover, and if the defendant's deed covered the land the plaintiff likewise was not entitled to recover, whether the defendant had or had not been in possession of the
(86) disputed land. If the plaintiff's deed covered the land, the only remaining question in the case was whether the defendant had

been in adverse possession for twenty years. The case was not tried upon the theory that the boundaries of the two deeds overlap each other so that both deeds covered the disputed land, but it was virtually admitted that either one or the other of the deeds covered the land. If, therefore, the plaintiff's deed covered it, the defendant's deed did not, and could not, therefore, be used as color of title, because a person in possession of land claiming it under a deed as color of title is always confined to the boundaries of his deed. *Davidson v. Arledge,* 88 N. C., 326. But there was no error of which the defendant can complain in submitting the question of adverse possession under color of title to the jury, because if the jury answered it in favor of the defendant, they necessarily found that the defendant's deed covered the land, and this was sufficient to entitle him to their verdict without regard to the possession of the land, and it was a rejection of the plaintiff's claim that his deed covered it. But even if the question of adverse possession under color of title was involved, the instruction was correct.

3. The plaintiff further excepts because the court charged the jury that the ignorance of the defendant as to the correct location of the line and as to the adverse possession by the defendant of what he alleges is a part of his tract would not affect the rights of the parties. We can see no error in this instruction. There was no fraud alleged, and certainly not in a manner which entitles the plaintiff to have the question considered by us; and, besides, there is no sufficient proof of any fraud. If the plaintiff was mistaken as to the dividing line, it was not only his misfortune, but his fault, as viewed by the law, because by having a survey made, which he afterwards did, he could easily have ascertained where the line was. If the defendant pointed out the line to the plaintiff, there is no evidence to (87) show that if it was not the true line the defendant was not acting in perfect good faith and without any fraudulent intent. The defendant relies on section 155, subsection 9, of The Code, but that section does not apply, as no fraud or mutual mistake is alleged or proved, and section 155 was not amended so as to include causes of action cognizable at law, as distinguished from those "solely cognizable in a court of equity" until 1889. Clark's Code (3 Ed.), p. 66.

4. The plaintiff requested the court to charge the jury that the defendant could not have adverse possession of the land prior to 20 March, 1881, under the facts and circumstances of this case, and therefore that the plaintiff's action is not barred by the statute of limitations; and, further, that if the defendant pointed out the line to the plaintiff in the fall of 1881 or at any other time after March, 1881, and caused the plaintiff to move his house off the disputed land at that time,

the defendant's possession had not continued a sufficient length of time to bar the plaintiff's right of recovery. The court gave the instruction, but confined it to the fourth issue, as to the statute of limitations. It seems to us that the plaintiff, by the very language employed by him, intended that this instruction should apply to the fourth issue. He asked the court to charge the jury that upon the facts embodied in the prayer the plaintiff's cause of action is not barred, and as there was a special issue submitted without objection from either party to which the instruction peculiarly applied, it was not unnatural to suppose from the form of the defendant's prayer that he was referring to that issue. But, however this may be, we think that the court, in other parts of the charge, and especially in giving the instruction requested in the defendant's second prayer, sufficiently explained to the jury what kind of possession by the defendant was required, and how long
(88) that possession must have continued in order to bar the plaintiff's right of entry and entitle him to their verdict. If the plaintiff's counsel thought, at the time the instruction was given or at any time before the jury retired, that the court had misunderstood him, he had the right to call the attention of the court to the matter in some way, so that the proper correction could have been made, if any was necessary, or so that the matter could at least have been made clear to the jury. In no view do we think any error was committed by the court in giving the instruction as modified, and certainly none that was prejudicial to the plaintiff.

5. The plaintiff's counsel further insists that the court in giving certain instructions, at the request of the defendant, imposed the burden of repelling the statute of limitations upon him. We do not agree with counsel that this was done. On the contrary, we think that the court made it plain to the jury that if the plaintiff's deed covered the disputed land he was entitled to recover, "unless the defendant satisfied them by a preponderance of the evidence that he had been in the actual possession thereof under known and visible boundaries for twenty years." This instruction, which was given at the request of the plaintiff, unquestionably placed the burden of proof upon the defendant.

Upon a review of the whole case, we have been unable to discover any error in the rulings of the court of which the plaintiff can justly complain. Indeed, we think that the charge was clear and explicit, and must have been well understood by the jury, and, we may add, that it was more favorable to the plaintiff than he had any good reason to expect.

Judgment affirmed.

(89)

HARPER v. ANDERSON.

(Filed 10 March, 1903.)

1. Ejectment—Boundaries—Burden of Proof.

In ejectment, there being an issue as to the boundary line between two adjoining tracts, the burden of proving the correct line is on the plaintiff.

2. Ejectment—Evidence—Instructions—Wills—Boundaries.

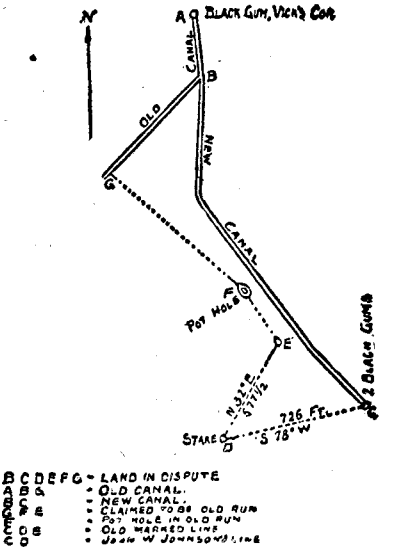
Testator purchased two adjoining tracts of land at different times and under distinct deeds, one tract from A, and the other from D. Thereafter he cut a canal differing from the boundary between the two tracts, and put plaintiff in possession of the D tract up to the canal, and defendant in possession of the A tract up to the canal, and subsequently devised the D tract to plaintiff and the A tract to defendant. There was evidence that the canal cut some eight acres off the south side of the D tract, as described in the deed to the testator; also, that the eight acres were included in the description in the deed for the A tract; also, that testator had treated the canal as the dividing line. In ejectment to recover the eight acres, the plaintiff's ownership did not depend on whether they were included in the deed of the D land, even if it was the senior deed, but on whether, by the terms of the will, they were devised to him; and the intention of the testator at the time of cutting the canal would not determine the true boundary between the tracts, but his intention at the time of making the will.

ACTION by Adrian Harper and wife against J. H. Anderson, heard by *Winston, J.,* and a jury, at October Term, 1902, of EDGECOMBE. From a judgment for the plaintiffs, the defendant appealed.

John L. Bridgers for plaintiffs.
G. M. T. Fountain for defendant.

CLARK, C. J. This case was before the Court, and upon substantially the same state of facts, 130 N. C., 538. In that case the Court said: "The question for the jury was not that of two parties claiming under distinct deeds, where the boundaries of the deeds must govern, but here the title came from the same source, the will of their father. The question is, What did he mean when he spoke of the 'Dickens (90) land' and the 'Micajah Anderson' land? Whether the *locus in quo* was intended by him to be embraced in the one or the other was not to be determined solely by whether it was included within the bounds of the one or the other deed, but that fact must be taken into consideration, together with the admission that he had made the canal a new boundary, putting one devisee in possession up to the canal on one side for eighteen years before his death, and the other on

the other side up to the canal as a new boundary, and the evidence that, after digging the canal, Thomas Anderson always termed the land on one side thereof the 'Dickens land' and that on the other side the 'Micajah Anderson land.' *Peebles v. Graham,* 128 N. C., 222. This, if found to be true by the jury, would be very pregnant if not conclusive evidence that the testator had that division in his mind in writing his will, especially taken in connection with the admitted long possession of the respective devisees up to the canal as the dividing line."



(91) The *locus in quo* is eight acres on the south side of the canal, and lying between it and the dotted line on the plat above. The plaintiff seeks to recover this eight acres lying on the opposite side of the canal by evidence tending to show that it was embraced in the boundaries of the deed for the "Dickens land" to the testator. There was also evidence tending to show that it was within the bounds of the original "Micajah Anderson" tract as described in the deed therefor to the testator. The canal was cut in 1872 or 1873.

The court charged, at request of plaintiff, "That the defendant contending that the new canal was made the line by Thomas Anderson between the Dickens land and the Micajah Anderson land, the burden of proving the same to be the line is on the defendant, and he must satisfy you that it is, by a preponderance of evidence." This is error. This is an action of ejectment, and the plaintiff must recover upon the

strength of his own title. The defendant is in possession up to the line of the canal, and the burden is on the plaintiff to show that this is not the line and that the defendant is in possession of land within the plaintiff's boundary. The second instruction is erroneous for the same reason. The court erred further in instructing the jury, "Whether the plaintiff owns the land in controversy will depend on whether it is land described in the deed to Thomas Anderson for the Dickens land." There was evidence, also, that it was described in the deed to Thomas Anderson for the Micajah Anderson land. The title of these parties arises simultaneously from the will. The defendant being in possession, the plaintiff must show that by the terms of the will the *locus in quo* was devised to him. If it is embraced in both deeds to the testator it is not decisive that the deed to him for the Dickens land was older than the deed for the Micajah Anderson land. This was distinctly pointed out in our former decision. The court also erred in charging that unless Thomas Anderson "made a new dividing line between the tracts, *cut the canal for that purpose,* then the plaintiff (92) would be the owner of the land and entitled to recover." It is not what was the purpose of Thomas Anderson in cutting the canal in 1872, which was probably for drainage merely and without any intention as to a division, but his meaning twenty-six years later, in 1898, in describing the land devised, which must govern. The evidence as to his nomenclature of the land thereafter, his treating the canal as a dividing line and putting each party into possession up to the canal as the dividing line, is entirely ignored by this instruction.

New trial.

PORTER v. BRIDGERS.

(Filed 10 March, 1903.)

Contracts—Sales.

A deed conveyed standing timber to a trustee, who was to permit defendant, on payment of a certain sum, to cut the timber, and afterwards, on measurement of the wood and payment by defendant of a certain price per cord, to convey the wood to him. The trustee agreed to allow defendant to remove the wood as fast as cut without prepayment —it to be paid for as soon as measured by the person to whom defendant sold. The title to the wood did not pass to defendant until it was removed by him, so that he was not liable for wood burned while awaiting shipment.

ACTION by S. E. Porter and others against H. C. Bridgers and others, heard by *Winston, J.,* and a jury, at October Term, 1902, of EDGECOMBE. From a judgment for the plaintiffs, the defendants appealed.

Gilliam & Gilliam for plaintiffs.
John L. Bridgers for defendants.

(93) MONTGOMERY, J. The plaintiffs, other than T. H. Gatlin, on 29 June, 1899, conveyed by deed to T. H. Gatlin all the timber of whatever kind and description which was standing and growing upon their Porter tract of land in Edgecombe County, in trust that he should, upon the payment to the plaintiffs by Johnson, agent, of $200 in cash and $367.50 on 1 January, 1900, permit Johnson to commence to cut the timber for market. The estimate of the wood to be cut by Johnson was 5,000 cords and the price to be paid by Johnson was 22½ cents a cord, Johnson to cut it at his own expense. When all the timber should be cut and was ready for shipment, the balance, after deducting the first-mentioned payments, was to be paid by Johnson. When the whole of the purchase money should have been paid and when all the wood had been cut and measured and ready for shipment, Gatlin, the trustee, was to convey the same to Johnson. Johnson conveyed his interest in this contract to the defendant.

The two first-mentioned payments were made, and the plaintiff cut and piled along the railroad for shipment 4,000 cords, 1,305 cords of which were destroyed by fire.

There was evidence offered on the trial by the plaintiffs tending to show that there was an agreement between Gatlin, the trustee, and the defendant that on account of the danger of fire the defendant might ship the wood as fast as possible, and render statements and settle for the same as shipped; that Fairley's measurement of cordwood, shipped to him by Bridgers, would be accepted; that cordwood was shipped from time to time by the defendant under their agreement, and without further notice to the plaintiffs than the statements subsequently rendered by Fairley; that the plaintiffs were never called upon by the defendant to measure the wood, except as above stated, and that the defendant was not waiting for any measurement of the wood on his part
(94) when it was burned. There was evidence on the part of the defendant that he had given the plaintiffs notice to measure this wood, and it was agreed, as stated in the plaintiff's evidence, that the measurement of Fairley would be accepted.

This action was brought by the plaintiffs to recover of the defendant the value of the 1,305 cords of wood which were cut and penned and unmeasured along the railroad, and afterwards destroyed by fire. The defendant insists that under the contract, the deed of trust, the wood

that was burned was the property of the plaintiffs; that no title passed to him, because there had been no measurement of the wood, and the purchase price had not been paid. The defendant requested the court to charge the jury: "Wood when cut from the land becomes personal property, and if anything remains to be done by the defendant to perfect and close the trade, the title does not pass to the defendant until this has been done; also, the possession of the thing sold must pass from the seller to the buyer; to illustrate: under the contract the defendant could cut the wood, but he could not take it into his possession and remove it from the land until it was ready for shipment and all paid for; so, when the defendant had cut the wood and got it ready for shipment—and 'ready for shipment' means when it had been measured and hauled to the railroad for transportation, and paid the money for it—it became his property, the title and possession then passing to him." So the court instructs you "that if you find from the evidence the facts to be that the wood which was burned was not ready for shipment and had not been paid for and removed, it was in law the property of the plaintiffs, and the defendant is not liable for the value or price of such wood, it being destroyed by fire."

We think the refusal of his Honor to grant the request was error. It is clear that upon the face of the deed of trust the trustee was not permitted to convey the title to the wood until the whole of the purchase price should have been paid upon a proper measurement (95) of the wood. He had no power in law to alter that requirement of the trust deed. He had no right against the terms of the contract to permit the removal of the wood, or any part of it, by the defendant until it was measured and paid for. It is to be seen, upon careful reading of the agreement made by the trustee with the defendant to permit the defendant to remove the wood without measurement and prepayment, that the agreement was really not inconsistent with the powers given to the trustee in the deed. To avoid the danger of fire, the trustee permitted him to ship in parcels or parts before the whole was measured and paid for, but with the understanding that each shipment was to be measured by Fairley and paid for at once upon that measurement. The 1,305 cords which were burned did not fall under the agreement with the defendant, but remained the property of the plaintiffs under the terms of the deed of trust.

The exception to the refusal of his Honor to give the instruction we have quoted above is the only exception in the record, and it appears in the statement of the case that "the court stated the contentions of the

parties and instructed the jury as to the law submitted, but declined to give the above prayer of defendant."

For the error pointed out there must be a

New trial.

Cited: Elliott v. R. R., 155 N. C., 238; *McKinney v. Matthews*, 166 N. C., 582.

---

(96)

SOUTHERN GROCERY COMPANY v. DAVIS.

(Filed 10 March, 1903.)

1. Arrest and Bail—Evidence—Agency—Consignment—The Code, Sec. 291, Subsec. 2.

In an action to recover a balance due on consigned goods, with ancillary proceedings in arrest and bail, it is competent for the defendant to show that he had not embezzled any of the goods, and that the shortage was due to theft, failure to collect, and the sale of some of the goods at an underprice to induce the sale of others.

2. Arrest and Bail—Agency—The Code, Sec. 291, Subsec. 2—Ancillary Proceedings.

A consignee of goods cannot be held in arrest and bail for failure to collect for goods sold on credit and payment therefor if there is no stipulation in the contract against selling on credit.

3. Arrest and Bail—Agency—Ancillary Proceedings.

Where, in an action against a consignee of goods, with ancillary proceedings in the arrest and bail, the jury finds that the shortage was not due to the misappropriation, the order of arrest should be vacated and a civil judgment given for the shortage.

ACTION by the Southern Grocery Company against J. P. Davis, heard by *Allen, J.*, and a jury, at December (Special) Term, 1902, of FRANKLIN. From a judgment vacating the arrest and bail, the plaintiff appealed.

W. B. Shaw and W. M. Person for plaintiff.

F. S. Spruill for defendant.

CLARK, C. J. This was an action begun before a justice of the peace to recover $56.73, with interest, alleged to be balance due plaintiff for goods consigned to defendant, with ancillary proceedings in arrest and bail. The defendant agreed to sell goods to be consigned to him

from time to time by plaintiff, title to the same to remain in the plaintiff, and turn over to it the proceeds at the invoice price, and on a settlement return to the plaintiff all such goods as remained on hand unsold. There was no stipulation shown as to the price at which the defendant should sell. It was in evidence that the defendant (97) received goods to the invoice price of $254.28 and that he returned $57.44 in goods to the plaintiff and turned over to it $140.11 as the proceeds of sale, leaving $56.73 unaccounted for. In reply to questions objected to, the defendant stated (1) that he had not appropriated any of the goods or proceeds of sale to his own use; (2) that he sold on credit $29.75 worth to three parties named (among them his father and brother), for which he was not paid, and that some goods were stolen, and (3) that he could not say what became of some of the goods, that he was compelled to sell meat at reduced prices to compete with others, that he had $100 of his own when he began and lost money in carrying on the business, but that he turned over all money received for the goods and all goods that were unsold.

The first three exceptions were to the admission of the above evidence. The arrest and bail was granted under the provisions of The Code, sec. 291 (2), "for money received or for property embezzled or fraudulently misapplied" by an "agent, broker, or other person in a fiduciary capacity," and it was clearly competent for the defendant to state the above facts in his own exoneration. It was most pertinent evidence upon the second issue whether the defendant had appropriated to his own use the property or its proceeds, which had been entrusted to him by the plaintiff. If the goods or proceeds had been appropriated by the defendant to his own use, his *intent* in so doing would be immaterial, but it was competent to show that he had not so appropriated anything, and that the shortage was due to theft, failure to collect, and sales of some articles at an underprice, to induce the sale of others.

The fourth exception is to the following paragraph in the charge: "If nothing was said in the contract about crediting goods out, the defendant would have some discretion in that respect, but (98) that discretion should be exercised with reference to the interest of the consignor in a reasonable, businesslike manner." There being no stipulation against selling on credit, if the defendant sold in good faith on credit and failed to collect, the most that the plaintiff could exact was civil liability for the invoice price, but he cannot hold the defendant in arrest and bail for unfortunate sales, or failure to collect, when there is evidence, which the jury believed, that the deficiency of $56.73 was not due to any misappropriation or embezzlement by the defendant, but to his failure to collect for goods sold on credit, and

the other causes stated in his evidence. The agreement to account for goods at invoice prices was not a stipulation that none should be sold at less, but a provision that all proceeds above the total of invoices should be the seller's commission or profit. The contract is much in the nature of a *Del Credere* agency in which the agent guarantees payment, and the title to goods remains in the vendor, and that usually contemplates sales on credit. See 9 A. & E. (2 Ed.), 182, 183.

The defendant does not seem to have been specially adapted for a successful mercantile career, but the jury having found that he had not appropriated any of the property entrusted to him to his own use, the court properly vacated the order of arrest and entered a civil judgment for the recovery of $56.73, which by consent the jury found was the amount to which the defendant was indebted to the plaintiff.

In the cases relied on by the plaintiff, *Travers v. Deaton,* 107 N. C., 500; *Boykin v. Maddrey,* 114 N. C., 89; *Fertilizer Co. v. Little,* 118 N. C., 808; and *Gossler v. Wood,* 120 N. C., 69, the fact of misappropriation by the defendant of the plaintiff's goods was admitted. In *Guano Co. v. Bryan,* 118 N. C., 578, the answer shows that the denial of misappropriation is not based upon the defendant's not appropriating the goods to his own use, but upon the legal construction he put upon the contract. Here the appropriation of any of the property is explicitly negatived by the defendant's testimony, and the jury found his statement to be true.

(99)

No error.

Cited: Guano Co. v. Southerland, 175 N. C., 231.

EDWARDS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 March, 1903.)

1. Negligence—Crossings—Signals—Railroads.

An instruction by the trial court that it is the duty of an engineer to ring the bell *and* blow the whistle when approaching a crossing is erroneous.

2. Evidence—Corroborative Evidence—Substantive Evidence—Witnesses.

Where witnesses give testimony corroborative of another witness, such testimony also being itself substantive evidence, an instruction that this evidence can be considered only as corroborative or contradictory of such other witness is erroneous.

EDWARDS *v.* R. R.

ACTION by J. W. Edwards, administrator of W. B. Edwards, against the Atlantic Coast Line Railroad Company heard by *Winston, J.*, and a jury, at November Term, 1902, of WILSON. From a judgment for the plaintiff, the defendant appealed.

Woodard & Mewborn and F. A. & S. A. Woodard for plaintiff.
F. A. Daniels and George B. Elliott for defendant.

WALKER, J. This is an action brought by the plaintiff to recover damages, under the statute, for the death of his intestate, which he alleges was caused by the negligence of the defendant. The case has been here before, and will be found reported in 129 N. C., at p. 78.

The intestate was driving in a buggy along Goldsboro Street in the town of Wilson and was killed at Herring's Crossing by a south-bound passenger train of the defendant, while attempting to cross the defendant's track at that point where the street and (100) track intersect.

There was conflicting evidence as to the giving of the usual signals for the crossing and as to the opportunity of the intestate to see and hear the approaching train in time to have stopped and prevented the injury.

The presiding judge charged the jury with his usual ability and clearness, but we are constrained to hold that in two respects he committed errors prejudicial to the defendant. They may have been the result of inadvertence, and probably were, but still we must treat them as if they were not, as the effect upon the jury in either case must have been the same.

The court instructed the jury that the defendant is required by law to give notice of the coming of its trains near crossings, either by ringing the bell or sounding the whistle, or both, so that persons traveling on the highways may have reasonable time to avoid collisions; but afterwards he told the jury that it was the duty of the defendant's engineer to ring the bell and also blow the whistle when a train is approaching a crossing.

We do not think that as a matter of law such is the duty of railroad companies when approaching crossings. It is undoubtedly true that the engineer must give such a signal as will be reasonably sufficient to warn persons on highways, that intersect the track, of the coming of the train, and this must be done by ringing the bell or blowing the whistle, as the peculiar circumstances of the case may suggest to be the proper method, and the failure of the engineer to give such a signal would be evidence of negligence. *Hinkle v. R. R.*, 109 N. C., 473, 26 Am. St., 581. The warning must be reasonably and timely, but what is reasonable and timely warning must depend upon the conditions

(101) existing at the time in the particular case, and we are not by any means prepared to say that the law requires in every case that the signal should be given in any special way. We know of no such hard and fast rule as that laid down by the trial judge in this case. The bell and the whistle are the appliances provided for the purpose of giving signals, and one or the other, as the case may seem to require, must be used for that purpose, and, in cases of emergency, or when the peculiar situation seems to demand it, there should perhaps be a resort to the use of both; but it must be left to the jury to decide, under proper instructions of the court as to the law, what is a proper signal in any given case.

We have carefully examined the authorities cited by the counsel of the plaintiff, and do not think they give any countenance to the charge of the court. In each one of the cases cited it is said to be the duty of the engineer to ring the bell *or* sound the whistle, and we have not been able to find a single case in which a different rule has been applied. *Hinkle v. R. R.*, 109 N. C., 473, 26 Am. St., 581; *Randall v. R R.*, 104 N. C., 416; *Troy v. R. R.*, 99 N. C., 298, 6 Am. St., 521; *Mays v. R. R.*, 119 N. C., 770.

The fact that the court in one part of the charge told the jury that it is the duty of an engineer, when approaching a crossing, to ring the bell *or* blow the whistle did not cure the error he committed in the respect already indicated. It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. *Edwards v. R. R.*, 129 N. C., 78; *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 662.

We must assume, in passing upon the motion for a new trial, that the jury were influenced in coming to a verdict by that portion (102) of the charge which was erroneous.

A witness for the defendant, George Rouse, testified that he had heard the whistle blow, and warned the intestate not to attempt to cross the tract, and he also testified to other material facts which were favorable to the defendant. Certain witnesses, and among them W. L. Cantwell, had given evidence which tended to corroborate the witness Rouse, and defendant requested the court to charge the jury with reference thereto that they should consider the testimony of those witnesses as corroborative of that of Rouse. The court gave the instruction with this modification, that the jury should consider the evidence as corroborating the testimony of the witness named, "or as contradicting it, as the case may be, and as affecting his crediblity and recollection, and in that light only." It will be readily seen that

the words which the court added to that instruction, as requested, were calculated to mislead the jury, as they might reasonably have inferred therefrom that their consideration of the testimony of the witness Cantwell should be confined to its character or quality as corroborative evidence, and that it should not be considered by them as substantive evidence of the material facts in the case, to which he also testified. The testimony of the witness Cantwell was very important to the defendant upon the vital questions at issue between the parties, and it was greatly weakened, if not practically destroyed, by the change made by the court in the instruction. Instructions should not be so framed as to be subject to a construction which may carry with it, even by implication, an erroneous principle or direction, or which may at least leave the jury in doubt as to what is meant. The presiding judge should be careful to see that the charge is given to the jury in such a way and with such reasonable accuracy as that neither party will be prejudiced by any misconception of it by (103) the jury.

Because of the errors pointed out there must be a

New trial.

Cited: *S. v. Barrett, post,* 1010; *Butts v. R. R.,* 133 N. C., 83; *S. v. Clark,* 134 N. C., 712; *Drum v. Miller,* 135 N. C., 218; *Westbrook v. Wilson, ib.,* 405; *S. v. Morgan,* 136 N. C., 632; *Wilson v. R. R.,* 142 N. C., 341, 342; *Edwards v. R. R.,* 147 N. C., 625, 629; *Jones v. Ins. Co.,* 151 N. C., 56; *Boney v. R. R.,* 155 N. C., 119; *McWhirter* v. *McWhirter, ib.,* 147; *Hoaglin v. Tel. Co.,* 161 N. C., 399; *Hill v. R. R.,* 166 N. C., 595; *Bagwell v. R. R.,* 167 N. C., 615; *Champion v. Daniel,* 170 N. C., 333; *Lea v. Utilities Co.,* 178 N. C., 511; *Goff v. R. R.,* 179 N. C., 219; *Haggard v. Mitchell,* 180 N. C., 264; *Kimbrough v. Hines, ib.,* 278, 279.

FINCH v. STRICKLAND.

(Filed 10 March, 1903.)

1. Amendments—Trial—Ejectment.

An amendment effecting a complete and radical alteration in the whole scope and nature of the action should not be allowed.

2. Improvements—Betterments—Ejectment—The Code, Sec. 473.

A claim for improvements will not be allowed a person holding land under an invalid decree.

FINCH *v.* STRICKLAND.

ACTION by N. B. Finch against Mary J. Strickland and others, heard by *Winston, J.,* at August Term, 1901, of NASH. From an order allowing an amendment to the complaint, the defendants appealed.

Jacob Battle and F. S. Spruill for plaintiff.
W. M. Person and T. T. Hicks for defendants.

CLARK, C. J. Allison Strickland died in 1891, having devised all his property, real and personal, to his widow, Mary J. Strickland, during her widowhood; and, subject to this devise to her, he gave his lands to his six children, specifying number of acres to each, which covered all his realty except one tract of 84 acres. In 1892, the widow, as executrix, filed a proceeding to sell this last-named tract to make assets to pay debts, and one Minshew purchased, but paid only $40 thereon. In 1895 the plaintiff N. B. Finch, claiming to be a creditor of the deceased, intervening in said proceeding, procured an order not only for resale of the said 84 acres, but obtained an order for the sale
(104) of all the realty, and a consent order was made by which 65 acres were set apart to the widow in lieu of dower, and all the realty, subject to this reservation, was sold and purchased by the plaintiff, and the sale was confirmed.

The plaintiff began this action 14 May, 1900, to recover of A. S. Strickland 99½ acres specifically described by metes and bounds, which was the tract devised to him by the will of Allison Strickand. Said A. S. Strickland then moved in the original proceeding, in which the land had been sold, to invalidate and set aside the decree which was the foundation of the plaintiff's title. That proceeding came before us, *Strickland v. Strickland,* 129 N. C., 84, when this Court held that the original proceeding was irregular and that the judgment should be set aside *in toto.* Pending that appeal, the plaintiff obtained leave to amend his complaint and make the widow a party to this action, and the defendant excepted. At November Term, 1901, of the court below, judgment was entered in the original cause that the plaintiff surrender possession of all the lands to Mary J. Strickland, the life tenant. The appeal of the plaintiff from that judgment was dismissed for insufficiency of transcript on appeal caused by disobedience of the directions and order of the judge who had settled the case on appeal. *Finch v. Strickland,* 130 N. C., 44.

At August Term, 1901, of the court below, the plaintiff again obtained leave to amend the complaint and summons by which all the devisees and heirs at law of Allison Strickland were made parties, and relief was asked to subject all the lands of the testator to the payment of the court costs, lawyers' and commissioners' fees incurred in the

above proceedings, including allowances to the guardian *ad litem,* payments to auctioneers and taxes, aggregating about $600, and, in addition, for betterments placed on the property by the plaintiff. The defendants excepted and appealed, and this presents the sole question before us. (105)

A simple action of ejectment against one person for 99½ acres cannot thus be expanded into an equitable proceeding against twenty-one persons to decree a lien on 426 acres, as above set forth. This is such a complete and radical alteration in the whole scope and nature of the action that the utmost liberality of amendment, which is recognized by The Code of Civil Procedure, cannot be stretched to cover it. *Mizzell v. Ruffin,* 118 N. C., 69, and other cases cited in Clark's Code (3 Ed.), at pp. 300, 301.

Besides, as to betterments, they are only allowed by The Code, sec. 473, to *defendants* against whom judgment has been rendered in an action of ejectment. At the utmost, the plaintiff would only be entitled, when sued for rents and profits, to set up such betterments as an equitable counterclaim upon showng that he was in possession under a title which he believed to be good. *Thurber v. LaRoque,* 105 N. C., 301. There is no equity to charge betterments as a lien on the land in such a case as this, for the law does not imply any contract on the part of the defendants to pay for improvements put upon land sold under an invalid decree, obtained and procured by the purchaser. If by reason of the above transactions the plaintiff's original debt against Allison be not barred by limitation, it is still open to him to subject the testator's realty to payment thereof.

If the only error was that the above amendments were improperly granted, the case might go back, that they might be struck out; but as it affirmatively appears in the record that the plaintiff's original basis of action to recover the 99½-acre tract has been taken away by the decree of November Term, 1901, below, let it be entered here,

Action dismissed.

(106)

COLLINS v. DAVIS.

(Filed 10 March, 1903.)

1. Mortgages—Assignments.

The transfer of a note and mortgage by a mortgagee does not divest him of the legal title.

2. Deeds—Mortgages—Registration—Laws 1885, Ch. 147—The Code, Secs. 1254 and 1245.

The proviso in Laws 1885, ch. 147, sec. 1, making actual possession notice to subsequent purchasers, applies only to deed executed prior to 1 December, 1885.

3. Deeds—Registration—Notice—Mortgages.

No notice, however full or formal, will supply the want of registration of a deed.

4. Color of Title—Deeds—Registration.

An unregistered deed is not color of title.

5. Mortgages—Notice—Vendor and Purchaser.

A person who purchases land with notice of an uncanceled mortgage thereon is charged with notice of all rights of the mortgagee and those cliaming under him.

6. Mortgages—Payment—Substitution.

The substitution of one note and mortgage for another will not constitute payment of the original note and mortgage unless they are surrendered to the mortgagor.

ACTION by Mariah Collins, administratrix of J. T. Collins, against John C. Davis and others, heard by *Justice, J.*, and a jury, at January Term, 1902, of FRANKLIN. From a judgment for the plaintiff, the defendant Davis appealed.

Battle & Mordecai for plaintiff.
F. S. Spruill and W. H. Yarborough, Jr., for defendant.

CONNOR, J. This is an action brought by the plaintiff, administratrix *cum testamento annexo* of J. T. Collins, deceased, for the purpose of foreclosing a mortgage executed by defendant Davis to her
(107) intestate. For the purpose of adjusting the rights and equities of all parties in interest, B. H. Tyson is joined as a party plaintiff and D. S. Leonard and D. T. Hollingsworth as parties defendant. The material facts as gathered from the pleadings and findings of the jury, upon issues submitted to them, are as follows:

D. S. Leonard being the owner of a share of a tract of land situated in Franklin County, for the purpose of securing the payment of a note of $217.50, executed to the plaintiff B. H. Tyson a mortgage on the

same bearing date 1 March, 1881. The note was due and payable 1 November, 1881. The mortgage was duly recorded. On 1 January, 1888, the said Tyson, for value, transferred and assigned the note and mortgage to J. T. Collins. On 3 March, 1891, there was due on said note the sum of $321.15 and on said day the said Leonard, Davis, and Collins entered into an agreement, whereby the said Davis assumed the payment of said note, and the said Leonard executed a deed to him for a portion of said land, containing 56 acres; Davis executing to Collins a note for $321.15 and a mortgage on said land to secure its payment. Said deed was never recorded. The said mortgage was duly recorded. Collins did not cancel the Tyson mortgage on the record, nor does it appear that he actually surrendered the note for $217.15. Davis entered into possession of said land after the execution of said deed and has remained thereon until the date of the summons herein. On 7 November, 1900, Leonard executed a deed to the defendant D. T. Hollingsworth for the said 56 acres of land, for and in consideration of $420, and said deed was duly recorded. J. T. Collins died in February, 1899, leaving a last will, but naming no executor, and the plaintiff Mariah Collins was duly appointed administratrix *cum testamento annexo*. The plaintiff alleged that after said agreement Davis made several payments on said note, the last being made on 8 May, 1894. The defendant Davis admitted the payments. The defendants Leonard and Hollingsworth averred that they had not sufficient knowledge or information to enable them to form a (108) belief as to the said alleged payments.

The foregoing facts were found by the jury upon issues submitted to them, either by consent or under the instructions of the court.

There was no evidence that Hollingsworth had any other notice of the mortgages and deeds above set forth, except such as was afforded by the records. His Honor held that Hollingsworth was a purchaser "for value, but with notice."

The sixth issue submitted to the jury was as follows: "Is the plaintiff's cause of action as to Hollingsworth barred by the statute of limitations?" Answered, under the instruction of the court, "No." To this instruction the defendant Hollingsworth excepted. The defendant Hollingsworth, upon the verdict as found, moved for a judgment of nonsuit against the plaintiff. The motion was denied, and the defendant excepted. The court rendered judgment for the plaintiff, directing a sale of the land, etc., and Hollingsworth appealed.

The legal title to the land was conveyed to and continued in B. H. Tyson by virtue of the mortgage of 15 February, 1881. The transfer of the note and mortgage to Collins did not divest him of the title. *Williams v. Teachey,* 85 N. C., 402; *Dameron v Eskridge,* 104 N. C.,

621. He held the legal title in trust to secure the payment of the note in the hands of Collins, with the equity of redemption in Leonard. The effect of the agreement between Davis, Leonard, and Collins, and the execution of the deed to Davis, was, as between the parties, to transfer or convey the equity of redemption to Davis, who assumed the payment of the Tyson note. It is admitted that the Tyson mortgage has not been canceled, and there is no evidence that the note was in fact sur-
(109) rendered to Leonard or Davis. Hollingsworth took his deed with such notice as the possession and the registration of the mortgage from Leonard to Tyson and Davis to Collins gave him of the condition of the title. His Honor was of the opinion that he purchased with notice, and therefore took subject to the encumbrances and the equities of Davis. By the failure to record the deed from Leonard to Davis, it was, under the provisions of chapter 149, Laws 1885, invalid as against Hollingsworth, who purchased for value. The proviso to said act, saving the rights of persons in the actual possession of land, applies only to deeds executed prior to 1 December, 1885. In *Maddox v. Arp,* 114 N. C., 585, *Shepherd, C. J.,* says: "The present case not being within the proviso of the act, actual notice of a prior unregistered contract to convey cannot in the absence of fraud affect the rights of a subsequent purchaser for value, whose deed is duly registered according to law." It will be observed that the act of 1885 is an exact copy of section 1254 of The Code, with the insertion of the words "conveyance of land or contract to convey or lease," etc., placing deeds upon the same basis, in regard to registration, as mortgages and deeds of trust; hence, as said by this Court in *Allen v. Bolen,* 114 N. C., 560, "thus applying to the registration of deeds the same rule applicable to the registration of mortgages." Since the passage of the act of 1829, ch. 20, brought forward and incorporated in The Code, sec. 1254, *Reade, J.,* in *Robinson v. Willoughby,* 70 N. C., 358, says: "The decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors, unless they are registered, and that they take effect only from and after registration, just as if they had been executed then and there. . . . No notice, however full or formal, will supply the want of registration." In *Hooker v. Nichols,* 116 N. C., 157, *Faircloth, C. J.,* quoting the language of chapter 147, Laws 1885, says: "It will be noted that the effective words of this act are identical in sub-
(110) stance with section 1254 of The Code, and we are driven to the conclusion that the Legislature with full knowledge of the meaning and effect of said act of 1829 intended to apply the same rule to all conveyances of land as declared in the late act of 1885, and we must give the same effect to it."

So that the defendant Davis is, in respect to the rights of Hollingsworth, in the same position as if he had no deed.

We are thus brought to a consideration of the question presented by the argument of the learned counsel for the plaintiff, that the defendant Hollingsworth took his deed with notice of the equities of Davis; that Davis's possession put him upon notice of such equities as he acquired by the agreement of 3 March, 1891, and the execution of the deed by Leonard. If this be conceded, we do not perceive how it will avail Davis or his mortgagee, Collins. If Davis acquired no title to the land as against Hollingsworth because of his failure to record his deed, we do not see how he could have acquired any equity affecting Hollingsworth. Suppose that Hollingsworth had admitted that he had actual knowledge of the entire transaction and of the execution of the deed, we cannot see how his position would be affected. The *deed* was invalid to convey the title as against him by the act of 1885. It may be that if Davis had actually paid the Tyson note he would be subrogated to the security afforded by the mortgage given to secure the same; but as he did not pay the note, this question is not presented.

We must therefore conclude that Hollingsworth took the title, free from any encumbrances placed upon it by the deed from Leonard to Davis or the mortgage from Davis to Collins.

The plaintiff, however, insists that Davis's possession, under the deed from Leonard, for more than seven years ripened into title. His counsel conceded that this Court had decided in *Austin v. Staten,* (111) 126 N. C., 783, and reaffirmed in *Lindsay v. Beaman,* 128 N. C., 189, that since and by virtue of the act of 1885, an unregistered deed is not color of title. The learned counsel for the plaintiff, in an able and interesting argument, asks us to reverse the decision in *Austin v. Staten, supra.* It is not clear that the Legislature intended or contemplated this radical change of the law in this respect. The Court recognizes the fact that the question presented was "new and important." We would not be disposed to give to that decision any other or further effect than was necessary in that and other cases coming clearly within the same principle. The proposition as stated by the Chief Justice may be broader than was necessary to the disposition of that case, and while we are not disposed to disturb it in so far as we have suggested, we think it well to restate the principle as confined in its application to the case before us.

We therefore hold that where one makes a deed for land for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered

his deed. We use the term "purchaser for a valuable consideration" in the sense in which it is defined by this Court in *Fullenwider v. Roberts,* 20 N. C., 278, "A fair and reasonable price according to the common mode of dealing between buyers and sellers," or as said by *Pearson, C. J.,* in *Worthy v. Caddell,* 76 N. C., 82, "The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing; there must have been some fraud or contrivance about it.' "

Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed
(112) or affected by the act of 1885. To this extent we affirm the law as laid down in *Austin v. Staten, supra.* It is in harmony with the legislative purpose and policy incorporated into our laws by the act of 1885. The act intended to make secure and give notice of the condition of titles, and thereby prevent the evils existing under the law prior thereto, and must be construed with reference to this evil and in furtherance of the remedy.

No question seems to have been made in regard to Hollingsworth being a purchaser for value, but his Honor directed the jury to find that he purchased "with notice." We construe this to mean with notice of the agreement between Davis, Leonard, and Collins, and the rights, if any, of Davis under the deed from Leonard. There being no evidence of any other notice than Davis's possession and the mortgage to Collins, we think his Honor erred in so instructing the jury. In fact, we do not think any notice thereof, however full and complete, would affect his rights. We do think, however, that he purchased with notice of the uncanceled mortgage to Tyson, and was thereby fixed with notice of whatever rights Tyson or the holder of his note had. If he had inquired of Tyson he would have learned that the note had been transferred to J. T. Collins, and it would have been his duty to inquire of Collins in respect to the payment of the note. "The record of an unsatisfied mortgage is sufficient to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts which such inquiry would have disclosed." *Bolles v. Chauncey,* 8 Conn., 389. "One who purchases premises covered by an undischarged mortgage cannot claim to be a purchaser without notice of the equities of the mortgagee, simply because the mortgagor has possession of and exhibits to him the notes described in the mortgage, when he has knowledge of facts sufficient to put a prudent man upon inquiry, and the mort-
(113) gagee is well known and easily accessible to him; and inquiry of the mortgagee would have elicited information that the mortgage

was still in force as between the original parties." *Boxheimer v. Gunn,* 24 Mich., 272; Jones on Mortgages, 927.

Did the agreement and what was done pursuant thereto discharge, as between the parties, the Tyson note and the mortgage? The general rule undoubtedly is that nothing, save actual payment of the debt, will as between the parties operate to discharge the mortgage. Davis assumed the payment, but by reason of his neglect to record his deed, the mortgage executed by him became ineffectual as against Hollingsworth. He has not paid the note, and has not, nor is he seeking to, set up any rights against Collins. Leonard has never paid the note, nor did he demand the surrender of the note or the cancellation of the mortgage. Hollingsworth took with notice of the uncanceled mortgage. If, as was his duty, he had made inquiry, he would have learned of the existence of the mortgage from Davis to Collins and that the debt had not been paid. He purchased an equity of redemption from Leonard and cannot perfect his legal title without demanding of Tyson and Collins a cancellation of the mortgage. We think that a court of equity would not grant to him this relief until the note was paid. "Courts of equity will, to accomplish the ends of justice, keep alive a security which in form has been surrendered." Pingree on Mortgages, sec. 1212. "Where one mortgage is substituted for another, equity will keep the first alive when the interest of justice requires it." *Tollman v. Smith,* 85 Cal., 280; *Richardson v. Hockenhull,* 85 Ill., 124; 1 Jones Mortgages, 873.

We have not overlooked the case of *Smith v. Bynum,* 92 N. C., 108. There the note and mortgage were surrendered to the mortgagor.

We think, therefore, that as against Leonard the Tyson mortgage was not canceled or extinguished, and that Hollingsworth (114) is fixed with notice and took subject thereto.

The defendant Hollingsworth says, however, that the Tyson note and mortgage are barred by the statute of limitations. This is true, unless the payments were made by Davis, as alleged. The note was due 1 November, 1881, and there is no allegation of any payment by Leonard since March, 1891. The payment of May, 1894, is admitted by Davis, but as Hollingsworth does not claim under him, we do not think the admission binding upon or any evidence against him. Leonard and Hollingsworth deny the payments. No issue was submitted to the jury in respect to them, but the general issue in regard to the statute of limitations was submitted and answered under the instruction of his Honor in the negative. In this we think there was error and entitles the defendant Hollingsworth to a new trial on this issue.

It is the duty of the plaintiff to show the payments. She offered no evidence in regard thereto. We think that a payment by Davis, within the ten years, would prevent the bar.

We remand the case for a new trial upon the issue in regard to the statute, which will be answered in accordance with the evidence of payments, as alleged. The court will thereupon render judgment according to the principles announced herein. There must be a

New trial.

Cited: Laton v. Crowell, 136 N. C., 380; *Printing Co. v. Herbert,* 137 N. C., 320; *Dawson v. Thigpen, ib.,* 470; *Millsaps v. Estes, ib.,* 543; *Wood v. Tinsley,* 138 N. C., 510; *Janey v. Robbins,* 141 N. C., 404; *Bank v. Jones,* 147 N. C., 424; *Piano Co. v. Davis,* 150 N. C., 169; *Modlin v. Ins. Co.,* 151 N. C., 41; *Smith v. Fuller,* 152 N. C., 13; *Wood v. Lewey,* 153 N. C., 403, 404; *Wilkes v. Miller,* 156 N. C., 431; *Burwell v. Chapman,* 159 N. C., 212; *Gore v. McPherson,* 161 N. C., 644; *Moore v. Johnson,* 162 N. C., 270; *Buchanan v. Clark,* 164 N. C., 71; *Hodges v. Wilson,* 165 N. C., 332; *Wynn v. Grant,* 166 N. C., 46; *King v. McRacken,* 168 N. C., 624; *Bank v. Cox,* 171 N. C., 81; *Sills v. Ford, ib.,* 740; *Lanier v. Lumber Co.,* 177 N. C., 205.

(115)

MAY v. LEWIS.

(Filed 17 March, 1903.)

Estates—Life Estates—Wills—Construction.

When a will provides, "I loan unto my son my entire interest in the tract of land . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin," the son takes merely a life estate.

ACTION by Benjamin May against B. M. Lewis, heard by *Ferguson, J.,* at January Term, 1903, of PITT. From a judgment for the defendant, the plaintiff appealed.

Womack & Hayes, F. G. James, and J. H. Pou for plaintiff.
No counsel for defendant.

CONNOR, J. The plaintiff acquired title to the land in controversy by the sixth item of the will of his mother, Mrs. Mary A. E. May, which is in the following words: "I loan unto my son Benjamin May my entire interest in the tract of land . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin."

On 1 December, 1902, the plaintiff entered into a contract with the defendant to sell him said land at the price of $5,500 and has in accordance with the terms of said contract prepared and tendered to the defendant a deed with warranty for said land, and demanded payment of the purchase money. The defendant refused to accept said deed and pay said money, for that he is advised that the plaintiff has not and cannot convey to him a good and indefeasible title in fee in said land. This action is brought to compel specific performance on the part of the defendant. The court being of the opinion that the plaintiff has only a life estate in said land, rendered judgment against the (116) plaintiff, and he appealed.

The correctness of the judgment of his Honor is dependent upon the construction of the will under which the plaintiff claims title. If the devisor had concluded the limitation with the words "to be theirs in fee simple forever," there would be no doubt that, under the well-settled principle known as the *Rule in Shelley's Case,* the plaintiff would have taken an estate in fee simple. This "rule" is too thoroughly and firmly fixed in our jurisprudence to be brought into question. *Starnes v. Hill,* 112 N. C., 1, 22 L. R. A., 598; *Nicholson v. Gladden,* 117 N. C., 497.

The limitation over by which it is provided that if he should die without heirs the land should "revert back to his next of kin," is valid as an executory devise. *Smith v. Brisson,* 90 N. C., 284, in which *Ashe, J.,* discusses the doctrine of springing and shifting uses with much learning. It may be suggested that if the plaintiff died without heirs he could leave no next of kin, and that therefore the language of the will is equivalent to saying that if the devisee dies without heirs the land shall revert back to his heirs, which would be an absurdity. It will be observed, however, that the word "heirs" is to be understood in that sense which is given it by the law, and is essentially different from the term "next of kin." It is our duty, as far as possible, to give to words used by a testator their legal signification, unless it is apparent from the will itself that they were used in some other sense. "He on whom the law casts an inheritance on the death of the ancestor is designated by the technical word 'heir.' It could not originally be used to designate on whom the law cast the goods or chattel property, for it cast them on no one, no person was appointed to succeed to the deceased ancestor; on his death they became *bona vacantia* and were seized by the king on that account, and by him, as grand almoner, applied to (117) pious uses, now considered superstitious. . . Hence it is that in the common-law vocabulary there could be found no technical word to designate such successor. After one was pointed out by the statute of distributions, the technical word used in regard to inheritances would

not answer for that purpose; for very frequently the persons are different, the rules of construction being very different from the canons of descent. The meaning of the word 'heir,' therefore, retains its primitive and technical meaning when standing alone and unexplained by the context." *Croom v. Herring,* 11 N. C., 393; *Nichols v. Gladden, supra; Rogers v. Brickhouse,* 58 N. C., 301. "In the United States it has been very generally held that the term 'next of kin,' when unexplained by the context, means 'next of kin' according to the statute of distribution." 21 A. & E., 539.

From these authorities it is clear that the ulterior limitation is not to the same persons who would take in the same manner and quality as *heirs.* "The *Rule in Shelley's Case* applies only when the same persons take the same estate, whether they take by descent or purchase." *Mills v. Thorne,* 95 N. C., 362; or, as is said by *Black, J.,* in *Steacy v. Rice,* 27 Pa. St., 95, 67 Am. Dec., 447, "When they take in the quality of heirs." It is for this reason that it is held that if the limitation over be to the heirs of the first taker, "share and share alike," or "to be divided equally," the rule does not apply. Any words added to the limitation which carry the estate to any other person, in any other manner, or in any other quality than the canons of descent provide, will take the case out of the operation of the "rule" and limit the interest of the first taker to an estate for his life.

If, however, it be suggested that the word "heirs" is limited or restricted to "issue" or "children" by the context, and that such construction should be given it as being clearly the intention of the testator, as held in *Rollins v. Keel,* 115 N. C., 68, we would be brought to the same conclusion. In that view of the case the limitation would be to the plaintiff and to his "issue," if any, and if none, then to his next of kin.

(118)

In the view which we have taken, without any departure from the well-settled principle that the "rule" is one of property and is applied without regard to the intention of the testator, we have effectuated the manifest purpose of the devisor, and given effect to every expression used by her.

We concur in the judgment of his Honor that the plaintiff cannot convey to the defendant an indefeasible estate in fee simple in the land. The judgment is therefore

Affirmed.

Cited: Tyson v. Sinclair, 138 N. C., 25; *Perry v. Hackney,* 142 N. C., 375; *Price v. Griffin,* 150 N. C., 526; *Puckett v. Morgan,* 158 N. C., 347; *Jones v. Whichard,* 163 N. C., 244; *Rees v. Williams,* 165 N. C., 209; *Cohoon v. Upton,* 174 N. C., 90; *Nobles v. Nobles,* 177 N. C., 245; *Smith v. Moore,* 178 N. C., 374; *Blackledge v. Simmons,* 180 N. C., 542.

RIDDICK v. FARMERS' LIFE ASSOCIATION.

(Filed 10 March, 1903.)

1. Insurance—Certificate of Membership—Annual Dues—Beneficial Association.

Where the losses of a beneficial association were paid from assessments, and the certificate provided that annual dues should amount to a certain sum and should be paid on a certain day, and an agent soliciting for the association told insured that he would have twenty days notice "of anything to be paid under the policy," such statement did not cover annual dues, but referred merely to such things as were uncertain, such as assessments for losses.

2. Appeal—Exceptions and Objections—Findings of Court.

Where no exception is taken in the trial court to findings of fact as not being supported by any evidence, such objection will not be considered on appeal.

ACTION by W. A. Riddick, wife of John A. Riddick, against the Farmers' Life Association, heard by *Brown, J.*, at October Term, 1902, of PITT. From a judgment for the defendant, the plaintiff (119) appealed.

Fleming & Moore for plaintiff.
Jarvis & Blow for defendant.

MONTGOMERY, J. The defendant is a benevolent life insurance association, having no capital stock and no stockholders. Its officers are the president, vice-president, secretary, and treasurer. The secretary alone receives compensation for his services. Two meetings in each year, one in January and one in August, are provided for by the articles of confederation, and the meetings are participated in by such of the members as choose to attend. The policy of insurance is a simple certificate of membership, in which it is agreed that the connection is to continue as long as the annual dues and the assessments are paid, and that upon the death of the certificate holder the beneficiary shall be entitled to the amount named therein, to be raised by an assessment upon all the other members. Each member is required to pay $2 upon entrance, $1 as annual dues to be paid at or within thirty days after each annual meeting (for contingent expenses) and such assessments as shall be levied to pay death losses.

The insured entered into the association as a member on 12 December, 1899, and paid the initiation fee. He died on 17 December, 1901, not having paid the annual dues for 1901. On the back of the certificate

of membership the articles of confederation of the association were printed, one of which read as follows: "Each member shall pay $1 as annual dues. The annual dues shall be to defray all contingent expenses of the association. The annual dues must be paid at or within thirty days after each annual meeting." And article 8 provides that any member who fails to pay dues and assessments, as required, shall forfeit membership and not be reinstated until all delinquencies
(120) are paid. The articles of confederation do not require notices to be sent out by the secretary to the members for the payment of the annual dues. The secretary, however, had established a custom of sending out such notices, but there was no evidence that the insured knew of such custom.

It would seem from the above findings of fact, made by his Honor by consent, that the insured had forfeited his membership in the association by his failure to pay the annual dues of 1901. But the plaintiff insists, under a certain one of the findings of fact made by his Honor, to wit, that at the time of the issuing of the certificate of membership the agent who issued it and solicited for the defendant told the insured that he would have twenty days notice of anything to be paid under the policy, that as it was admitted that no notice was sent by the secretary to the insured calling for the annual dues of 1901, the membership and policy of the insured ought not to be forfeited. The contention is that the agreement that the insured should have twenty days notice of anything to be paid under the policy is strong enough to cover the annual dues, as well as assessments to cover losses caused by death. His Honor thought otherwise, and we are of the same opinion. We think that the natural construction of the words "anything to be paid under the policy" is such things as are uncertain and to be fixed in the future, as assessments for losses. There was no need for notice to pay the annual dues, for that notice was always with the insured, printed plainly on the back of his certificate of membership. The times of the annual meetings, in which he had the right to participate and was expected to participate in, were also printed in the articles on the back of the certificate, and he was expected to take his annual dues with him to the meeting or to send them within thirty days afterwards in case he did not attend.

In Bacon's Benefit Societies and Life Insurance, sec. 389, the author says: "In some associations not consisting of local and grand
(121) lodges, a stated sum is to be paid annually or oftener in addition to assessments on death claims for the expenses of the organization. The first class of contributions, of which we have already treated, is called 'assessments,' the second is known as 'dues.' The laws of the orders provide that the dues be paid by each member at certain times without notice, and no action of the lodge or its officers is required

to make them due and payable. . . . If nonpayment of the dues works a forfeiture, the provisions of the laws are to be strictly construed. Nonpayment of dues, however, if so stipulated, will of itself work a forfeiture." The articles of the defendant association require notices of assessments to be given, but we have seen the difference between the rules governing the payment of annual dues and those governing assessments. The authorities cited by the counsel of the plaintiff bear upon the payment of assessments and not upon the payment of annual dues. The plaintiff's counsel insisted here that his Honor's finding of fact that the defendant's meeting in January of each year and not the meeting of August was the time at which the annual dues were payable, was made without any evidence to support the finding. However that may be, that exception was not taken in the court below, and we cannot consider it.

We find no error, and the judgment must be

Affirmed.

---

(122)

MOREHEAD v. HALL.

(Filed 10 March, 1903.)

Ejectment—Grants—Registration—Evidence—Statutes—Retroactive—Laws 1901, Ch. 175.

A person cannot maintain ejectment where, when the action was begun, a grant from the State, through which he claimed, had not been and could not be legally registered, though it had been registered at the time of the trial under Laws 1901, ch. 175.

ACTION by John L. Morehead and others against David B. Hall and others, heard by *Brown, J.*, at September Term, 1902, of CARTERET. From a judgment for the defendants, the plaintiffs appealed.

Simmons & Ward for plaintiffs.
W. W. Clark for defendants.

MONTGOMERY, J. When this action was commenced on 4 September, 1897, the plaintiff's sole claim to the land in dispute was through an unregistered grant from the State to John Benthall, dated 30 October, 1765. At the time of the trial of the action, Fall Term, 1902, of the Superior Court of Carteret County, the plaintiffs offered that grant, which had been registered since the commencement of the action, to wit, on 24 October, 1899, in evidence in support of their title. The evidence was rejected upon the objection of the defendant, and an exception entered by the plaintiffs. The plaintiffs then tendered to the court a

complete chain of title from John Benthall to them, and tendered evidence to identify the land in said grant and in the *mesne* conveyances to the plaintiffs, as the *locus in quo,* and tendered evidence to show that the defendants were in possession of the *locus in quo* at the time of the commencement of the action, but stated that they could not show possession in the plaintiffs and those under whom the plaintiffs claimed for a sufficient time, in the absence of the grant, to perfect title in the
(123) plaintiffs. A nonsuit was suffered by the plaintiffs on intimation from the court that they could not recover.

The last act of Assembly extending the time for registration of grants, except the one of 1901 to be hereinafter referred to, was the one of 27 January, 1893, the expiration of the time being 1 January, 1894. It is to be observed that the registration of the grant was without authority of law, but the plaintiffs contend that the act of 1901 cures that defect and gives validity to the registration of the grant. That part of that act which has relation to this case is in the following words: "That all grants from the State of North Carolina . . . heretofore made, which were required or allowed to be registered within a time or times specified by law, or in the grants themselves, may be registered in the counties in which the lands lie, respectively, at any time or times within three years from 1 January, 1901, notwithstanding the fact that such specified times have already expired, and all such grants heretofore registered after the expiration of such specified time or times shall be taken and treated as if they had been registered within such specified time or times."

It is unnecessary to discuss generally the effect of the act of 1901 upon the grant itself, for the only question raised by the appeal is whether the grant ought to have been received as evidence *in the present action.* We are of the opinion that the ruling of his Honor was correct. The rule in this State is that the plaintiff in an action of ejectment, an action for the possession of real estate, must have the title and right to the possession, not only at the time of the trial, but at the time of the institution of the suit. *Arrington v. Arrington,* 114 N. C., 116. There the Court said: "This is said (7 Lawson Rights and Remedies, sec. 3708) to be almost the universal rule, the only exception thereto being in
(124) Vermont," as he says in his note referring to *Edgerton v. Clark,* 20 Vt., 264. Chapter 175, Laws 1901, must be construed so as not to antagonize the rule above laid down. It was not intended to alter the rules regulating the trial of actions for the possession of real estate.

No error.

Cited: Burnett v. Lyman, 141 N. C., 501; *Brown v. Hutchinson,* 155 N. C., 208; *Herbert v. Development Co.,* 170 N. C., 625.

PINNIX v. CANAL COMPANY.

(Filed 10 March, 1903.)

1. Negligence—Evidence—Canals.

Under the evidence in this case the trial court properly instructed that if the jury believed the evidence they should find that the defendant canal company negligently injured the property of the plaintiff.

2. Damages—Permanent Damages—Issues.

In an action for injuries to property, where no exception is taken and no additional issues are tendered, there is no impropriety in including all forms of injury in a single issue as to permanent damages.

3. Negligence—Damages—Canals.

A canal company is liable for unlawfully damaging the lands of an adjacent landowner, even though such work is not negligently done.

4. Corporations—Franchises—Canals.

A corporation cannot justify an unwarranted act by a reference to a charter granted to its predecessor, irrevocable without the consent of the State, where the record does not show that the State has ever consented to a transfer from such an alleged predecessor.

ACTION by H. C. Pinnix and others against the Lake Drummond Canal and Water Company, heard by *Moore, J.*, and a jury, at September Term, 1902, of CAMDEN. From a judgment for the plaintiffs, the defendant appealed.

E. F. Aydlett and Williams & Leigh for plaintiffs. (125)
Pruden & Pruden and Shepherd & Shepherd for defendant.

DOUGLAS, J. This is an action to recover damages for alleged injury to the plaintiff's land by the defendant throwing mud, sand, and water thereon, and further flooding it by filling up the sweat and lead ditch which was necessary for its proper drainage.

This is one of a series of cases arising out of injuries inflicted upon abutting landowners by the defendant in deepening and widening its canal in 1898 and 1899. It is identical in principle and practically so in its essential facts with the cases of *Mullen v. Canal Co.*, 130 N. C., 496; *Ferebee v. Canal Co.*, 130 N. C., 745, and *Williams v. Canal Co.*, 130 N. C., 746. It is "on all fours" with the latter case. In fact, they are twin cases against the same defendants, arising out of the same work, involving similar injuries and resulting in damage of the same nature. They must therefore be governed by the same legal principles. The

sweat and lead ditch was filled up, whereby the plaintiff's land was flooded, and large amounts of mud and sand were thrown in some places directly on the plaintiff's land, and in others on the banks of the canal, whence it was permitted to flow upon said land. The land was permanently flooded, the shrubbery killed, and the houses injured. One of the defendant's own witnesses testified on cross-examination that "sand and mud were piled up so high in front of one of the tenant houses that a cart wheel would have knocked the shingles off the porch; it was piled eight or ten feet high; that the plaintiffs planked up the porch to keep the sand out, and that sand went into the porch." There was other evidence of the same nature. As there was no substantial conflict in the testimony except as to the amount of damage, we see no error in his Honor's charging the jury that if they *believed* (126) the evidence they should answer the first issue "Yes."

The issue was as follows: "Did the defendant company negligently and wrongfully damage and injure the plaintiff's property, as alleged in the complaint?" Answered, "Yes." The second issue was the amount of permanent damages. There was no exception to the issue, and no additional issues were tendered. As it was agreeable to the parties, we see no reason to object to the inclusion of all forms of injury arising from the same work under the same issue.

The defendant contends that it is not liable unless the work was done negligently; but one is just as liable for doing an unlawful act as for negligently doing a lawful act, and of both there was ample evidence. Piling large quantities of mud and sand upon the banks of the canal, without providing means to prevent its flowing upon the plaintiff's land, was negligence; while throwing mud and sand directly upon the plaintiff's land was an unlawful act, which no amount of skill could justify. When a man's house is blocked up by a pile of mud ten feet high, the mere fact that the mud was skillfully piled helps neither his damaged building nor his wounded feelings. A man may lawfully pull down his chimney and pile the brick on top of his house, but he must pile them so that they will remain there. He cannot lawfully throw them together so carelessly that they fall off and injure some one passing in the street below. Still less could he throw them directly into the street regardless of injury to others.

The defendant contends in argument that it was organized under a public act of which this Court will take judicial notice, and by which its easement will be shown. It says further in its brief: "This canal, of which it is said that General Washington was a chief promoter, is a matter of public history in North Carolina, and does not derive its corporate existence by an ordinary charter. It will appear from (127) section 19 (page 225, 2 Rev. Stats.) that it was the result of a

compact between two sovereign States concerning a great interstate public improvement, and which the two States declared should be a 'public highway' (section 9, p. 221) between the two States." If these concurrent charters are public laws entitled to judicial notice, which we doubt, they cannot avail the defendant. The complaint alleges that the defendant is a corporation organized under the laws of Virginia, and this is admitted in the answer. It is true, the complaint further says that the defendant owns the canal property formerly known as the "Dismal Swamp Canal," but there is no allegation in either pleading connecting the defendant with the franchises granted to the Dismal Swamp Canal Company by the interstate compact of 1790, or those granted to the Northwest River Company by the concurrent acts or compact of 1825. By express stipulation, these compacts were irrevocable without the consent of both States, and it does not appear that the State of North Carolina has ever consented to the transfer of such franchises to a purely Virginia corporation, such as the "Lake Drummond Canal and Water Company," the defendant in this action, appears to be. However, if we go back to the act of 1790 and 1792, we find nothing tending to show the extent of the right of way actually obtained by the defendant or its predecessor. Section 10 of the act of 1790 provides that the Dismal Swamp Canal Company *may,* on failure to agree with the owner of the land, condemn a right of way *"not exceeding* the width of 300 feet." We have no evidence whatever, in or out of the record, tending to show what amount of land was actually condemned, if any. Hence, we can only repeat what we said in *Mullen v. Canal Co.,* 130 N. C., 496, 500: "It does not appear when or how the original right of way was acquired by the defendant, nor what was its extent. Under the circumstances, we must presume that it was a mere easement, and (128) that it was limited to the extent of its use prior to the widening of the canal in 1898." The statutory right to acquire a right of way is no proof whatever of its subsequent acquisition, any more than a statute authorizing the entry of certain lands would be proof of subsequent entry and payment. The judgment of the court below is

Affirmed.

Cited: S. c., post, 180; *Norris v. Canal Co., post,* 183; *Edney v. Canal Co., post,* 184; *Cherry v. Canal Co.,* 140 N. C., 424.

PARKER v. SOUTHERN EXPRESS COMPANY.

(Filed 17 March, 1903.)

1. Appeal—Transcript—Record—Exceptions and Objections—Case on Appeal.
Where there is no exception to the evidence or the charge of the court, no part of them should be sent upon appeal.

2. Nonsuit—Dismissal—Jurisdiction.
A motion for nonsuit treated as a motion to dismiss for want of jurisdiction may be made after verdict.

3. Jurisdiction—Justices of the Peace—Superior Court—Contract—Torts.
Where a person sues an express company before a justice of the peace for breach of a contract for failing to deliver a package, and upon appeal the jury finds that the defendant "negligently" failed to deliver the package, the action is for breach of contract, and a justice of the peace has jurisdiction if the amount sued for is less than $200.

ACTION by J. C. Parker and others against the Southern Express Company, heard by *Timberlake, J.*, and a jury, at November Term, 1902, of HARNETT. From a judgment for the plaintiffs, the defendant appealed.

Stewart & Godwin for plaintiffs.
McLean & Clifford for defendant.

(129) CLARK, C. J. This was an action brought before a justice of the peace, and no written pleadings were filed. The summons notifies the defendant to appear at the time and place named "to answer the complaint of plaintiffs for nonpayment of the sum of $175, with interest thereon from 17 August, 1901, until paid, *for breach of contract.*" On appeal to the Superior Court, the following issues were submitted: "1. Were the plaintiffs damaged by reason of the negligence of the defendant in the failure to deliver the express package in question? 2. What damages have the plaintiffs sustained?"

The jury responded "Yes" to the first issue and to the second issue "$70," whereupon the defendant excepted to the jurisdiction of the court and moved for judgment of nonsuit against the plaintiffs, which motion was overruled, judgment entered for the plaintiffs upon the findings of the jury, and the defendant excepted and appealed.

There being no exception to the evidence or the charge of the court, very properly no part of them is sent up. *Durham v. R. R.*, 108 N. C., at p. 404; *Mining Co. v. Smelting Co.*, 119 N. C., at p. 416. The only exception is for the refusal to nonsuit after verdict. Taking this to be

a motion to dismiss for want of jurisdiction, it might be made at any time, even in this Court for the first time. Rule 27 and cases cited in Clark's Code (3 Ed.), p. 923. But no such defect appears on the face of the record. In the summons before the justice of the peace the plaintiffs state their cause of action to be for "breach of contract," and the issue finding that there was a "negligent failure to deliver an express package" is on its face a breach of contract to deliver the same. *Froelich v. Express Co.*, 67 N. C., 1. It is true, the word "negligent" was surplusage, for the failure to deliver the package is a breach of the contract of carriage equally whether such failure is wilful or negligent. The only defense for failure to deliver would be "the act of God or the public enemy." If there was negligent failure, (130) it would be like the breach of any other contract in which the contractor negligently failed to keep and execute its terms. There was no exception to the issue, and if there had been, the negligence was simply the manner of breaking the contract, and at the utmost it was a *tort* arising on contract.

"The justice's summons is a substitute for the complaint when no other complaint is filed." *Cromer v. Marsha*, 122 N. C., 564; *Allen v. Jackson*, 86 N. C., 321; *Williams v. Beasley*, 35 N. C., 112; *Emmit v. McMillan, ibid.*, 7; *Duffey v. Averitt*, 27 N. C., 458. Here the declaration is explicit in the summons "for breach of contract." If there had been a tort, the plaintiffs had the right to waive it and sue in contract, but in *Froelich v. Express Co., supra, Pearson, C. J.*, says the failure of a contract of a carrier to deliver is a breach of contract, and adds (on p. 4): "As the distinction between declaring in tort or in contract is a refinement abolished by the Constitution, taking it in any point of view, this is a civil action founded on contract." See citations approving that case in the Annotated edition of 67 N. C.

In *Bowers v. R. R.*, 107 N. C., 721, the Court modified that decision by holding that in such case the plaintiff may waive the contract, if he so elect, and sue in tort, if he set out his intention "in terms that clearly show his purpose" to do so. The same purpose to uphold whatever jurisdiction the plaintiff shall elect is clearly shown in all our decisions. In the late case of *Sams v. Price*, 119 N. C., 572, the Court says: "If the complaint is so worded that under the liberal procedure of The Code it could have been construed to be either an action on an express or an implied contract (*Stokes v. Taylor*, 104 N. C., 394; *Fulps v. Mock*, 108 N. C., 601; *Holden v. Warren*, 118 N. C., 326), or *either in tort or contract* (*Britton v. Payne*, 118 N. C., 989; *Schulhofer v. R. R., ibid.*, 1096; *Timber Co. v. Brooks*, 109 N. C., 698; *Bowers v. R. R.*, 107 N. C., 721), or as a common-law action or one under the (131) statute (*Roberson v. Morgan*, 118 N. C., 991), the Court *will*

sustain the jurisdiction." It would be passing strange if since the Constitution, Art. IV, sec. 1, the courts could turn a party out of court and require him to come back again by another door to litigate exactly the same sum, upon the same facts, when he has stated his cause of action in a manner which entitles him to have a decision in the forum which he has chosen.

No error.

Cited: White v. Eley, 145 N. C., 36; *Stroud v. Ins. Co.,* 148 N. C., 56; *Riley v. Stone,* 169 N. C., 424; *Newell v. Barley,* 180 N. C., 432.

LACY v. CLINTON LOAN ASSOCIATION.

(Filed 17 March, 1903.)

Corporations—Insolvency—Judgment Creditors—Preferences.

A judgment against an insolvent corporation for money had and received merely establishes the debt and does not give the judgment creditor preference over other creditors.

ACTION by B. R. Lacy, State Treasurer, against the Clinton Loan Association, heard by *Bryan, J.,* at chambers, 30 January, 1903, in WAKE. From an order made upon a petition filed by W. A. Dunn, who had been appointed receiver of the defendant, asking to be instructed by the court, to which petition A. F. Johnson filed an answer, defendant appealed.

Junius Davis, Rountree & Carr, and H. E. Faison for plaintiff.
J. L Stewart and George E. Butler for stockholders.
W. A. Dunn for defendant.

CLARK, C. J. The Clinton Loan Association was a joint-stock company doing a banking business from 1871 to 1891. It became incorporated by the same name 14 February, 1891, turning over its assets, charged with its liability, of course, to the latter, and most of its (132) members becoming stockholders in the corporation. It was insolvent, and the new corporation was another instance of what *Mr. Justice Douglas* styled "congenital insolvency" in *Ins. Co. v. Edwards,* 124 N. C., 116. In December, 1891, W. A. Dunn was appointed receiver of the corporation, which included among its assets those of the former joint-stock company, which had been assigned in

a trust to the corporation to pay its debts, etc. The facts are set out in *Bain v. Loan Assn.,* 112 N. C., 248. As such receiver, Dunn brought an action against A. F. Johnson (two previous actions having been withdrawn), alleging that he was largely indebted to the joint-stock company, which indebtedness had been assigned with all its other assets to the corporation of which Dunn was receiver. On 6 June, 1891, after the assignment of the assets of the joint-stock company to the corporation, A. F. Johnson paid to W. A. Johnson, at that date cashier of the corporation (and who had been cashier to the defunct joint-stock company), the sum of $2,039.17, taking the following receipt:

$2,039.17.

Received of A. F. Johnson two thousand and thirty-nine dollars and seventeen cents in checks (describing them), which checks are to be applied to credit of his private account with Clinton Loan Association, without in any way his acknowledging the correctness of the same, as it appears on the ledger and without prejudice.

WILLIAM A. JOHNSON, *Cashier.*

By the ledger of the defunct joint-stock company it appeared that A. F. Johnson was then indebted to said concern in the sum of $5,643.02 on notes and open book accounts, but in the last action brought against him by the receiver as aforesaid it was ascertained that there was in fact due said A. F. Johnson $7,389.48, including aforesaid $2,039.17, and it was adjudged, confirming the report of the referee, that said $7,389.48 was "to be discharged and satisfied so far as the liability of the said W. A. Dunn as receiver and his indebtedness as receiver is concerned, upon payment to A. F. Johnson of $2,039.17, with interest from date hereof." On appeal in that case the judgment was affirmed by a *per curiam* order. 130 N. C., 742. (133)

This is a proceeding by the receiver for instructions from the court, the stockholders and A. F. Johnson being parties. The latter contends that this $2,039.17 is a preferential claim to be paid in full and in preference to the ordinary claims of creditors, which is contested by the stockholders and the receiver, the stockholders contending further that the $2,039.17 is an indebtedness of the joint-stock company, said money being paid the corporation as its trustee. The assets of the corporation are *in custodia legis* to be disbursed by the receiver under the order of the court. If, therefore, A. F. Johnson had brought his action against the receiver to recover a balance due him, any judgment he might have obtained in that action would only have ascertained the indebtedness, leaving the order of preference to be determined by the court in this proceeding, in which the receiver was

appointed, and in which the court has custody of the funds and control of their disbursement after collection. This is nowise changed by the fact that instead of A. F. Johnson suing the receiver, the receiver sued him, and this balance was set up as a counterclaim, a cross-action, and a balance was ascertained to be due A. F. Johnson. The judgment of affirmation on appeal had only the same effect as the judgment in that action below, *i. e.*, to ascertain the debt. The form of the judgment served only to indicate that $2,039.17 was an indebtedness of the corporation, the balance being the debt of the joint-stock company.

Of the sum determined to be due A. F. Johnson, all except the $2,039.17 being due him by the joint-stock company is to be provided for in the administration of the assets and liabilities of that concern.

The $2,039.17 was money paid in by him to the cashier of the corporation to be applied on his account, which it held as assignee
(134) and trustee of the joint-stock company—stipulating, however, that it should not be deemed an admission that he owed that company anything. It turns out, in fact, that he owed the joint-stock company nothing, and therefore the corporation, having received and used for its own purposes the $2,039.17, owes that amount for "money had and received." This amount, we think, is a liability of the corporation, but there is nothing to give it a preference over any other indebtedness of the corporation for money, labor, or other cause. The $2,039.17 was not received as a special deposit. It was not put aside and segregated, to be kept intact and returned in the identical package. It was simply money to be applied to his account, but the payment of which was to be taken as an acknowledgment of the correctness of the account claimed against him, and the corporation used it.

As we have seen, there was no judgment in the action of Dunn, receiver, v. A. F. Johnson declaring this debt a preferred claim, and there could be none. The $2,039.17 will be paid pro rata among the ordinary debts of the corporation, without preference. By virtue of the agreement on record, the judgment bears no interest as against the corporation, the fund being *in custodia legis*.

The judgment will be corrected to conform to this opinion.

Error.

(135)

STEPHENS v. McDONALD.

(Filed 17 March, 1903.)

Appeal—Transcript—Record—Plats.

The same number of copies of a plat referred to in the pleadings and evidence should be filed on appeal as is required to be filed of the printed record and brief.

ACTION by W. M. and W. B. Stephens against H. J. McDonald, heard by *O. H. Allen, J.*, and a jury, at April (Special) Term, 1902, of HARNETT. From a judgment of nonsuit, the plaintiff appealed.

Stewart & Godwin for plaintiffs.
No counsel for defendant.

CLARK, C. J. This is an action of ejectment for two tracts of land, one of 17 acres and one of 50 acres. At the close of the plaintiff's testimony the defendant moved to "nonsuit the plaintiffs under the statute" because they had failed to make out a case. The motion was allowed, and the plaintiffs appealed. The surveyor, witness for the plaintiff, testified "it is not possible to locate the 17-acre tract," and without going over the testimony in detail, it is sufficient to say that his Honor's conclusion was clearly correct as to both tracts.

It is proper to note that, though a plat is referred to in the pleadings and evidence and is necessary to the understanding of the appeal, only two copies are sent up with the record. While the Court does not require that maps, plats, and similar exhibits should be printed, the same number of copies (15) thereof should be filed as is required to be filed of the printed records and briefs. In *Smith v. Fite*, 98 N. C., 517, the Court said that when a plat is used and referred to in the trial below, it is the duty of the appellant to have it sent up in the case, and in *Whichard v. R. R.*, 117 N. C., 614, the Court said that it "gave notice of a rule" that whenever a survey and plat are necessary for the proper understanding of an appeal (in that (136) case, an action for the diversion of water), unless a survey is made and "15 maps of the locality are sent up as exhibits" in the case, "the judgment of the court below will be affirmed or the appeal dismissed." There are very few actions of ejectment in which a plat is not indispensable for a clear comprehension of the points involved.

The judgment of nonsuit is
Affirmed.

MURRAY v. BARDEN.

(Filed 17 March, 1903.)

1. Limitations of Actions—Plea—Sufficiency—Pleadings.

It is not sufficient merely to allege that an action is barred by the statute of limitations, without stating the facts from which it could be deduced.

2. Executors and Administrators—Trusts and Trustees—Guardian and Ward—Fraud.

An executor may purchase claims against his testator for moneys received by his testator as guardian or agent, if no money received by the testator as such guardian or agent has come into his hands as executor and there is no fraud or concealment on his part.

3. Executors and Administrators—Husband and Wife—Separate Property of Wife.

A husband may receive and receipt for money due his deceased wife, as her administrator, and such receipt is prima facie evidence that he was such administrator.

4. Appeals—Record—Transcript—References.

An alleged order of reference not contained in the record on appeal will not be considered in support of the judgment rendered in court below.

ACTION by D. H. Murray and others against J. J. Barden, executor of will of John Barden, heard by *Timberlake, J.*, at May Term, 1902, of SAMPSON.

(137) The plaintiffs, the children and grandchildren of the testator of the defendant, brought this action to recover an amount alleged to be due to them by the testator. The allegation is that the defendant's testator in 1872 received, as guardian of a part of the plaintiffs and as agent of the others, a large amount of money bequeathed to them by the will of James Vann. There was an order of reference.

(143) The plaintiffs filed numerous exceptions to the referee's report, but the court confirmed the same in all respects and entered judgment as appears of record. To this confirmation of the report and judgment the plaintiffs filed exceptions and appealed.

J. D. Kerr and Stevens, Beasley & Weeks for plaintiffs.
Faison & Grady and Womack & Hayes for defendants.

MONTGOMERY, J. The plaintiffs' contention, raised by several of their exceptions, that the defendant was a trustee of an express trust

because of the fact that his testator had received the money of the plaintiffs as their guardian and agent, and therefore that he had no right to purchase the claims of the plaintiffs arising out of the Vann legacy except for the full amount of those claims, principal and interest, and also that he cannot set up the statute of limitations against those claims, cannot be sustained. There is no evidence in the case that one cent of the money, received by the testator from the Vann legacy, ever went into the defendant's hands. In fact, the evidence is to the contrary. The only estate of the testator at the time of his death was real estate in the county of Sampson, and $350 worth of personal property, the latter being subject to the year's support.

We are of the opinion, however, that the defendant failed in his attempt to plead the statute of limitations. The language of that plea was as follows: "That outside of the debts held and owned by said J. A. Powell, which have been duly presented and accepted by the defendant executor, this defendant alleges and pleads notice as aforesaid, and the statute of limitations of three, seven, and ten years in bar of the recovery of said plaintiffs or any of them, and he prays judgment that said Powell's claim be admitted, and no other, and that he recover costs and expenses of the plaintiffs in this action." That was but the statement of a conclusion of law, and not (144) the acts from which it could be deduced.

In *Turner v. Shuffler,* 108 N. C., 642, the language of the plea was in these words: "They plead the statute of limitations of ten, seven, six, and three years, as prescribed in The Code, to all said claims, and aver that they are unable to plead the same more definitely to each and all said claims," and the Court there said: "This is clearly bad and insufficient pleading." Along the same line, reference is made to the case of *Heyer v. Rivenbark,* 128 N. C., 270; *Lassiter v. Roper,* 114 N. C., 17. There was nothing either in the complaint or answer which could in any manner aid the insufficiency of the plea. The plaintiff's exception, therefore, to the referee's conclusion of law, No. 3, ought to have been sustained.

The defendant J. J. Barden not having any trust funds in his hands arising from the Vann legacy, had the clear right to purchase the interests of the plaintiffs, his sisters, in the Vann legacy, unless he practiced some fraud upon them in the purchase; and under the head of fraud would be the withholding of any information from them as to the value of their interests, which information had come to him by virtue of his office as executor. The plaintiffs introduced no evidence before the referee tending to show that the defendant in any way had over-

reached the plaintiffs. They were as well acquainted with the lands of the testator as was the defendant, and while the defendant as executor made no returns of the estate, he testified that he had received no money by virtue of his office as executor or in any other capacity from his father's estate, and that the whole of the personal property was worth no more than $350, and that his mother, the testator's widow, was entitled to her year's support out of that.

(145) The plaintiffs' exception to the seventh conclusion of law of the referee cannot be sustained. The interest of Rebecca Page in the Vann legacy, being personal property, became the property of her husband, Abner Page, when she died, and his receipt to the defendant J. J. Barden for the amount of Mrs. Page's claim was valid. She had received the money in her lifetime. The signature of Abner Page as administrator of his wife was prima facie proof that he was such administrator, and there was no evidence to the contrary.

The other exceptions of the plaintiff, except those for the judgment itself, are without merit. The plaintiffs' exception to the judgment, because it contained a decree that Daniel Page and Walter and Oscar Page had assigned their claims to J. J. Barden, the defendant, is founded on a misapprehension. Neither the referee's report nor the judgment contains any such statement. In this connection, however, it may be well to say that the plaintiffs failed to file any exception to the eighth conclusion of law and affirmed by the judgment, to wit, "That the children of Daniel Page, Ellen Carroll, Martha Carroll, are not entitled to recover anything by reason of the Vann legacy."

The third conclusion of law as affirmed by the judgment, being erroneous, as we have pointed out, will cure that failure, however, as the eighth conclusion of law followed the third as a necessary consequence. That part of the judgment in which the lands of the testator were ordered to be sold to pay the debts therein named seems to be erroneous. As the case appears to us, it was no part of the object of the action to have a sale of the lands of the testator. It was simply an action for the recovery of the amount due to the plaintiffs on account of the Vann legacy.

(146) The counsel of the defendant moved for a *certiorari* to have sent up by the clerk of the Superior Court of Sampson County the order of reference in this case. The notice required in such cases had not been given to the other side and there was no motion to shorten the time of notice, and it was therefore declined. During the argument, the counsel of the defendant stated that that order of reference, made by consent, contained matters which would make the judgment regular. But the order is not before us, and we must

follow the record. If, when the case goes back, that order of reference should be full enough to justify the judgment, the defendant can pursue such course as he may be advised, to get the benefit of it.

Error.

Cited: Alley v. Rogers, 170 N. C., 539.

HICKS v. BARNES.

(Filed 17 March, 1903.)

Parent and Child—Contracts—Minor—In Loco Parentis.

Where it appears from the evidence of the plaintiff that he, when an orphan, had lived with his uncle as a member of his family and had grown up in this relationship, he is not entitled to recovered compensation for services performed for his uncle.

ACTION by Bruce Hicks against A. T. Barnes, heard by *Winston, J.,* and a jury, at September Term, 1902, of VANCE. From a judgment for the plaintiff, the defendant appealed.

T. T. Hicks for plaintiff.
T. M. Pittman for defendant.

CONNOR, J. This action was begun before a justice of the peace for the recovery of $195 and interest from February, 1895. The plaintiff alleged that he entered into the service of the defendant during the month of February, 1895, and continued therein until February, 1898; that his services were reasonably worth $7.50 per month; that he never received any compensation "except a very scanty supply of clothing" during the period of service, and his food and lodging; and that he was a minor, reaching his majority on 23 February, 1902. (147)

The defendant denied being indebted to plaintiff. The case was carried by appeal to the Superior Court, and the following issue submitted to the jury: "Is the defendant indebted to the plaintiff, and if so, in what sum?" to which the jury responded: "Thirty dollars, with interest."

The plaintiff testified that his father died during the year 1895, his mother having died two years earlier; that he went to live with his uncle, the defendant; lived with him two years; that he swept the

floor, cleaned his own room, sold milk, went to store, and dusted furniture, waited on customers, packed and unpacked furniture. Defendant had a furniture store; helped about the store, etc., fed cow and carried in wood; defendant had a man-servant; "did my part, did not go to school; started one day and had books; stopped at store, defendant had nothing for me to do, did not start again. Had some education before I went to defendant's, could read, write and cipher. Went to Norfolk; went with Burrow, Martin & Co., a large drug house; have been with them ever since. Defendant gave me no money. Had a railroad ticket furnished me; after I got to Norfolk, defendant sent me money, about $9, to buy clothes; made no claim on him for wages until I was twenty-one years old; did not go to defendant's as a hireling, no bargain was made; went there, not knowing where to go; was told to go; was there as a member of his family. No word of wages between us, and no suggestion that I was to be paid for it. Came and went with family; defendant had all my time except when at church; was kept in close at night and watched close." Plaintiff admitted that defendant proposed to a gentleman, a relative of plaintiff, while plaintiff was with him, to send plaintiff to Wake Forest, defendant paying his board, and other relatives to pay his tuition and books, but the proposition was not accepted; he had some controversy with defendant regarding manner of dress; left and went to Norfolk.

(148) Defendant testified that plaintiff did no valuable service; "after his father's death, some of his relatives met and sent for me, saying that he was an orphan boy, and asked me to take him. I consented to give him a home, and he went to live with me. He was my sister's son. I did not employ him. Received him as a member of my family; had no contract with him; said he wanted to go to my house, and nowhere else; never heard of his sweeping the floor or such work before his statement here today, nor of his making bed. I kept men and women servants; no difference made between him and my children. I was to use him as my child. Told him when he came to me that I would certainly correct him if he did not behave or obey, and he said he wished me to. I sent him transportation and wrote friends in Norfolk to look after him and get him work, also to get him necessary clothes which I paid for. His expenses when with me were included in my family expenses. I got no one in his place when he left."

His Honor charged the jury:

1. The law presumes when one person works for another, renders another valuable service, that the person for whom he works has agreed to pay what the services are reasonably worth.

2. If the plaintiff was placed by his relatives with his uncle to be

reared as a member of his family, to be treated as his own, reared and cared for as such, and to be put to doing those things incident to the relation of father and son, and no more was required of the plaintiff than is usually included by that relation, then the plaintiff cannot recover.

3. If while in that relation he was at odd times put to doing service about home or occasional service at his home or the store, then in the absence of an express agreement the plaintiff cannot recover.

4. But if the relations placed the plaintiff as a member of the family of the defendant to be reared as a member of it, and treated as such; and the defendant placed the plaintiff in his store and (149) kept him there as a clerk, and under the direction of the defendant he did clerk there for two years and two months, then he would be entitled to recover for what his services were reasonably worth, less what has been received and less his board. You will ascertain what was the work done.

5. But if the relationship was not that, but was that of master and clerk, then the clerk could recover, and you would answer "Yes," and also the amount.

The defendant excepted to the charge:

1. That the instruction in paragraph 4 does not correctly state the law, because the services therein described are not inconsistent with the relation therein stated, and that plaintiff would not be entitled to recover under such facts.

2. That there is no phase of the evidence that supports the view of the case submitted in paragraph 5.

The first, second, and third instructions were in strict accordance to the decisions of this Court. The exception to the fourth instruction should, we think, be sustained. The relation existing between the plaintiff and the defendant, as testified to by the plaintiff, brings the case clearly within the principle announced and applied in the several cases found in our reports. In *Hussey v. Rountree,* 44 N. C., 110, it is held that while the stepfather is under no legal obligation to support the child, or the stepchild to serve the stepfather, if he maintained the child and the child labored for him, they will be deemed to have dealt with each other in the character of parent and child and not as strangers. In *Hudson v. Lutz,* 50 N. C., 217, *Pearson, J.,* says: "The same prinicple applies to a grandfather and child *when the one assumes to act in loco parentis.* . . . The grandfather allowed her (his daughter) and her child to live with him as members of his family up to his death. The relation of the parties rebuts the presumption of a special contract." In *Dodson v. McAdams,* 96 (150) N. C., 149, 60 Am. Rep., 408, the same principle was enforced

and the plaintiff, a granddaughter, held not entitled to recover for services. See, also, *Young v. Herman,* 97 N. C., 280.

In *Callahan v. Wood,* 118 N. C., 752, *Faircloth, C. J.,* says: "We do not put our decision entirely on the kinship relation, but also on 'one family' relation, established and maintained by the parties, and the entire absence of any intention to the contrary on the part of either party." In *Avitt v. Smith,* 120 N. C., 392, it is said: "In the absence of some contract, express or implied, showing an intention on the part of one to charge and the other to pay, the presumption is rebutted by the relationship." The text-writers fully sustain the principle which this Court has adhered to: "When an infant lives with his own parents or with others, *whether relatives or strangers,* who stand *in loco parentis* to him, rendering them the usual domestic services and receiving support and maintenance from such parents or strangers, as the case may be, there is no presumption of law on the part of the parent to pay the child for such services." Rogers on Domestic Relations, sec. 480; Tiffany's Parsons' Dom. Rel., secs. 251, 252.

In the light of these authorities, we think that his Honor should have instructed the jury, upon the plaintiff's own testimony, to answer the issue in the negative. It is clear that he was there as a member of the family; there was no express contract to pay, and the law implies none. We approve of and concur in the opinion of *Ruffin, C. J.,* in *Williams v. Barnes,* 14 N. C., 348: "I think such claims without probable evidence of a contract ought to be frowned on by courts and juries." The evidence in this case is a striking illustration of the wisdom of this observation by this eminent jurist. It is not the character of the services rendered which determines the right to
(151) recover, but the relationship of the parties, and the manner of terms upon which the child enters into and resides in the family of the one standing *in loco parentis.*

We do not think that upon the whole of the evidence there is any testimony to sustain the fifth instruction. Upon the plaintiff's own evidence, he was residing with the defendant as a member of his family—as one of his own children, and not as a clerk. There must be a New trial.

Cited: Stallings v. Ellis, 136 N. C., 72; *Dunn v. Currie,* 141 N. C., 127; *Winkler v. Killian, ib.,* 580; *Ellis v. Cox,* 176 N. C., 618.

(152)

CRAFT v. ALBEMARLE TIMBER COMPANY.

(Filed 17 March, 1903.)

1. Evidence—Sufficiency—Logs and Logging—Fires.

In an action for cutting and removing timber contrary to the terms of a contract, evidence of the plaintiff that he saw the hands of the defendant timber company cutting and removing the timber is some evidence of that fact, the sufficiency of which is for the jury.

2. Evidence—Sufficiency—Negligence.

In an action for burning timber, when a witness testifies that he saw smoke and went to the place where it was and saw the fire burning in the tree-tops on the ground near the railroad, and that the engine had just passed, is some evidence of negligence, the sufficiency of which is for the jury.

3. Railroads—Negligence—Right of Way.

A company operating a private logging road is liable for fire caused by the ignition of combustible material negligently permitted to remain on land necessarily used by it as a right of way.

4. Master and Servant—Railroads—Independent Contractor.

A timber company building a railroad is liable for damages to land done by one who built the railroad under a contract with the company where it is shown that the work was done under the supervision and contract of the company.

5. Evidence—Sufficiency—Independent Contractor.

The evidence in this case is sufficient to go to the jury to the effect that the party with whom the defendant contracted for the construction of the road and the cutting of the timber was not an independent contractor.

6. Instructions—Waiver.

When a party fails to request the trial court to make its instructions more explicit, objection to the charge on that ground is waived.

MONTGOMERY, J., dissenting.

ACTION by M. G. Craft and wife against the Albemarle Timber Company, heard by *Winston, J.*, and a jury, at September Term, 1902, of MARTIN. From a judgment for the plaintiffs, the defendant appealed.

Gilliam & Gilliam for plaintiffs.
John L. Bridgers for defendant.

WALKER, J. This action was brought to recover damages for wrongfully cutting and removing timber from the plaintiffs' land and for negligently burning other timber.

It appears that in August, 1895, the plaintiffs and the defendant entered into a contract by which, for the consideration therein expressed,

the former conveyed to the latter, for the term of five years, the pine and poplar trees standing and growing on a tract of land owned by the plaintiff and particularly described in the complaint, and also the right and privilege of entering upon the land with its servants and teams and constructing and operating such "railroads, tramways, and roads" over and upon the said land as may be necessary for said purposes, and providing that the defendant should not cut trees measuring less than 12 inches on the stump, except for the purpose of being used in the construction and operation of the road.

The defendants afterwards entered into a contract with Ward & White by which the latter agreed to construct the railroad upon said tract of land and to cut the timber and to deliver the same at
(153) certain designated points on the Wilmington and Weldon Railroad for shipment to Norfolk, and for that service a certain compensation was provided.

It was further agreed that the defendant should furnish the rails, spikes, and other fixtures, and the engine and cars to be used in the "logging operations under the contract by Ward & White, the same to remain the property of the timber company."

It was further provided that the contractors "will cut, haul, and deliver, so far as may be practicable and in accordance with direction of the timber company, all the timber on the said land."

The plaintiff alleged that the defendant had cut and removed timber which measured less than 12 inches at the stump and which was not used in the construction of the road; but the defendant denied the allegation and contended that there was no evidence to sustain it. The plaintiff in his own behalf testified that he saw the hands cutting and removing the timber; and this was some evidence of the fact, the sufficiency of which was for the jury. As to whether the defendant is liable for what the servants of the contractors did, is a question which we will discuss hereafter.

The plaintiff further alleged that in constructing the road the contractors cut down trees and left the tree-tops lying within a few feet of the track, where they had become dry and very inflammable, and by reason of the negligent operation of the engine, live coals or sparks were allowed to escape therefrom and lodge in the tree-tops, which were about 12 feet from the rails, and they were thereby ignited and the fire was carried directly from them to his timber, which was destroyed. The defendant denied that the timber was destroyed by any negligent act on its part, or that there was any evidence of negligence, and specially averred that it was not responsible for what Ward & White did, as they were independent contractors.

(154) We think that there was evidence that the burning was

caused by the negligence of Ward & White, for which the defendant is liable in damages. The plaintiff testified that he saw the fire, but could not tell when or where it started. The witness Rogers testified that he saw the smoke and went to the place where it was and saw the fire burning in the tree-tops, and that the engine had just passed. As there was no evidence that the engine was furnished with spark arresters or otherwise properly equipped to prevent the emission of sparks or the dropping of live coals, and as the tree-tops, which were very inflammable, were permitted to remain so near the track as to be easily ignited by sparks or coals, we are constrained to hold, upon well-settled principles which have frequently been applied by this Court, that there was evidence of negligence which the court properly submitted to the jury. *Aycock v. R. R.*, 89 N. C., 321; *Ellis v. R. R.*, 24 N. C., 138; *Lawton v. Giles*, 90 N. C., 374; *Piggot v. R. R.*, 54 E. C. L., 228; *Ins. Co. v. R. R., ante*, 75.

It is just as well in this connection to discuss the question raised by the fifth exception to the charge. The court instructed the jury "that if the defendant permitted its right of way to become foul with trash and tree-tops, and the fire originated in the tree-tops, the jury should answer the third issue as to negligence 'Yes' and assess the damage under the fourth issue. There is no width of right of way specified, and in the absence of that specification a right of way is such width as is needed for the safe and prudent operation of the road." We are unable to find any error in this instruction. When the plaintiff granted to the defendant the right to construct a line of railway across his land for the purpose of removing the timber to be cut therefrom under the contract, this grant impliedly carried with it, as a necessary incident, the right to have and use a right of way of such width as was reasonably sufficient for the construction and (155) safe operation of the road. This must needs be so, for otherwise the grant would be practically useless. In *Waters v. Lumber Co.*, 115 N. C., 654, this Court says: "In the light of the meager statement before us, we must hold that the court erred in instructing the jury that the plaintiff (the landowner) was entitled to compensatory damages for the injury done to the land in cutting and removing so much timber as it was reasonably necessary to remove in order to construct a way for the passage of lumber trains. Whether a way 21 feet wide was necessary for the purpose, was a question for the jury under proper instructions. Construing the contract as we do, we conclude that, with the right to build a road sufficient for the passage of trains, the plaintiff by necessary implication agreed to surrender his claim to such damage to his land as might be incident to the skillful construction of what he had empowered Simmons to build. The same implication

must grow out of the right to build a private railway as is held to arise in the case of a grant or condemnation for the use of a common carrier." Citing *Adams v. R. R.*, 110 N. C., 325, and *Fleming v. R. R.*, 115 N. C., 676.

The instruction given by the court in this case conformed strictly with the principle laid down in the case just cited, and the jury have found upon evidence, sufficient in law for that purpose, that the fire originated on the right of way, and was caused by the dropping of coals or sparks from the engine of the defendant, which was at the time being operated by the contractors, the coals or sparks having lodged in the tree-tops or combustible matter on the right of way and ignited it, and that the fire was thereby carried directly to the plaintiffs' timber. *Aycock v. R. R., supra.*

It is contended that the liability of an individual or a private corporation owning a railroad, like the one described in this case,
(156) for setting fires is not the same as that of a *quasi*-public corporation having the right to condemn land and to construct a railroad with the right of way of certain width, and owing certain well-defined duties and obligations to the public. We are unable to perceive any difference in principle between them. The mere fact that the defendant has no chartered rights to build a railroad and to use locomotives and other dangerous machinery and appliances is surely no good reason for making a distinction, in this respect, in its favor. If anything, it has been said, that fact rather makes against the defendant. "Where a company is not authorized by its charter to use locomotive engines, it uses them at its peril and is liable for fires caused by the emission of sparks, irrespective of negligence, and although it has taken all reasonable precaution to prevent injury." 13 A. & E., 414; Wharton on Negligence, sec. 868; *Kendrick v. Towles,* 60 Mich., 363, 1 Am. St., 526; *Hilliard v. Thurston,* 9 Ont. App., 514. It is not necessary, though, that we should adopt and apply so rigid a rule. It is quite sufficient for the purposes of this appeal to say that the rule applicable to railroad corporations, which makes them liable for fires negligently caused by igniting combustible material on the right of way, has been applied to private railroads constructed for logging purposes, *Kendrick v. Towles, supra;* and private steamboat companies, *Hilliard v. Thurston, supra.* It seems to us that the rule applicable in such cases is the one which governs in the case of the owners of private property, for surely such companies cannot claim greater exemption than private landowners. The rule of the common law is that you must so use your own property as not to injure your neighbor's. In *Garrett v. Freeman,* 50 N. C., 78, it was held to be the duty of an individual, using fire on his own premises, to first remove

such combustible matter as he could reasonably see would conduct (157) it to another's fence, and the defendant was held liable in that case, of course, for failing to perform this plain duty to his neighbor. 13 A. & E. (2 Ed.), 454 and 463; *Higgins v. Dewey,* 107 Mass., 494, 9 Am. Rep., 63.

It must be true that in respect to the plaintiff, from whom the right to enter upon the land and construct the railroad was acquired, the defendant owed the duty so to exercise the right and use the privilege granted as not unnecessarily to injure his property. We have held that the defendant was entitled to a right of way of sufficient width to enable it to build and safely operate the road, but if there was no right of way outside of the strip of land upon which the cross-ties and rails were laid, we incline to the opinion that the defendant would still be liable, if in constructing the road or clearing a way for it the trees were cut down and the tops left in close proximity to the track, where they would be liable to be ignited by sparks or coals falling from the engine, as the defendant certainly had the implied right to remove this combustible material when the road was complete, and the failure to do so was negligence. But it is not necessary to pass upon this question, and it is left open for decision if it should hereafter be presented.

In any view of the matter, it seems that the case was correctly submitted to the jury by the court upon the question of negligence.

Our attention has been called to *Simpson v. Lumber Co.,* 131 N. C., 518, which now stands for rehearing in this Court, and, having examined and considered it most carefully, we must decline to be governed by it in this case. The conclusion reached in that case is not in accordance with the well-settled rules of law, as we understand them, and so far as it is in conflict with the principles herein declared, it is overruled.

It is further insisted that if there was negligence which proximately caused the burning of the plaintiff's timber, it was (158) not that of the defendant, but of Ward & White, who were independent contractors, and we will now consider this contention.

Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master. Cooley on Torts (2 Ed.), sec. 548, p. 646. The principle as thus stated, and which we believe to be the correct one, has been approved and applied by this

Court in *Waters v. Lumber Co.,* 115 N. C., 652. We are of the opinion that there was evidence sufficient to go to the jury to the effect that the defendant did reserve control over Ward & White, with whom the contract for the construction of the road and the cutting of the timber was made. The evidence tended to show that the defendant, through Jenkins, its manager, took an active part in the prosecution of the work, and that Jenkins was frequently in the woods looking after the business of cutting the timber and hauling it to the railroad station. The property of the defendant, such as engines, rails, spikes, and other things, was used by the timber company, and the contract provided that the cutting should be done under the direction of the defendant, and it was stated by one of the defendant's witnesses that Jenkins' duty was to look after the logging and to see that Ward & White did the cutting and logging, in accordance with the requirements of the contract. It further appears that the defendant listed for taxation all of the property
(159) used in the construction of the road and in its operation. There was other testimony with reference to the acts and conduct of Jenkins, which, with that we have already mentioned, furnished sufficient evidence to be considered by the jury upon the question of the defendant's reserved control over Ward & White, and the matter was fairly and correctly explained to the jury in the charge.

The defendant further complains that the instructions were not clear and explicit in regard to the relation sustained by Ward & White towards it. We do not agree with the defendant, but, if it is correct, it had the right to request the court to make the charge more explicit, and in failing to do so it has waived any objection to the charge on that ground. *Kendrick v. Dellinger,* 117 N. C., 496.

Judgment affirmed.

MONTGOMERY, J., dissenting.
CONNOR, J., did not sit.

Cited: Simpson v. Lumber Co., 133 N. C., 96; *Hemphill v. Lumber Co.,* 141 N. C., 490; *Knott v. R. R.,* 142 N. C., 243; *Sawyer v. R. R.,* 145 N. C., 27; *Whitehurst v. R. R.,* 146 N. C., 592; *Stewart v. Lumber Co., ib.,* 106; *Young v. Lumber Co.,* 147 N. C., 31; *Merritt v. Mfg. Co.,* 150 N. C., 341; *Walker v. Walker,* 151 N. C., 167; *Snipes v. Mfg. Co.,* 152 N. C., 45; *Bissell v. Lumber Co., ib.,* N. C., 125; *Hunter v. R. R., ib.,* 687; *Thomas v. Lumber Co.,* 153 N. C., 354, 355; *Beal v. Fiber Co.,* 154 N. C., 151; *Twiddy v Lumber Co., ib.,* 240; *Denny v. Burlington,* 155 N. C., 36; *Johnson v. R. R.,* 157 N. C., 383;

Holton v. Morganton, 159 N. C., 434; *Carter v. Lumber Co.,* 160 N. C., 10; *Aman v. Lumber Co., ib.,* 373; *Embler v. Lumber Co.,* 167 N. C., 462; *Buchanan v. Lumber Co.,* 168 N. C., 43; *S. v. Perley,* 173 N. C., 789; *Cashwell v. Bottling Works,* 174 N. C., 237; *Mumpower v. R. R., ib.,* 745; *Williams v. Mfg. Co.,* 177 N. C., 515; *Matthis v. Johnson,* 180 N. C., 133.

(160)

HARRIS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 March, 1903.)

1. Instructions—Findings of Court—Trial.

It is not error for the trial court to refuse to charge that certain facts in evidence are true.

2. Instructions—Charge of Court.

The trial court is not required to charge in *ipsissimis verbis* of the request for instructions.

3. Instructions—Trial.

The trial court is not required to dissect an erroneous prayer for instruction and to give that part that is good to the exclusion of the other.

4. Issues—Negligence—Contributory Negligence—Last Clear Chance.

In an action for damages for personal injuries, it is not necessary for the jury to pass on the issue as to the last clear chance where they find the defendant was negligent and the plaintiff was not guilty of contributory negligence.

5. Negligence—Contributory Negligence—Bridges.

It is not negligence *per se* for a person to go upon a railroad bridge, but it is some evidence of contributory negligence.

6. Negligence—Instructions.

In an action for personal injuries it is not error to charge on the issue of negligence that the jury should consider whether or not the defendant failed to do what an ordinarily prudent and skillful person would have done under the circumstances.

MONTGOMERY, J., dissenting.

ACTION by D. H. Harris, administrator of Cora Denton, against the Atlantic Coast Line Railroad Company, heard by *Winston, J.,* at October Term, 1902, of EDGECOMBE. From a judgment for the plaintiff, the defendant appealed.

Gilliam & Gilliam and Kitchin & Allsbrook for plaintiff.
John L. Bridgers for defendant.

DOUGLAS, J. This is an action for damages for the killing (161) of the plaintiff's intestate through the alleged negligence of the defendant. The material facts are substantially set forth in the following testimony of the witness Manning.

J. W. Manning, for plaintiff, testified: "I am 79 years of age; on the morning of 26 January, 1900, left home with Mrs. Denton and her little boy, 6 years old; I went with them to the Tar River railroad bridge; we went across the field and entered upon the railroad track about 150 to 200 yards of the bridge, walked down the track to the bridge; at the bridge we stopped and talked, looked back and saw and heard no train; no trains were usually passing at that hour—this between 9 and 10 o'clock in the morning; she asked me to stay there until she got over the bridge; she started to cross the bridge, but had not reached the draw when I heard the train. I called to her to come back; she started, holding the boy by the hand; the boy stumbled and she was dragging him; she returned as soon as I called to her to do so and had gotten within a few feet of the end of the bridge, just near enough to reach my hand, when the train struck her; I did not go on the bridge, but stood at the end of it, beside the track; there is a 'stop post' near the bridge, 20 or 25 yards from the end of the bridge, where trains usually stop. This train did not stop there; did not blow, that I heard; the train was composed of 11 flat cars, 3 shanty cars and an engine, flat cars ahead, 3 shanty cars and then engine, train moving backward; I did not see any one on the shanty cars or flat cars until the train was close to the bridge, then conductor came running to end of flat cars and motioning to Mrs. Denton to get to one side; train was then not 20 feet from her; no 'lookout' until then, that I saw; did not see him signal the engineer; train did not slacken its speed until after it passed the 'stop post,' did not stop until after it had run over Mrs. Denton. One on track at the end of bridge can see the train 400 to 500 yards and Mrs. Denton (162) could be seen same distance by one on the train. Have seen trains pass over bridge frequently. The rule and custom is for trains to stop at 'stop post' on each side of the bridge; there is also a 'blow post' about one-half mile of the bridge; rule for trains to blow there; did not hear this train blow there. Mrs. Denton was killed and her little boy injured."

There was further evidence to the same effect; and in fact, while there was some contradiction as to the minor statements, the principal facts were practically admitted. Whatever contradiction there might

be was a matter for the jury. The conductor in charge of the train testified in part that the train was required to stop in sight of the draw-bridge, so that it could be seen if the draw was open; that when it came within sight of the bridge, the whistle was sounded and the train was stopped 400 or 500 yards from the bridge, and then proceeded again; that he saw a woman on right-hand side of track near bridge, but supposed she saw the train; that she walked ahead and went on bridge, and he then signaled the train to stop. This testimony is not very clear, but in any event the conductor saw the deceased as she went upon the bridge, and probably saw her when he stopped the train 400 or 500 yards from the bridge.

We are not attempting to find facts or to weigh the evidence, but simply reciting portions of it to show its general bearing as applied to the defendant's exceptions. For instance, the defendant's seventh assignment of error is as follows: "That the court refused to instruct the jury as requested in that part of defendant's seventh prayer which reads as follows: 'That when she went on the bridge the train was only about 75 yards from her and she could have both seen and heard it, if she had been at all careful'." This is a request for the court to find three distinct facts: the distance of the train and the ability of the deceased both to see and hear it. The court had no such power, and, if it had, would hardly find such facts contrary to the de- (163) fendant's own testimony.

There are fifteen assignments of error, none of which, in our opinion, can be sustained. Thirteen of them are directed to the refusal of the court to give the defendant's prayers for instructions. Nearly all were intrinsically erroneous, and could not have been given as requested. Those that were correct were either given as requested or included in his Honor's charge to the fullest extent to which the defendant was entitled. Upon a request for special instructions, the court is not required to charge in *ipsissimis verbis* of counsel, even when the prayer is correct. *Norton v. R. R.*, 122 N. C., 910; *Cox v. R. R.*, 126 N. C., 103; *R. R. v. Horst*, 93 U. S., 201; *R. R. v. Volk*, 151 U. S., 73. Nor is the court required to dissect an erroneous prayer and give that part that is good to the exclusion of the other. The judge may do so in his discretion, as he has done in the case at bar; but the two are generally so intermingled as to make the attempt difficult, if not dangerous.

With so many exceptions relating to prayers of such length, it is neither necessary nor practicable to discuss them separately and in detail. Every material question in this case is practically decided in *McLamb v. R. R.*, 122 N. C., 862, and *Boggan v. R. R.*, 129 N. C., 154, 55 L. R. A., 418. The case at bar is in one material aspect stronger

than either of those cases, as the jury found all the issues in favor of the plaintiff. After finding that the deceased "was killed by the negligence of the defendant company," and that the deceased was not guilty of contributory negligence, it was not necessary for the jury to pass upon the third issue as to the last clear chance; but they have done so, and we see no reason to disturb their verdict. The wording

(164) of that issue was as follows: "Notwithstanding the negligence of the deceased, *if guilty of such negligence,* could the defendant have avoided the injury by the exercise of ordinary care?"

It was necessary for a recovery by the plaintiff that the first issue as to the negligence of the defendant should have been found in his favor, as there can be no recovery unless the injury is the result of some negligence on the part of the defendant. When such primary negligence is found, the next inquiry is as to the contributory negligence of the plaintiff. If he has not been guilty of such negligence, then he is at once entitled to the issue of damages. If he has been guilty of contributory negligence, and yet the defendant might, notwithstanding the negligence of the plaintiff, have avoided the injury by the exercise of ordinary care, the plaintiff can still recover. The nature and effect of these issues have been fully discussed by this Court in the recent case of *Curtis v. R. R.,* 130 N. C., 437. There was certainly evidence tending to prove the negligence of the defendant.

The mere fact that the deceased went upon the railroad bridge was in itself some evidence of contributory negligence to be considered by the jury in connection with all the surrounding circumstances. It was not negligence *per se,* but only evidence tending to prove negligence, which might be nullified or rebutted by other controlling circumstances. The courts are more and more abandoning arbitrary definitions and distinctions as to negligence, and coming down to the rule of the prudent man. Would a woman of ordinary prudence, in like circumstances with the deceased, looking up a straight track for 500 yards and seeing nothing, knowing that no trains were then due, and that if a train were to come, it would be required by rule and custom to stop before reaching the bridge, have undertaken to cross the bridge when she had no other convenient means of reaching her destination? The jury might well have answered such a question in the affirmative.

One of the defendant's exceptions is that the court instructed

(165) the jury that "in this cause you will, in considering whether the defendant was negligent, consider whether or not it failed to do what an ordinarily prudent and skillful person would have done under the circumstances." We see no error therein. It is certainly correct as an abstract proposition of law. If the court had said nothing more, and had left the jury to apply the law as best they could, there

would have been an error of omission; but this was but a small part of a long and elaborate charge in which every phase of the case was presented to the jury. Indeed, it might be questioned whether the charge as a whole was not too favorable to the defendant.

The judgment of the court below is

Affirmed.

MONTGOMERY, J., dissenting: The going by a wayfarer upon a railroad trestle or bridge so high that it would be dangerous to get off by leaping to the ground is *per se* negligence.

In *Little v. R. R.*, 118 N. C., 1072, this Court said: "It was conceded and settled in *Clark v. R. R.*, 109 N. C., 430, 14 L. R. A., 749, that one who attempts to walk across an elevated trestle so high that it is dangerous to jump from it to the ground is negligent, and that where he is injured by a train while crossing, it is the duty of a jury to find, in response to an issue involving the question, that he contributed by his own carelessness to cause the injury." In *McLamb v. R. R.*, 122 N. C., 862, the defendant asked the court to instruct the jury that upon the whole evidence the plaintiff's intestate was guilty of contributory negligence. In the opinion of this Court in that case it was said by way of parenthesis that that instruction was not given for the reason that the third issue as to the negligence of the deceased was, by consent of the plaintiff, answered in the affirmative before the charge of the court was read. Plaintiff's intestate there was killed while (166) walking on a trestle.

I think his Honor should have instructed the jury that the plaintiff as a matter of law was guilty of contributory negligence in going upon the trestle. That being so, it was highly important that the third issue, which involved what is called the last clear chance on the part of the defendant, should have been submitted to the jury upon full and thorough instructions in the light of negligence on the part of the plaintiff's intestate.

Cited: *S. v. Davis,* 134 N. C., 634; *Lumber Co. v. R. R.,* 152 N. C., 71; *Hamilton v. Lumber Co.,* 160 N. C., 52; *S. v. Greer,* 162 N. C., 648.

(167)

LEIGH, v. GARYSBURG MANUFACTURING COMPANY.

(Filed 17 March, 1903.)

1. Contracts—Easements.

A contract allowing a timber company to construct and use a tramway on land of plaintiff for carrying away timber from land of plaintiff and any other timber that they may find convenient to move for five years does not authorize the use of the tramway for carrying other timber after the expiration of the five years.

2. Damages—Measure of Damages—Trespass.

In an action for damages for the use of a tramway after the right to use it had expired the measure of damages is the rental value of the land occupied, and in addition the decrease in rental value of other land affected by the tramway.

3. Eminent Domain—Damages—Permanent Damages—Private Corporations—Laws 1895, Ch. 224—Laws 1887, Ch. 46, Secs. 1, 2—The Code, Secs. 2056, 2023.

A private corporation is not entitled to condemn land for a tramway solely for its own use and have permanent damages assessed therefor, except to obtain a temporary easement *ex necessitate*.

4. Eminent Domain—Counterclaim—Set-off—Recoupment—Easements—The Code, Sec. 244.

In an action for damages to land a proceeding for the condemnation of an easement cannot be set up as a counterclaim.

5. Eminent Domain—Evidence—Damages—Trespass.

In an action to recover damages for occupying land with a tramway, the defendant is not entitled to show in mitigation of damages that he hauled freight free of charge for the tenants of the plaintiff.

ACTION by M. A. Leigh against the Garysburg Manufacturing Company, heard by *Brown, J.*, and a jury, at April Term, 1902, of NORTHAMPTON. From a judgment for the plaintiff, the defendant appealed.

Thos. W. Mason and W. E. Daniel for plaintiff.
Day & Bell, S. J. Calvert and Battle & Mordecai for defendant.

(168) DOUGLAS, J. This is an action to recover damages for the unlawful occupation of land for the use of a tramway and to enjoin its further occupation. The defendant by a written contract dated 4 May, 1894, bought all the timber measuring 14 inches at the

stump standing on the plaintiff's land, at a price that practically amounted to $1 per 1,000 feet, and agreed to cut and remove all said timber within the period of five years from the beginning of the contract. The contract further provided that the defendant should "have the right to build railroad or tramway across the above-named lands for the purpose of removing said timber, and also any other timber that they may find convenient to move over said tramway or railroad." The defendant finished cutting and removing all of said timber within the time allowed by the contract, but continues to use its tramway on said land for the purpose of hauling logs cut on lands not belonging to plaintiff, claiming that the right given in the contract to remove "any other timber that they might find convenient to move over said tramway or railroad" did not expire with the expiration of the contract, but continued indefinitely "so long as it has timber trees beyond said land from defendant's plant at Garysburg, and which could not be conveniently hauled to said plant except over said land."

The defendant also alleged in its answer that such was the actual agreement between the parties, and that, if not sufficiently expressed in the written contract, it was omitted by mutual mistake, and asked that the written contract be reformed in accordance therewith. The defendant further set up as a so-called counterclaim that it had the right to condemn a right of way, and asked that the issue of permanent damages be submitted to the jury.

The following issues were submitted, apparently without objection:

1. Has defendant a right of way over the lands of plaintiff after the expiration of five years from the signing of the contract, 4 May, 1894, for purposes of removing timber off of other lands than plaintiff's? Answer: No.

2. Was it agreed as a part of said contract that defendant should have a right of way over said land of plaintiff for the purpose of removing any other timber the defendant may own, and for an (169) indefinite period? Answer: .....

3. If so, was such agreement omitted by mutual mistake in the preparation and execution of the contract by plaintiff's husband and the draftsman? Answer: .....

4. What damage has plaintiff sustained? Answer: We find $387.

His Honor directed the jury to answer the first issue "No." In this we think he was correct, as the execution of the written contract was admitted, and its construction therefore became a matter of law for the court. We think it was correctly construed. The only consideration expressed in the contract is the purchase price of the lumber, which is to be removed within five years. The defendant is given "the right of ingress and egress upon and over the said tract of land

for themselves, their servants, agents and teams for the purpose of cutting and carrying away the said lumber for the space of *five years from the date of this contract.*" (The italics are ours.) The right given to build the tramway, as above quoted, was primarily for the convenience of removing the trees cut on the plaintiff's own land, and we can readily see that, as long as it was necessary for this purpose, she might be willing to permit the defendant to use it for any other purpose that did not cause any additional damage or inconvenience.

But this is entirely different from assuming that the plaintiff would, without compensation or resulting benefit to herself, be willing to permit the tramway to remain indefinitely, with all its attendant risk and inconvenience, solely for the benefit of the defendant.

Placing upon the contract such a reasonable construction as (170) is consistent with all its provisions, we think that the defendant's right to use the tramway expired with the contract on 4 May, 1899.

At the conclusion of the defendant's evidence offered in support of the so-called counterclaim set out in the answer asking a reformation of the written contract, the plaintiff demurred thereto. The court below adjudged as follows:

"1. That the evidence is insufficient to justify a reformation of the contract.

"2. That it appears from McNeill's own evidence that he was satisfied with and executed the contract on behalf of the defendant, after the words inserted by Leigh were stricken out, and that the contract in evidence as executed was the contract of the parties.

"3. That there is no evidence that the provision contended for by defendant was omitted by mutual mistake.

"4. That the contract, if amended in the manner and form as contended for by defendant, would be void for indefiniteness and uncertainty of duration."

The court being of opinion with the plaintiff, sustained the demurrer, and the defendant excepted and appealed.

Again we think his Honor was correct, as the burden of proving the second and third issues rested on the defendant. Whatever chaffering may have occurred between the parties prior to the execution of the contract, there was no proof of fraud or mutual mistake in its execution.

The record further states as follows: "Upon the issue of damage, the court charged the jury at length and stated that the rule of damage would be the actual rental value of the land actually occupied by defendant since 4 May, 1899, and that if the rental value of the cleared land was at all reduced or injured by the presence of the road since 4

May, 1899, that is an element of damage. To this charge the defendant excepted."

We see no error in the charge as given, under the circumstances of this case, as there was testimony tending to prove both (171) elements of damage.

Again we quote from the record as follows: "In regard to that section of the answer seeking to condemn right of way, claimed by the defendant's counsel under sections 2023 and 2056 of The Code and amendments thereto, the court held that such allegation in the answer was not a counterclaim nor the subject of equitable relief, and that the court in this action had no original jurisdiction to grant any such relief, and that defendant had no power of eminent domain in the charter, and the court overruled the defendant's contention in that respect. Defendant excepted."

We think the court was correct in its ruling. The defendant was not a *quasi*-public corporation, and its tramway was in no sense impressed with a public use. It did not profess to be a common carrier, but on the contrary expressly stated that the tramway was built solely to haul its own timber. Therefore it was not entitled to demand the assessment of permanent damages under chapter 224, Laws 1895. The most that it could obtain was a temporary easement *ex necessitate* under section 2056 of The Code as amended by chapter 46, Laws 1887; and this could be obtained only by a strict compliance with the provisions of the statute. A proceeding for the condemnation of an easement can never be a counterclaim, as defined in section 244 of The Code, as it has none of its essential characteristics. It is not even a cause of action. The owner of the land may have a cause of action, and when he brings his action the defendant may obtain an easement by demanding the assessment of permanent damages under the act of 1895, or the general equity jurisdiction of the court, *provided the easement is impressed with a public use.* We are now considering easements that are purely statutory in their nature, and not those arising in grant or prescription. *Lassiter v. R. R.*, 126 N. C., 509; *Geer v. Water Co.*, 127 N. C., 349. In all other cases the easement may be (172) obtained only by the method prescribed by the statute in the nature of a special proceeding. While the question is not before us, it is somewhat singular that Laws 1887, ch. 46, provides that: "Cartways, tramways, or railways for the removal of timber shall continue for a period not longer than five years."

The defendant offered to prove, we presume in mitigation of damages, that the defendant hauled, free of charge, freight belonging to some of the plaintiff's tenants. This testimony was properly excluded, as it

did not tend to show that the plaintiff herself derived any benefit therefrom.

The judgment of the court below is

Affirmed.

HARRISON v. GARRETT.

(Filed 17 March, 1903.)

1. Evidence—Instructions—Libel and Slander.

It is error to permit evidence competent for one purpose only to be considered generally by the jury without instructions restricting it to the special purpose for which it is admissible.

2. Libel and Slander—Privileged Communications—Evidence.

In an action for libel, to make a communication privileged, it must be made bona fide about something in which the writer has an interest or duty, the person addressed a corresponding interest or duty, and in protection of that interest, or the performance of that duty.

3. Libel and Slander—Evidence—Malice.

In an action for libel, evidence of a public rumor affecting the character of plaintiff does not tend to disprove malice or show good faith in the absence of evidence that the defendant at the time he made the publication had knowledge of the rumor and acted thereon.

4. Pleadings—Complaint—Waiver—Demurrer—Libel and Slander.

When, in an action for libel, the publication is not libelous *per se*, and the complainant fails to allege special damage, a failure to demur waives the defect.

ACTION by T. N. Harrison against Paul Garrett, heard by *Winston, J.*, and a jury, at August Term, 1901, of HALIFAX. From a judg-
(173) ment for the defendant the plaintiff appealed.

Thos. N. Hill, Day & Bell, and F. H. Busbee & Son for plaintiff.
E. L. Travis, W. E. Daniel, and Claude Kitchin for defendant.

WALKER, J. This is an action to recover damages for libel, in which the plaintiff alleged that on 30 May, 1898, the defendant, over the name of Garrett & Co., mailed a certain letter to his agent or employee in Belton, Texas, which contained the following libelous matter: "Replying to your favor of 26th, we beg to say that it occurs to us you have seen a circular gotten out by this firm referred to. This circular consists, in the first part, of a certificate from the chairman of the county board of commissioners, one of our Populist effusions, who, as Sam Jones says, 'has risen to the top' among the scum in the recent political 'boil.' We presume a few dollars would buy almost any sort

of a certificate from him." The court submitted to the jury four issues, as follows:

1. Did the defendant compose and publish of the plaintiff the false and defamatory words set out in the complaint?

2. Was the occasion on which they were written privileged?

3. If so, was the defendant actuated by express malice in writing and publishing them?

4. What damage, if any, has the plaintiff sustained by said written and published words?

The plaintiff introduced testimony for the purpose of showing that the alleged libel was published with malice, and on the cross-examination of the plaintiff and of several of the plaintiff's witnesses, the defendant's counsel was permitted to prove, over the plaintiff's objection, that in 1898 there was a public rumor that any man who affiliated (174) with the fusionists was a bad and corrupt man. This evidence was admitted generally and, if it was competent at all, it was not confined within its proper limits.

We do not by any means wish to be understood as ruling that this evidence was competent for any purpose, or that it had in any degree a tendency to prove plaintiff's general reputation or to impeach his character, but if it was competent in any view, it certainly was not so as to all of the issues upon which the jury were required to pass; and, when objection was made to the evidence, it was the duty of the presiding judge either at the time of the objection or in his charge, to have told the jury for what purpose it could be considered by them. We are unable to know what use was made of it, or the impression it may have produced upon the jury, or what influence it had upon the decision of any question to which it could not possibly have been relevant.

It has often been held by this Court that, when testimony proposed to be introduced by a party is competent for one purpose and not for another, and is objected to in apt time, it is the duty of the court to instruct the jury as to how it shall be considered and applied by them. *Burton v. R. R.*, 84 N. C., 192; *S. v. Powell,* 106 N. C., 635; *S. v. Bullard,* 79 N. C., 627; *S. v. Oxendine,* 107 N. C., 783; *Tankard v. R. R.*, 117 N. C., 558. The charge of the court is fully set out in the record, and it does not appear that the court, either at the time the objection was made or in its instructions to the jury, cautioned them as to their duty in regard to this testimony.

But this evidence was incompetent in another respect. The plaintiff was introduced as a witness in his own behalf, and it appears that evidence of mere rumor in the community as to the standing of persons of certain political affiliations, was admitted generally and not

(175) confined to any purpose for which it was competent. The defendant, therefore, was left unrestrained in the use he could make of it, and he may have used it, and no doubt did, for the purpose of assailing the plaintiff's credibility as a witness. Whether it was used for this purpose or not by counsel in argument, the jury were left without any instructions from the court as to the legal nature and effect of the evidence, and they were at liberty to consider it as impeaching the plaintiff and impairing his credibility.

Public rumor is not always the equivalent of general reputation, and certainly not of general character, so as to be competent for the purpose of discrediting a witness. That will depend largely upon the character of the rumor and the extent of its circulation, and finally upon the impression it has made upon the minds of the people in the community where the party, whose credibility is in question, lives. The question was not what was the rumor, but what was the general reputation or character of the witness, and it is only the latter that can be given in evidence for the purpose of supporting or impeaching the witness. A striking illustration of this principle is furnished in this very case. The witness J. H. House testified that there was such a rumor "with some people, but not with the mass," and the witness Dr. O'Brian stated that the plaintiff's general character is good; that he stands well socially and is a good man, and that his politics had not affected his social standing; and yet this evidence as to the rumor was elicited by the defendant with the consent of the court and against the plaintiff's protest, and presumably was used to assail the credit of the plaintiff as a witness. The answers given by the two witnesses just mentioned emphasize the importance of explaining to the jury the nature of the evidence and the purpose for which it might have been considered by them. The question was not what was the rumor as to the class of men, but what was the plaintiff's reputation or character in the community.

(176) As far as the evidence shows, the plaintiff's character, as we have said, has not been affected by the rumor, and we do not think that under the facts and circumstances of this case the evidence of the rumor should have been admitted, without explaining to the jury how it could be considered.

It may be added that there is nothing in the case to show that the defendant had heard the rumor, and we do not therefore perceive how the evidence was competent upon the question of malice or good faith.

This case was tried upon the theory that the communication of Garrett to his employee in Texas (Saunders) was one of qualified privilege, in accordance with the rule that any communication between employer and employee is protected by this privilege, provided it is made bona fide about something in which (1) the speaker or writer has an interest

or duty; (2) the hearer or person addressed has a corresponding interest or duty; and provided (3) the statement is made in protection of that interest or in the performance of that duty. There must also be an honest belief in the truth of the statement. When these facts are found to exist, the communication is protected by the law unless the plaintiff can show malice on the defendant's part, the burden in this respect being upon the plaintiff. 1 Jaggard on Torts (H. S.), 530. But while all this is true, evidence as to a public rumor could not possibly tend to disprove malice or to show the good faith of the defendant, unless it was shown that he had knowledge of the rumor and acted upon it. How can any one be heard to say that his conduct in regard to a particular transaction was influenced by something of which at the time he had no knowledge?

It is not an answer to the contention of the plaintiff, that this evidence was improperly admitted, to say that the plaintiff has introduced the witnesses, who on cross-examination gave the testimony, for the purpose of proving his own good character, and that the evi- (177) dence as to the rumor having been elicited on cross-examination was intended to meet and overcome the testimony as to the plaintiff's good character, and that the plaintiff in that way opened the door and let in the evidence. The defendant first opened the door when he cross-examined the plaintiff as to the rumor, and it can make no difference that the matter was afterwards referred to in the cross-examination of witnesses who had been introduced to establish the plaintiff's good character. Even if it is true, as contended by the defendant, that it was made competent as impeaching testimony because the plaintiff had opened the door, the court, when the evidence was objected to, should have restricted its use to the purpose for which it was competent.

The defendant moved to dismiss the action because the complaint does not state facts sufficient to constitute a cause of action. This motion can be made even in this Court, but the action will be dismissed only when the court below had no jurisdiction, or when it affirmatively appears that the cause of action is defective, and not when it is merely defectively stated and the defect can be cured by amendment. The defect alleged in this case is that the matter contained in the letter of the defendant to Saunders is not libelous *per se* and that the plaintiff does not allege special damage. If the words of the letter are not libelous *per se* and could only become actionable if special damage be alleged, the complaint, if there has been a failure to allege therein special damage, would only be a defective statement of a cause of action as distinguished from the statement of a defective cause of action, and the defect was waived or cured, and there was an aider when the defendant answered the complaint. The defect could be taken advantage of only by a

(178) demurrer in the court below. *Bennett v. Telegraph Co.,* 128 N. C., 103, *Mizell v. Ruffin,* 118 N. C., 69.

In *Johnson v. Finch,* 93 N. C., 205, cited in the defendant's brief, the plaintiff sought to recover damages for false arrest, and failed to allege in the complaint that the action in which the order of arrest was issued had been terminated. It was held that this was merely a defective statement of a cause of action, although the plaintiff had failed to allege a fact which was *essential* in order to constitute a good cause of action for the arrest.

In *Garrett v. Trotter,* 65 N. C., 430, the Court by *Pearson, C. J.,* says: "When there is a defect in substance, as an omission of a material allegation in the complaint, it is a defective statement of a cause of action, and the demurrer must specify it, to the end that it may be amended by making the (necessary) allegation."

That a failure to point out the defect by demurrer and an election to answer is a waiver of the defect, has repeatedly been decided by this Court. Clark's Code (3 Ed.), sec. 242, and notes.

The distinction between a defective cause of action and a defective statement of a good cause of action is well stated by *Clark, J.,* in *Bank v. Cocke,* 127 N. C., 467, 473. He says: "If the defendant had demurred, could the judge have cured it by permitting the amended averment? If so, the failure to demur waives the objection. If, on the other hand, the defect is so organic that permission to amend cannot cure it, then it is a defective statement, of which advantage could be taken here."

If there is any defect in this complaint, it surely is not organic, and could perhaps have easily been removed or remedied if a demurrer had been filed in the court below and the defect had been specified therein.

For the reasons given, the motion to dismiss is denied, and because of the erroneous ruling of the court upon the evidence, the issues
(179) in the case must be submitted to another jury.

New trial.

Cited: Wright v. Ins. Co., 138 N. C., 491; *Riley v. Stone,* 174 N. C., 597.

BULLOCK v. LAKE DRUMMOND CANAL AND WATER COMPANY.

(Filed 17 March, 1903.)

1. Evidence—Estates—Title—Possession.

In an action for damages to land, the title being in issue, the plaintiff may show possession for more than thirty years under a deed which is in evidence, and the question of title should be left to the jury.

2. Evidence—Proof—Estates—Title.

In an action brought for damages to land, there being no adverse claimant, and where the proof of ownership is only to identify plaintiff as the person entitled to sue, he is not bound by the same strict rules of proof as where the recovery of the land is the object of the action.

3. Evidence—Canals.

In an action for injuries to land by changing a canal it is not competent to show the effect of the change on the land of an adjoining landowner.

4. Evidence—Competency—Canals.

In an action for injuries to land by changing a canal, evidence that the superintendent of the canal told the plaintiff that he could not drain into the canal unless he sold some land to the defendant, is competent.

ACTION by Robert and Eliza Bullock, his wife, against the Lake Drummond Canal and Water Company, heard by *Justice J.*, and a jury, at December (Special) Term, 1902, of CAMDEN. From a judgment for the plaintiffs, the defendant appealed.

E. F. Aydlett and Williams & Leigh for plaintiffs.
Pruden & Pruden and Shepherd & Shepherd for defendant.

DOUGLAS, J. This is one of a series of cases for damages to (180) land arising out of the deepening and widening of the defendant's canal in 1898, and is governed by the principles discussed in *Mullen v. Canal Co.*, 130 N. C., 496; *Williams v. Canal Co.*, 130 N. C., 746; *Pinnix v. Canal Co., ante,* 124, and *Norris v. Canal Co., post,* 182. In the case at bar an additional question is raised as to the *feme* plaintiff's ownership of the land. The following statement appears in the record:

"Plaintiffs introduced a deed from Chamberlain, administrator, to Eliza Bullock, dated 11 June, 1866, which described the land in controversy by metes and bounds. No other paper title was introduced. Robert Bullock, for the plaintiffs, testified as follows: That the boundary in deed is the same as that in complaint. He was asked when he and his wife went into possession of the land described in the deed, and how long they remained in possession. Defendant objected to this question; objection overruled, and defendant excepted. (First exception.) He answered that he and his wife went into possession of the land in 1866, after the deed was executed, and have remained in possession ever since. Defendant objected to this. Objection overruled, and exception by defendant."

The learned counsel for the defendant do not allude to this point in their brief, nor do they press it in their oral argument; but as it was not specifically abandoned, we feel constrained to say that in our opinion the testimony was entirely competent. We are at a loss to find either reason or authority to the contrary. It was material, as it tended directly to prove a material fact at issue. Actual possession by the plaintiffs, open, adverse, and uninterrupted for more than thirty years under color of title, would ripen into title under any statute of limitations. *Bryan v. Spivey,* 109 N. C., 57.

The witness Bullock also testified to various continuous acts indicating ownership, and among other things said that "Nobody made claim to land against us, and nobody been in possession but us. Therefore the court properly refused the defendant's prayer, which was as (181) follows: "That the evidence in this case is not sufficient to show title to the 600 acres of land described in the complaint, and the jury will answer 'No' as to that tract." The question of ownership was properly submitted to the jury, and by them found for the plaintiffs. They could not have found otherwise, if they believed the testimony, which was uncontradicted.

In actions brought for damages to land where there is no adverse claimant, and where the only object in requiring the plaintiff to prove ownership is to identify him as the person entitled to sue, he is not bound by the same strict rules of proof as where the recovery of the land is the object of the action.

In *Nelson v. Ins. Co.,* 120 N. C., 302, which was an action upon a fire insurance policy, this Court said: "The possession of land under a deed apparently good and sufficient, properly acknowledged and recorded and unimpeached, is sufficient evidence of title."

There is another exception not alluded to in either brief or argument, but still upon the record. The defendant asked one of its witnesses as to what effect this work (on the canal) had had on his own property adjoining the plaintiffs'. Upon objection of the plaintiff the question was excluded. We see no error in such exclusion. The witness had already testified as to the value of the plaintiff's property, both before and after the work, stating in substance that it had not been damaged, and this was the tract at issue. To inject another collateral question which might itself be disputed, is not permissible under our decisions. *Phillips v. Telegraph Co.,* 131 N. C., 225; *Rice v. R. R.,* 130 N. C., 375, and cases therein cited.

The plaintiff Bullock was permitted to testify that Gary, the defendant's superintendent in charge of the work, told him that he (Bullock) should not drain into the canal unless he sold some land to the defendant. No reason is given by the defendant why this testimony was not

competent, and we see none. It tended to prove that the de- (182)
fendant refused to permit the plaintiffs to do an act which might materially have lessened their damages.

The judgment of the court below is

Affirmed.

Cited: Edney v. Canal Co., post, 184; *Clark v. Guano Co.,* 144 N. C., 73.

NORRIS v. LAKE DRUMMOND CANAL AND WATER COMPANY.

(Filed 17 March, 1903.)

Pleadings—Corporations—Complaint—Answer.

Where plaintiff alleged that defendant was a corporation, duly incorporated, and defendant alleged that such allegation was untrue, and that the defendant was also incorporated under the laws of this State, but failed to plead any statute of incorporation, its allegation was insufficient to raise the issue of its corporate capacity.

ACTION by G. W. Norris against the Lake Drummond Canal and Water Company, heard by *Justice, J.,* and a jury, at December (Special) Term, 1902 of CAMDEN. From a judgment for the plaintiff, the defendant appealed.

E. F. Aydlett and Williams & Leigh for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

DOUGLAS, J. This case is identical in principle with that of *Williams v. Canal Co.,* 130 N. C., 746, and grows out of the same state of facts. In fact, it is a mere supplement to that case, as therein the owners of the land recovered for the permanent damage to the land and their part of the crops destroyed; while in the case at bar the lessee has recovered for the damages resulting to the lease held and his share of the crops. This his Honor seems to have adjusted on the trial, and the exception thereto was not insisted upon in the hearing before us.

The only exceptions apparently relied upon by the defendant (183)
are those discussed by us in *Pinnix v. Canal Co., ante,* 124, with which this case was argued.

In the case at bar the plaintiff alleges in paragraph 7 of the complaint "That the defendant is a corporation duly incorporated, as plaintiff is informed and believes." To this allegation the defendant answers in paragraph 7 as follows: "That section 7 of the complaint is untrue, but

defendant is also incorporated under the laws of North Carolina." We presume the word "untrue" is a misprint, and that the defendant intended to allege that it was incorporated under the laws both of Virginia and North Carolina; but as it has pleaded neither statute of incorporation, we do not see how it can affect the case.

Upon the principles decided in *Mullen v. Canal Co.*, 130 N. C., 496, and *Pinnix v. Canal Co., ante,* 124, the judgment of the court below is

Affirmed.

Cited: Bullock v. Canal Co., ante, 180; *Dale v. R. R., post,* 708.

S. R. EDNEY v. LAKE DRUMMOND CANAL AND WATER COMPANY.

(For headnotes and facts as to these two cases, see *Pinnix v. Canal Co., ante,* 124, and *Bullock v. Canal Co., ante,* 179.)

G. W. Ward for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

S. D. BURNHAM ET AL. v. LAKE DRUMMOND CANAL AND WATER COMPANY.

No counsel for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendants.

---

(184)

S. R. EDNEY v. LAKE DRUMMOND CANAL AND WATER COMPANY.

(For headnotes and facts, see cases of *Pinnix v. Canal Co., ante,* 124, and *Bullock v. Canal Co., ante,* 179.)

Pruden & Pruden and Shepherd & Shepherd for defendants.

DOUGLAS, J. These are two of the series of cases against the same defendant, which were argued together at this term with *Pinnix v. Canal Co., ante,* 124, and *Bullock v. Canal Co., ante,* 179. As they are identical in legal principles and practically so in their material facts, no further discussion is deemed necessary. In both cases the judgments of the court below are

Affirmed.

BOYD v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 24 March, 1903.)

Jurisdiction—Amendments—Pleadings — Verdict — Superior Court — Courts.

Where a complaint does not state the sum demanded, and a verdict is rendered for less than $200, the trial court may allow the complaint to be amended after verdict so as to make the claim more than $200, and the Superior Court has jurisdiction if the claim was made in good faith.

ACTION by S. W. Boyd against the Roanoke Railroad and Lumber Company, heard by *Jones, J.*, and a jury, at February Term, 1902, of BEAUFORT. From a judgment for the plaintiff, the defendant appealed.

Chas. F. Warren and B. B. Nicholson for plaintiff.
Rodman & Rodman and Small & McLean for defendant.

WALKER, J. This action was brought to recover the contract (185) price of certain timber which the plaintiff sold and delivered to the defendant by deed set out in the record. It was provided in the deed that the defendant should cut 100,000 feet of the timber, for which $100 should be paid, and that for all timber thereafter cut upon the land the defendant should pay $1 for each and every 1,000 feet cut by it. The defendant cut the 100,000 feet of timber and paid the stipulated price therefor, and the plaintiff now sues for the price of the timber cut by the defendant in excess of 100,000 feet. In the complaint, the plaintiff does not ask for the recovery of any specific sum of money, but demands judgment that the defendant be required to account to him for all timber cut from the land in excess of 100,000 feet and that defendant be required to pay the amount due therefor according to the contract, and that an account be taken to ascertain the amount so due by the defendant.

The plaintiff introduced in evidence a statement which he received from the defendant before the suit was brought, and from which it appears that 250,695 feet of timber had been cut by the defendant from the land in excess of the 100,000 feet for which the plaintiff had been paid, but some of the items of this account were disputed, as there was a controversy about the ownership of the land. There was a second cutting of timber on this land, after this suit was commenced, which amounted to 48,591 feet, and the plaintiff insisted in the court below that he was entitled to recover for all timber cut to the date of the trial.

After all of the evidence was in and the plaintiff's counsel had opened his argument, the counsel of the respective parties entered into an agree-

ment to the effect that, if the plaintiff was entitled to recover at all, the amount of the verdict should be $178.25, that being the
(186) amount due for all timber cut prior to the bringing of this action, the right of the plaintiff to recover even that amount depending upon the location of what is known in the case as the "Jackson grant."

The jury returned a verdict for $178.25, and the defendant thereupon moved to dismiss the action for want of jurisdiction. This motion was denied, and the plaintiff moved to be allowed to amend his complaint so as to claim $225. This motion was granted and the plaintiff was allowed to amend his complaint accordingly. The defendant excepted, and now insists that the court did not have the power to allow the amendment to be made, and that the action should have been dismissed for want of jurisdiction.

If the court found as a fact, and we must assume that it did, that this suit was brought in good faith to recover an amount in excess of $200, it had the power to allow the amendment so as to show what was the sum originally claimed. The aggregate sum demanded in good faith is the test of jurisdiction, and if the plaintiff claimed more than $200 the fact that he failed in his proof to establish all of his claim did not oust the jurisdiction of the court. The plaintiff may claim a sum sufficient to give the court jurisdiction and a part of his claim may be based upon an erroneous principle of law, and for this reason he may fail to recover that part, and the total recovery may therefore fall short of the jurisdictional amount; but the court will still have jurisdiction of the case and may award judgment for the smaller sum, provided it appears that the right to recover the larger amount was asserted in good faith.

Upon an examination of the pleadings and evidence in this case, we are satisfied that the plaintiff intended in good faith to claim more than $200, and the amendment, therefore, was properly allowed, not for the purpose of conferring jurisdiction, but of showing that the court had jurisdiction of the action when it was commenced. The mere
(187) fact that the plaintiff had recovered less than $200 by reason of the failure of proof, or because he was mistaken as to the extent of the recovery to which he was entitled, could make no difference, even though he agreed with the defendant as to what the amount of the judgment should be in the event of a recovery, provided his original demand for judgment was made in good faith, or it can be gathered from the facts of the case that he was claiming a sum sufficient to give the court jurisdiction. *Sloan v. R. R.*, 126 N. C., 487.

In their brief the defendant's counsel did not mention the exception in regard to the evidence of J. H. Latham, and we infer that it is

abandoned. We are of opinion, though, that the ruling of the court in respect thereto was correct.

No error.

Cited: Thompson v. Express Co., 144 N. C., 392; *Brock v. Scott*, 159 N. C., 516; *Field v. Brown*, 160 N. C., 300; *Faircloth v. Kenlaw*, 165 N. C., 233.

TURNER v. DAVIS.

(Filed 24 March, 1903.)

1. New Trial—Verdict—Setting Aside—The Code, Secs. 274 and 412, Subsec. 4.

A motion made in the Superior Court for a new trial for newly discovered evidence must be made and passed upon at the same term at which the trial is had.

2. Judgments—Setting Aside—Verdicts—Supreme Court—Newly Discovered Evidence.

Where new evidence is discovered during the term at which a case is tried, but too late for the trial court to hear a motion for a new trial at that term, such motion may be made in the Supreme Court.

ACTION by R. W. Turner against Elizabeth Davis and others, heard by *Jones, J.*, at March Term, 1902, of PASQUOTANK. From an order refusing to grant a new trial on the ground of newly discovered evidence, the plaintiff appealed.

E. F. Aydlett for plaintiff. (188)
George W. Ward for defendant.

CLARK, C. J. When judgment was offered for signature in this case, the plaintiff moved for a new trial for newly discovered evidence, but his Honor stated that he was about to depart for the next court and could not hear the motion, and continued it to be heard at next term. He thereupon signed the judgment, embracing therein the above statement and an order staying proceedings under the judgment till said motion could be decided at next term. At such next term, another judge being on the bench, adjudged that he had no power to grant said motion, and denied the same, from which order the plaintiff appealed.

An irregular judgment can be set aside by motion within a reasonable

time (*Strickland v. Strickland,* 129 N. C., 89); but a motion to set aside a regular judgment based on a verdict "can only be *heard* at the same term at which the trial is had." The Code, sec. 412(4). This section covers all motions to set aside regular judgments, though they may be on grounds not specifically named therein. *Quincey v. Perkins,* 76 N. C., 295; *Puffer v. Lucas,* 107 N. C., 322; *McCaskill v. Currie,* 113 N. C., 313; *Hardy v. Hardy,* 128 N. C., 178. The only exceptions made in The Code are motions on the grounds named in section 274, "mistake, inadvertence, surprise, and excusable neglect," in which cases the motion may be made "within one year after notice of the judgment." A motion to set aside a judgment "for newly discovered evidence" does not come within the latter category, and therefore could only be *heard* at the trial term. Section 412(4). The continuance of such motion was therefore improvident, and the judge who held the next term properly held that he could not hear it. The requirement that motions to set aside judgments must be *"heard* at the same term at which the trial is had"
(189) (except in cases coming under section 274 and in cases of irregular judgments) is wisely conceived. Such action at the trial term is discretionary and not reviewable (as has been always held as to motions to set aside for newly discovered evidence), and, besides, no one could possibly be so well advised as to the justice and propriety of granting or refusing such motion as the judge who has just heard the facts developed in the trial. In *Redmond v. Stepp,* 100 N. C., at p. 219, *Smith, C. J.,* says: "Where the new evidence is discovered during the term, the motion must be made to the court that tried the cause, and its decision, whether granting or refusing the new trial, is conclusive." A motion on such ground can ordinarily be made in this Court only when discovered after the adjournment of the court below at which the cause was tried, and pending the appeal, and is decided here as a matter of discretion, not as a legal right, no opinion being written in any case. *Bledsoe v. Nixon,* 69 N. C., 81; *Henry v. Smith,* 78 N. C., 27; *Brown v. Mitchell,* 102 N. C., 347, 11 Am. St., 748; *Nathan v. R. R.,* 118 N. C., 1066.

Under the peculiar facts of this case the plaintiff might have made the motion in this Court, and failing to do so, he may make it on a petition to rehear filed for that purpose, as was allowed in *Black v. Black,* 111 N. C., at p. 305, provided his affidavits make out such a prima facie case as shall justify some member of the Court to endorse the petition to rehear.

While, as we have pointed out, the plaintiff under the circumstances of this case still has an opportunity to present his motion in this Court, it is not amiss to quote, "Such applications are regarded with suspicion and examined with caution, the applicant being required to rebut the

presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial." 14 A. & E. Enc. Pl. and Pr., 790.

Our own decisions require as prerequisites for such motions, whether made below or in this Court, that it shall appear by (190) affidavit (1) that the witness will give the newly discovered evidence, (2) that it is probably true, (3) that it is material, (4) that due diligence was used in securing it, and that such motions have been allowed only "in cases of manifest injustice and wrong and when there was no other relief attainable." *Carson v. Dellinger,* 90 N. C., at p. 231. But the motion will be denied if the new evidence merely tends to contradict a witness examined on the trial (*Brown v. Mitchell,* 102 N. C., at p. 367, 11 Am. St., 748), or to discredit the opposing witness (*S. v. DeGraff,* 113 N. C., 688), or is merely cumulative (*S. v. Starnes,* 97 N. C., 423); and it is not sufficient to state that "every means had been used to find out where the witness was." The applicant should state what means he did use, and let the court judge. *Schehan v. Malone,* 72 N. C., 59.

No error.

Cited: McLeod v. Graham, post, 474; *S. v. Robinson,* 143 N. C., 624; *Aden v. Doub,* 146 N. C., 13; *Gay v. Mitchell, ib.,* 511; *Smith v. Moore,* 150 N. C., 159; *Mottu v. Davis,* 153 N. C., 164; *Chrisco v. Yow, ib.,* 436; *Murdock v. R. R.,* 159 N. C., 132; *Stilley v. Planing Mills,* 161 N. C., 519; *Johnson v. R. R.,* 163 N. C., 454; *Allen v. Gooding,* 174 N. C., 273; *Alexander v. Cedar Works,* 177 N. C., 537; *Cogburn v. Henson,* 179 N. C., 635.

CUTLER v. CUTLER.

(Filed 24 March, 1903.)

1. Wills—Revocation—Presumptions.

Where a will, having been in the possession of the testator, has the signature of the testator erased, it is prima facie evidence of its revocation.

2. Evidence—Corroborative Evidence—Wills.

Where a witness testifies that a maker of a will told him that he (the witness) would not have to qualify as executor, as he had destroyed his will appointing witness executor, such witness may state in corroboration of this evidence that he did not qualify because of this statement to him by the testator.

CUTLER *v.* CUTLER.

ACTION by S. A. Cutler against C. C. Cutler and others, heard by *Jones, J.*, and a jury, at April Term, 1902, of BEAUFORT. From (191) a judgment for the defendants, the plaintiff appealed.

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

MONTGOMERY, J. This was a proceeding in which the issue was *devisavit vel non.* The script when offered for probate had not a trace of the signature of the testator. It had been completely removed, by all the evidence, before the death of the testator. There was evidence tending to show that the testator had torn off his name with the intent to revoke his will, and there was also evidence tending to show that, notwithstanding he knew of the mutilation, he did not acquiesce, or adopt and ratify the mutilation, but still regarded the paper-writing as his last will and testament.

The chief contention between the parties is over the effect of the mutilation, whether or not it was a revocation of the will; and the test of correctness of his Honor's instruction to the jury on that matter is whether or not in substance he gave the following special request of the caveator:

"(7) Now, in this case, I charge you that it is necessary for the propounders to establish two things: first, that the will was properly executed in the first instance. Upon this point I charge you, if you believe the evidence, that it was properly executed. The paper, however, is produced in a mutilated condition and the name of the testator is gone from the will. The will had been in the possession of Nathan C. Cutler. It devolved upon the propounders to account for this mutilation, and the paper is not the will of Nathan C. Cutler until they have done so to the satisfaction of the jury. When the paper was produced without the name of Nathan C. Cutler it was prima facie evidence of a revocation by him, and the law presumed that it had been revoked by him. This presumption might be repelled, but the burden of doing so is upon the propounders to show by the greater weight of evidence that it (192) was not revoked. From the appearance and condition of the will while in his possession, the law presumes that he revoked it. If the propounders shall fail to repel this presumption by the greater weight of evidence, then it is your duty to answer the issue 'No.' "

That instruction embraced substantially the decision of this Court on that point when the case was here before—130 N. C., 1, 57 L. R. A., 209.

The first branch of that instruction was given almost literally. On the latter branch of the instruction, his Honor in one place said that

"Unless the said will was revoked by the said Nathan C. Cutler before his death, then you will find that the said paper-writing is the last will and testament of said Nathan C. Cutler, and you should answer the issue 'Yes'; but if you find he *knew* (italics ours) his name was erased from the will, the law would presume he revoked it."

In another place he said: "If you find that the said Nathan C. Cutler *knew* his name had been erased from the will in time to have executed another, then the law would presume that he had revoked his will, and the burden would be on the propounders, Martha Cutler and others, to satisfy the jury by the greater weight of the evidence that the name of the said Nathan C. Cutler had not been removed from said paper-writing by his consent, or that he did not revoke it after his name was erased from the paper while it was in his possession or control"; and in another place he said: "It is true that the burden is upon the propounders of this will to satisfy the jury that said will was not revoked by Nathan C. Cutler. The propounders contend that the tattered and mutilated condition in which said alleged will was found at the death of Nathan C. Cutler was caused by insects or vermin. They further contend that Nathan C. Cutler did not ratify or adopt the mutilation of said will by insects or vermin, as his own act. They (193) further contend that Nathan C. Cutler up to the time of his death continued to recognize the said paper-writing as his last will and testament, and continued to express his wish that his property at his death should be disposed of in accordance with said will. If you find from all the evidence that the said contentions of the propounders are true, then you will find that the said paper-writing is the last will and testament of said Nathan C. Cutler, and you will answer the issue 'Yes.'"

In our opinion, those instructions did not measure up to the requirements of the special prayer requested by the caveator. The will had been in the possession of the testator, and when it was produced without his name, that was prima facie evidence of a revocation, and the law presumed that it had been revoked without further proof of knowledge by the testator of such mutilation. It is very probable that the jury did not get the idea that there was a presumption that the will was revoked by the mutilation, under the facts of this case, whether the testator knew of the mutilation or not; and that was the defect in the charge.

We have looked into the caveator's exceptions to the evidence, and find only one of them of substantial merit. Giles Cutler testified that he was the executor named in the will, and that he had promised the testator, if he survived him, to be qualified as such executor, but that he had not qualified; that the testator afterwards stated to him that he had thrown his will away, and that the bugs had disfigured it so that it could not be understood and that he would never be troubled with settling it.

The witness was then asked by the caveator why he did not qualify as executor, the caveator stating that he expected to prove by the witness that he did not qualify as executor because Nathan C. Cutler told him that he had thrown his will away, and that the witness would never be troubled with settling it. The question ought to have been al-
(194) lowed. The refusal to qualify was corroborative of the witness's testimony previously given in regard to the statements of Nathan C. Cutler about his will. The testimony and the corroborative statement were very nearly related to the issue, and in that respect differs materially from the evidence offered in the case of *McQueen v. McQueen,* 82 N. C., 471. For the reasons pointed out, there must be a New trial.

LAMB v. ELIZABETH CITY.

(Filed 24 March, 1903.)

Eminent Domain—Condemnation Proceedings—Damages—Res Judicata—Former Adjudication—Private Laws 1899, Ch. 62, Sec. 24.

Under Private Laws 1899, ch. 62, sec. 24, providing for the condemnation of land in Elizabeth City, a landowner who fails to appeal from an award of damages in such proceeding cannot maintain an independent action for the value of the land.

DOUGLAS, J., dissenting.

THIS is a petition to rehear in part this case, which is reported in 131 N. C., 241. Petition dismissed.

Busbee & Busbee and J. H. Sawyer for petitioner.
E. F. Aydlett and G. W. Ward in opposition.

CLARK, C. J. This is a petition to rehear in part this case, which is reported in 131 N. C., 241. In that opinion a new trial was granted the petitioner as to his second ground of damages, alleged to have been sustained from the careless and negligent manner in which the defendant had moved back the plaintiff's buildings from a narrow strip of land, 8 ft. wide at one end, 4 feet wide at the other, and 293 feet long, taken off the front of the plaintiff's lot in widening the street; but the
(195) court adjudged that the first ground of damages alleged for taking said strip has been in effect abandoned by an amendment, which had been procured by the plaintiff himself; and, besides, the matter was *res judicata,* for its was in evidence and not denied that said strip had

been regularly and legally condemned, and the damages assessed and tendered.

The plaintiff asks a rehearing upon this point upon the ground that section 24, chapter 62, Private Laws 1899, chartering the defendant town, excepts it from the application of the doctrine of *res judicata* in such cases. This is the sole point before us, and the order to docket the petition restricts the rehearing to the construction of the effect of said section, to the end that "this Court pass upon and construe said section."

Said section 24, chapter 62, Private Laws 1899, for condemnation of land for streets and compensation to the owners thereof, provides: "In case the owners of the land and the board of aldermen cannot agree upon the price, the said board of aldermen shall appoint five disinterested freeholders, residents of Elizabeth City, who shall assess the land to be condemned and make report to the board of aldermen. If the board of aldermen accept the report, they shall pay or tender to the said landowner the amount assessed, in legal tender of this country, and thereupon the title shall become vested in the board of aldermen and their successors. In case the landowner shall think the amount assessed is below the actual value of the land taken, nothing herein shall be construed to deprive him of his right to appeal, or sue *de novo* for damages against the corporation for the value of the land taken."

This action was originally begun by the plaintiff for ejectment, alleging that the defendant was in wrongful possession, not having paid for said strip, and also for damages (as above stated) sustained from the negligent manner in which the defendant had moved (196) back the houses from said strip. During the progress of the cause the plaintiff obtained leave and amended his complaint by striking out the allegations that the defendant had "without due process of law and in violation of the rights of the plaintiff wrongfully" entered into possession of said strip, and also striking out the allegation that the defendant was "wrongfully" in possession. On the trial, the plaintiff testified that the defendant had "condemned" the strip, and that J. W. Walker had offered him $12,000 for the land before the strip was taken off, and he had sold it after the strip was taken off for $12,261. It was in evidence for the defendant that the street was too narrow for use, and little better than a quagmire; that the city had widened it, raised, graded, and paved it at a cost of $20,000, and the value of the plaintiff's property abutting thereon had been increased 20 per cent by such improvements; and one witness said it had been doubled in value thereby. Walker (referred to in the plaintiff's evidence) testified that he offered the plaintiff $10,000 for the property, and had only made the $12,000 offer after the city had determined to widen and pave the street and had

condemned the aforesaid strip. The condemnation proceedings were introduced in evidence, by which it appeared that the plaintiff's damages had been assessed at $30, and the plaintiff did not appeal therefrom, and the plaintiff testified that said sum had been tendered him.

The petitioner's contention is that the words in the Private Laws, above set forth, "nothing *herein contained* shall be *construed* to deprive him of his right to appeal or sue *de novo* for damages against the corporation for the value of the land taken," entitle him to this action for value of the strip, notwithstanding he did not appeal when he had his day in court in the condemnation proceedings. It will be (197) observed that this section does not *confer* any new right, but says he shall not be *deprived of* his right to appeal or sue *de novo*—that is, that the condemnation proceedings should be reviewable. In other words, as we understand it, if the assessment was unsatisfactory, the landowner could appeal; or if the city did not take steps, and he instituted proceedings against the city under his common-law rights and took a nonsuit, he could begin an action *de novo,* or could bring an action *de novo* in any other instance in which he would have been so entitled to do if said section had not been passed. There is no indication that, by this section in a private act, the Legislature intended to abrogate the doctrine of *res judicata* and the whole system of legal and orderly procedure as to the town of Elizabeth City, and to provide that, as to that municipality, another judgment for the identical subject-matter could be obtained in a new litigation, leaving in force a judgment between the same parties, determining their rights, and unappealed from. No reasonable construction can give such effect to words which do not import to confer any new or exceptional rights and procedure, but which merely provide that a party shall not be *deprived of* certain rights which are theretofore recognized as existing.

The plaintiff can proceed to litigate his cause of action for those damages authorized by our former decision (131 N. C., 241) which granted him a new trial.

Petition dismissed.

DOUGLAS, J., dissenting: I cannot concur in the opinion of the Court, because it seems to me, to deny to the plaintiff a substantial right will establish a dangerous precedent. The statute under which the condemnation proceedings were had says in express words: "If the landowner shall think the amount assessed is below the actual value of the (198) land taken, nothing herein shall be construed to deprive him of his right to appeal or to sue *de novo* for damages against the corporation for the value of the land." But the opinion of the Court says that "It will be observed that this section does not *confer* any new

right, but says he shall not be *deprived* of his right to appeal or sue *de novo.*" This brings us to the consideration of what are the rights of the citizen in the protection of his property. The opinion of the Court seems to assume that in the case at bar the plaintiff had none outside of the statute. In this view I cannot concur. Suppose that the statute had failed to provide any method by which the land could be assessed, would the plaintiff have been deprived of all compensation? In my opinion, the citizen has primarily the same rights and remedies for the protection of his property against corporate aggression as he would have against an individual. Let us briefly examine the Constitution of this State and see what are some of the rights of the individual. The Declaration of Rights declares, section 17, "No person ought to be . . . in *any manner* deprived of his life, liberty, or property, but by the law of the land." Section 35: *"All courts shall be open,* and every person for an injury done him in his *lands,* goods, person or reputation shall have remedy by *due course of law,* and right and justice administered without sale, denial, or delay." In *Jester v. Steam Packet Co.,* 131 N. C., 54, this Court, speaking through *Justice Montgomery,* says: "The courts of this State are open to all suitors, resident and non-resident, whether individuals or corporations." In this principle, so clearly enunciated, I fully concur and favor its universal application wherever existing conditions will permit. I am aware of the decisions holding that in certain cases the statutory remedy is exclusive; but this can be so only where, at least in the opinion of the Court, the statutory remedy is adequate and it appears to be the clear intention of the Legislature, either in express words or by necessary implication, to make it exclusive. Even then I do not think it would be consti- (199) tutional unless demanded by some public necessity.

In the case at bar the statute expressly disclaims any intention of depriving the landowner of any right he may have to an appeal or suit *de novo* for the purpose of ascertaining and recovering adequate compensation. He cannot recover the land, because it has been lawfully condemned, but he can recover his just compensation. To say that the plaintiff cannot recover his just compensation because the land was *lawfully condemned,* when the city has statutory authority to condemn whatever land it sees fit, amounts to an assertion of the right to take land without compensation. From any such proposition I am compelled to dissent.

SYKES v. BOONE.

(Filed 24 March, 1903.)

1. Trusts—Parol Trusts—Consideration.

Where a person takes a deed for property with an agreement that he will, upon the payment of a certain sum, convey the same to a third person, a parol trust is created in favor of the latter.

2. Frauds, Statute of—Trusts—Parol Trusts.

A declaration of trust by a purchaser at the time of the conveyance of the legal title to him, as a condition on which the vendor consents to convey, is not within the statute of frauds.

ACTION by W. R. Sykes against Bessie Boone and W. H. Britton, heard by *Brown, J.*, and a jury, at February Term, 1902, of NORTHAMPTON. From a judgment for the defendants, the plaintiff appealed.

Peebles & Harris and W. E. Daniel for plaintiff.
Day & Bell and Battle & Mordecai for defendant.

(200) WALKER, J. The plaintiff in this action sues for the recovery of real property. The defendant denies his right to recover the possession of the same and pleads a counterclaim, in which she alleges that she applied to Mr. B. B. Winborne, the agent of Miss Vaughan, who was the owner of the tract of land described in the complaint, for the purchase of the said land, and Winborne agreed to give her an option to buy the land before he sold it to any one else.

On 14 October, 1899, the plaintiff applied to Winborne for the purchase of the land, and Winborne agreed to sell it to him at the price of $2,000, but before the deed was prepared and executed, Winborne notified the plaintiff of his previous promise to the defendant, and that thereupon the plaintiff promised and agreed with Winborne that, if he would let him have the land and the defendant should afterwards want it at the price of $2,000, he would either surrender the deed, then about to be executed to Miss Vaughan, and let her convey to the defendant, or he would himself convey directly to the defendant upon payment of $2,000.

There was evidence tending to show that the plaintiff had admitted this promise both before and after the execution of the deed, and there was much evidence to corroborate Winborne, who testified to the making of the promise. There was also evidence tending to show that Winborne would not have prepared and delivered the deed if the promise had not been made.

The following issues were submitted to the jury:

1. Did B. B. Winborne, as agent for Rosa Vaughan, agree with the defendant Bessie Boone to give her the refusal of the purchase of the land described in the complaint, as alleged in the answer? Yes.

2. Was the deed from Rosa Vaughan to the plaintiff executed and delivered upon the understanding and agreement upon the part of plaintiff, entered into immediately before and at time of execution of said deed, that plaintiff would convey said land to defendant (201) Bessie Boone for $2,000 if she desired it? Yes.

3. Did defendant Bessie Boone decline to take said land at $2,000, as alleged by plaintiff? No.

4. Did said Bessie Boone decide to take said land at $2,000, and notify plaintiff and said Winborne within a reasonable time, as alleged by the defendant? Yes.

5. Did said defendant Bessie Boone offer to pay plaintiff said $2,000 and interest and expenses, as alleged by her? Yes.

6. What damage, if any, is plaintiff entitled to recover?

The court charged the jury that before they could answer the second issue "Yes," the defendant must satisfy them by strong, clear, and convincing proof, more than a mere preponderance of evidence, that plaintiff's promise to convey the land to defendant was a part of the inducement moving Winborne to execute the deed, and if the jury found that the promise was the inducement for making the deed, they would answer the second issue "Yes." The court further charged that if it was Winborne's purpose and intention to sell to the plaintiff anyhow, and to deliver the deed whether such promise was given or not, and it was not a trust or condition attached to the title, and not intended as such, the jury would answer the second issue "No." The court further substantially instructed the jury that if Winborne did not exact the promise from the plaintiff as a condition precedent to the making of the deed, and Winborne did not annex any such condition or trust to the transmission of the title or the delivery of the deed, the jury should answer the second issue "No."

The jury answered the second issue "Yes," and they have thereby found as follows: That W. R. Sykes made the promise, and that it was the inducement for making the deed and was annexed at the time of preparing and executing the deed, as a condition and trust to the transmission of the legal title. (202)

Why did not the facts thus found create a valid parol trust in favor of the plaintiff which is enforcible in a court of equity? We think they did. It is familiar learning that a trust may be created in any one of the four modes:

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

2. By a contract based upon *valuable* consideration, to stand seized to the use of or in trust for another.

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

4. When the court by its decree converts a party into a trustee on the ground of fraud. *Wood v. Cherry,* 73 N. C., 110.

The trust in this case comes within the first class, as a declaration of trust was made at the time of the execution of the deed and the conveyance of the legal estate. A trust when so declared is not within the statute of frauds. *Pittman v. Pittman,* 107 N. C., 159, 11 L. R. A., 456. Nor does it require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even in favor of a mere volunteer. *Blackburn v. Blackburn,* 109 N. C., 488; *Pittman v. Pittman,* 107 N. C., 159, 11 L. R. A., 456.

We are unable to distinguish this case in principle from the many cases decided in this Court where purchases have been made at public or judicial sales, and the purchaser who paid the money out of his own funds agreed to hold the land subject to the right of the person, whose land he bought, to have a reconveyance of the legal title upon repayment of his outlay. In all such cases it has been held that there was a valid parol trust created in favor of the former owner of the land.
(203) *Cobb v. Edwards,* 117 N. C., 244; *Shields v. Whitaker,* 82 N. C., 516; *Mulholland v. York,* 82 N. C., 510; *Shelton v. Shelton,* 58 N. C., 292; *Owens v. Williams,* 130 N. C., 165.

It is true that in some of these cases the purchaser acquired the land at an undervalue because he was known to be buying for the benefit of the defendant in the execution, but if it is necessary that any equitable element should be involved in order to create a valid trust, we have that element in this case, as the jury have necessarily found, under the evidence and the charge of the court, that the plaintiff obtained the deed by reason of his solemn promise and engagement to convey to the defendant upon payment of the purchase money, and that this promise was a condition precedent annexed at the time of the execution of the deed and was what induced Winborne to sell and convey to the plaintiff. It was substantially, therefore, a part of the consideration for the conveyance, and it would be unconscionable and against equity for the plaintiff to take advantage of the deed and to insist upon holding the legal title acquired thereunder, and refuse to perform the promise he made in order to procure the execution of the deed. The case, in this view of it, is quite as strong as those in which this Court has frequently interfered in

behalf of parties seeking to attach a parol trust to the legal estate and to have it enforced by a conveyance of the same.

Cloninger v. Summit, 55 N. C., 513, presents a striking analogy to this case. In that case the defendant had agreed with the owner of the land, when the latter conveyed the legal title to him, that he would hold it subject to the right of a third party, to whom the owner had theretofore made a bond for title, to have a conveyance of the title upon payment of the amount specified in the bond. That was held to be a valid parol trust which the court enforced, and in its essential features the case is like the one now under decision. It is true, the defendant had by procuring possession of the bond for title induced the owner to convey to him, but in this case the plaintiff obtained the deed and (204) conveyance of the legal title by a promise to hold in trust for Miss Boone, to whom Winborne had previously promised the refusal of the land or an option to buy it. Though there may be a slight distinction between the two cases, we see no legal difference.

But the language of this Court in *Cousins v Wall,* 56 N. C., 45, is conclusive against the plaintiff. In that case the owner of the land was under a contract to convey to the plaintiff the land in controversy, and, instead of doing so, he conveyed it to the defendant, who paid the purchase money out of his own funds, but at the time of the execution of the deed he agreed to convey to the plaintiff upon payment of the amount of the purchase money.

In commenting upon these facts, and after referring approvingly to *Cloninger v. Summit, supra, Battle, J.,* for the Court, says: "By paying his money and taking the legal title to himself, defendant held the legal title in trust to secure the repayment of the purchase money, and then in trust for the plaintiff. The defendant never contracted to sell or convey the land, or any interest therein, to plaintiff; for at the time of the agreement he had no title or interest in the land, and it was only by the force of the agreement that he was permitted to take the legal title, and by the same act he took it in trust for the plaintiff. It is manifest that the statute of frauds does not apply."

In *Dennison v. Goehring,* 7 Penn., 175, 47 Am. Dec., 505, the conveyance had been made to a person who himself paid the purchase money, but the parol trust was declared for another, who happened, it is true, to be the child of the bargainor. It was held that the trust, though voluntary, was valid and enforcible in equity. The fact that the beneficiary was the child of the bargainor was not at all controlling in the decision of the case, but the reason of the decision was that the trust, having been declared at the time the legal title passed, and (205) being, therefore, an executed or perfected trust, as distinguished from an executory trust, or one arising out of an executory agreement,

the court would enforce it even in favor of a volunteer, or without any consideration moving from the beneficiary to support it. In that case, *Gibson, C. J.,* says: "The books are full of decrees in favor of children and volunteers. . . . When the legal estate has passed by a conveyance in which a trust is distinctly declared, the trustee will not be allowed to set up want of consideration to defeat it. *James v. Morey,* 2 Cowen (N. Y.), 246, 14 Am. Dec., 506, 507."

It is true that all trusts are in a certain sense executory, that is, the beneficiary is under the necessity of coming into the court and invoking its equitable jurisdiction for the enforcement of the trust, and for this reason *Lord Hardwick* at one time declared that there was no such distinction as that asserted between executed and executory trusts; but from this position he was forced afterwards to recede, and he finally abandoned it. *Excel v. Wallace,* 2 Vesey, Sr., 318; *Bastard v. Proby,* 2 Cox, 8. And now it is held that there never was a time when there was not a substantial difference between executed and executory trusts in this respect, that is, that one is good in favor of a volunteer and the other is not. An executed trust, therefore, if declared at the time the legal estate passes under the deed, will be enforced even without a consideration. *Ellison v. Ellison,* 6 Vesey, 656; White and Tudor's L. C. (4 Am. Ed.), 382; Adams Eq., 79; *Read v. Long,* 4 Yerger, 68; *Wyche v. Green,* 16 Ga., 49; *Fletcher v. Fletcher,* 4 Hare, 73.

In *Pittman v. Pittman,* 107 N. C., 163, 11 L. R. A., 456, *Shepherd, C. J.,* gives a very full and accurate statement of the law with reference to such trusts. He says: "Trusts and uses were raised in the
(206) same manner, and if a feoffment was made without consideration, a use resulted to the feoffor, unless the use or trust was declared at the time of the conveyance. Now, it must be observed that no consideration was necessary to a feoffment. The conveyance itself raised the use and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffor, unless declared at the time of the feoffment, and this declaration might be voluntarily made by parol, either in favor of the feoffee or a third person. But there was a great difference in this respect between a conveyance which operated by transmitting the possession, and the covenant to stand seized, which had no operation but by the creation of a new use; and, as this use was raised by equity, and equity never acts without a consideration, a consideration was always necessary to the transfer of the interest by this conveyance; whereas, in the case of a feoffment or fine, the use arises upon the conveyance itself. . . . It seems, therefore, that at common law only the solemn conveyance, by livery or record, could raise the use by its own virtue, and dispense with the deed declaring it, as well as the consideration for raising it. Roberts

on Fraud, 92. It appears, then, that at common law no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession, the character of the conveyance alone being sufficient to raise the use and to dispense with the necessity for a consideration."

When the principles thus laid down by this Court are applied to the facts of this case, we do not see why the promise made by the plaintiff to Winborne in behalf of the defendant, at the time the legal title passed to him, was not a valid and enforcible trust. No good reason has been suggested to us why the case should be excepted from the operation of the principles usually applicable to cases of its kind. (207)

We do not think that the decision in *King v. Kincey,* 36 N. C., 187, 36 Am. Dec., 40, militates against the views we have expressed. The agreement there was made at the time of *receiving* the deed, and was purely voluntary. The deed was not procured by reason of the promise; indeed, a reconveyance was not contemplated by the parties at the time the deed was executed. Besides, the plaintiff had two years within which to redeem the land, and failed to avail himself of the offer of the defendant, and the relief seems to have been denied upon that ground.

The assignment of error as to the ruling of the court upon the admissibility of testimony and the refusal to give the plaintiff's first and seventh prayers for instructions involve the same question as the one we have already discussed, and cannot, therefore, be sustained. We understand that the instruction requested in the plaintiff's fifth prayer was given by the court, or it was at least substantially given to the jury, and that was sufficient.

The sixth prayer was properly refused. The question was whether the trust had been declared at the time the legal title passed to the plaintiff. The promise could have become a part of the consideration even after the terms of the purchase had been agreed upon. It was a superadded consideration, and the jury found, under proper instructions from the court, it was part of the consideration and inducement for making the deed.

We conclude upon a view of all of the authorities that there was a valid trust declared, at the time of the conveyance of the legal estate from Miss Vaughan, in favor of the defendant, and she is entitled to have the same enforced by the conveyance to her of the legal title.

The parol trust is enforcible, not in the court of honor alone, as the plaintiff's counsel contended, but in the forum of conscience where right and equity are administered in accordance with those well- (208) established principles which have been found to be best calculated

to do justice between the parties, and to compel by legal methods and procedure the fulfillment of solemn engagements.

We believe that the result reached in this case is not only just, but that any other interpretation of the facts of the case, with reference to their legal character and efficacy, would be in contravention rather than in fulfillment of the provisions of the statute, for it has been well said that it is not easy to see how such a trust could be established except by parol evidence, and that if such evidence were not competent "a statute made to prevent frauds would become a most potent instrument whereby to give them success." Bispham Equity, sec. 95.

The questions as to the tender of the purchase money by the defendant before the suit was brought and as to the cost in the case, have both been settled against the plaintiff. *Cotton Mills v. Abernathy,* 115 N. C., 402; *Martin v. Bank,* 131 N. C., 121. There is no error in the ruling and judgment of the court below.

PER CURIAM. Judgment affirmed.

Cited: Avery v. Stewart, 136 N. C., 441; *Davis v. Kerr,* 141 N. C., 17; *Faust v. Faust,* 144 N. C., 386; *Chappell v. White,* 146 N. C., 573; *Gaylord v. Gaylord,* 150 N. C., 227, 237; *Harrell v. Hagan, ib.,* 244; *Newkirk v. Stevens,* 152 N. C., 502; *Taylor v. Wahab,* 154 N. C., 224; *Jones v. Jones,* 164 N. C., 322; *Brogden v. Gibson,* 165 N. C., 23; *Lutz v. Hoyle,* 167 N. C., 634; *Ballard v. Boyette,* 171 N. C., 26; *Massey v. Alston,* 173 N. C., 222; *Boone v. Lee,* 175 N. C., 386; *Williams v. Honeycutt,* 176 N. C., 103; *Rush v. McPherson, ib.,* 566; *McFarland v. Harrington,* 178 N. C., 192.

(209)

HANCOCK v. COMMISSIONERS OF CRAVEN COUNTY.

(Filed 24 March, 1903.)

1. Counties—County Commissioners—Contracts—Attorney and Client.

A board of county commissioners may employ an attorney for the term for which it is elected.

2. Evidence—Sufficiency—Demurrer—Nonsuit—Counties.

In this action against a board of county commissioners by an attorney for legal services, the evidence on demurrer by the defendant is sufficient to be submitted to the jury.

, ACTION by S. W. Hancock against the Board of Commissioners of Craven County, heard by *Brown, J.,* at September Term, 1902, of CRAVEN. From a judgment of nonsuit, the plaintiff appealed.

W. W. Clark for plaintiff.
D. L. Ward for defendant.

CONNOR, J. The plaintiff alleged that on 5 December, 1898, the defendant board of commissioners contracted with him to employ him as attorney for the term of two years at an annual compensation of $200. That he accepted the employment and entered upon the discharge of his duties, and that he has at all times during the said two years been ready, willing, and able to perform his part of the contract. That a balance is due him on account of said contract of $350. That he has made demand upon the defendant for payment thereof and it has been refused.

The defendant, answering, does not deny the alleged contract, but says that it is invalid and cannot be enforced for the reason that they had the right to dispense with plaintiff's services when they deemed it advisable for the best interest of the county to do so. They deny that the plaintiff was at all times during the two years ready, willing, and able to perform his part of the contract, but that on the (210) contrary he at divers times failed and refused to perform work which was required by said board under the terms of said contract. For a further defense the defendant says that the board of commissioners passed an order dismissing the plaintiff, and that he made no protest against said order, but abandoned the functions of his office as county attorney and rendered no service. That at the time of his dismissal he had abandoned the practice of the law and had been appointed postmaster at the city of New Bern; that his duties as postmaster demanded nearly all of his time and attention and rendered it unsafe for the defendant to rely upon his advice and services, as he did not have sufficient time or opportunity to properly acquaint himself with the law, etc., and was therefore unable and disqualified to properly perform his part of the contract. That his salary as postmaster was very much larger than his salary as attorney, and that his dismissal in no way damaged him; that the advice given the board was not in accordance with law, and that he did not at the time of his dismissal and does not now possess the requisite skill and ability as a lawyer to properly discharge the duties imposed upon him by said contract, etc.

The plaintiff offered in evidence the original resolution of the defendant, and testified that it was adopted 5 December, 1898:

"*Resolved,* That Seymour W. Hancock be employed as attorney for the county for the ensuing two years at an annual compensation of $200 per annum."

He further testified that he "served during December, 1898, January, 1899, and was paid for these two months. The board removed me 1 February, 1899, and employed D. L. Ward. I received $50. The board revoked resolution of 5 December. I offered to per-
(211) form the services, and the board refused to have me. I was appointed postmaster at New Bern July, 1898. I was postmaster when the board employed me. I have no law office, and had none, except my office in the Federal building for postmaster. I have twenty-five or thirty law books. I do not hold myself out as a practicing lawyer. I have now no cases in the State courts. I have not advertised myself as a practicing attorney for the past few years. I am still postmaster. I have not practiced law to any extent for the last two or three years, and therefore I have not paid my law license tax. I get $200 a month as postmaster. The United States Government requires my complete supervision of the postoffice. I ask permission from Government to be absent a week. I have to ask leave of absence when I leave town. I made no protest when the board employed D. L. Ward. I did not attend the meeting of the board, as some members of the board had told me that they intended to remove me, and that it would be more agreeable for me not to attend. The United States had a prior claim on my services. If my presence was required at the postoffice, I should have to be there instead of at meeting of board. I told the members of the board when they told me they intended to remove me, that I objected to my removal and should sue them. I did not go before the board in session and protest at the meeting at which I was removed. At the next meeting of the board after my removal I went before the board; I was ready to perform my duties and should sue them. I was paid $50 for the two months."

He introduced J. A. Bryan: I was county commissioner prior to 1898. Plaintiff was attorney for the board before he was postmaster. I was on board some time while plaintiff acted as attorney. We found no fault with him, so far as I know. I was not on board after 1 December, 1898.

E. W. Smallwood: I was a member of board of commissioners
(212) in February, 1899, when we discontinued plaintiff. We discontinued him because we thought his duties as postmaster must necessarily interfere, and that he could not discharge all the duties of our attorney in all the courts of the State. He was attorney for our board before he was postmaster, and we made no complaint. When the Legislature of 1899 met, it added four commissioners, all of whom were Democrats. There might have been some politics inducing some of the board to discontinue plaintiff, but we thought that there might

be, and likely would be, a conflict between his duties as postmaster and his duties to us.

John Biddle: I was chairman of the board of commissioners. There was nothing said at the meeting of the board, when plaintiff was discontinued, about politics. No reason was given for the action of the board. Before the meeting, and outside, Mr. Smallwood told me he thought the four new Democratic commissioners would prefer another lawyer, and that there might be some politics in it.

At the conclusion of the evidence for the plaintiff, the defendant moved to nonsuit the plaintiff under the act. Motion sustained. Exception by plaintiff. Appeal by the plaintiff.

The defense set up by the defendant in its answer, if submitted to and found by the jury, would have been ample reason for discontinuing the service of the plaintiff as attorney. We think that the board had the power to make the contract for the term of two years, that being the term for which it was elected. *Roper v. Laurinburg,* 90 N. C., 427. We think, also, that if the plaintiff assumed other obligations, or took other service which prevented him from discharging his duties under the contract with the defendant, or if he was not able to give correct advice, or for any of the reasons mentioned in the answer he could not serve the defendant in the capacity of attorney, that it had a legal right to put an end to the contract (213) or the relation growing out of it. We cannot see, however, that as a matter of law, upon the testimony, which for the purpose of the demurrer must be taken as true and construed in the light most favorable to the plaintiff, that he was unable or incompetent to comply with his contract. It is true that his becoming postmaster absorbed very largely his time and attention, but we cannot see that he was unable to give advice or serve the defendant. It seems that he did so for two months, and no complaint was made. The opinion of the defendant board that his duties as postmaster would interfere with the discharge of his duties as attorney to the board may have been well founded, but we cannot say as a matter of law or legal inference that it was so. We do not think that the plaintiff was called upon to enter any protest against the action of the defendant. We think that these were questions for the jury upon issues arising upon the pleadings. The court was in error in sustaining the motion to nonsuit the plaintiff. The issues raised by the pleadings should have been, upon all of the evidence, submitted to the jury under proper instructions from the court. There must be a

New trial.

(214)

HAVENS v. BANK OF TARBORO.

(Filed 24 March, 1903.)

Banks and Banking—Corporations—Stock—Certificates of Stock—Issuance.

Where the president of a bank signs certificates of stock in blank, and leaves them with the cashier, all the stock having been issued, who fraudulently issues such certificates to himself and pledges them as collateral for a loan, the bank is liable to the pledgee for the value of the stock, although the certificates of stock recite that they are transferable only on the stock book of the bank.

ACTION by Lucy E. Havens against the Bank of Tarboro and others, heard by *Winston, J.*, at October Term, 1902, of EDGECOMBE.

This action was brought by the plaintiff to recover the value of a certificate for thirteen shares of stock, which she alleged was issued by the defendant to James G. Mehegan, and which she received from him as collateral security for a loan of $500.

(218) From a judgment for the defendants, the plaintiff appealed.

Gilliam & Gilliam for plaintiff.
John L. Bridgers for defendant.

WALKER, J. It appears in this case that the bank was fully authorized by its charter to issue the certificate of stock in question, and that, so far as the face of the certificate shows, it was issued in accordance with the provisions of the charter and the by-laws and regulations. The plaintiff loaned the money in the faith and confidence that the certificate of stock, which had all the appearances of being genuine, would constitute a valid and unimpeachable security in her hands for the money borrowed by Mehegan, and we think that, upon well-

(219) established principles, she had the right to so regard it, and that the bank must pay to her the value of the stock, not exceeding the amount of the debt, although it was in fact issued without the authority and contrary to the bank's instructions and in fraud of its rights.

The president and secretary signed several blank certificates and they were then left with the cashier, Mehegan, to be filled out in the name of the purchasers of the stock when called for by them.

The fact that they were signed by the president gave Mehegan, the cashier, the power to commit the fraud, but the opportunity to issue the spurious certificate was afforded by the negligent act of the corpora-

tion in leaving the blank certificates with Mehegan, who thereby acquired full control over them, and the bank has thus become the author of the fraud and the victim of its own misplaced confidence. But should the plaintiff, an innocent holder, be caused to suffer for what the bank itself made it possible for him, Mehegan, to do? We think not. The decision of the case must turn upon the application of a simple and just principle of the law to its facts:

"Whenever one of the two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." *Lickbarrow v. Mason,* 2 T. R., 70.

It is well said by *Lord Holt* in *Hearn v. Nichols,* 1 Salk., 289, "For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposed a confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *R. R. v. Kitchin,* 91 N. C., 39. (220)

The principle has a striking illustration in the case of agency, and has been extended to the acts of corporations, as we will presently see. "The rule has been established and may now also be stated as an indisputable principle that a corporation is responsible for the acts and negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances that a natural person is chargeable with the acts and negligence of his agent, and 'There can be no doubt,' says *Lord Ch. Cranworth* in *Ranger v. R. R.,* 5 H. L. Cases, 86-87, 'that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the person for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.'" *R. R. v. Schuyler,* 34 N. Y., 50.

There is no good reason for holding that this bank is not legally responsible for the fraudulent acts of the cashier, Mehegan, upon the ground that at the time he delivered the certificate to the plaintiff he was not in the performance of his master's business, but was acting for and in behalf of himself and outside the scope of his agency. This would be true as to all fraudulent acts and as to all acts done not strictly within the line of duty. The correct principle is that it will be quite sufficient to charge the employer with the liability, if all the acts of the employee are done within the apparent, though not real, scope of his agency.

In *R. R. v. Bank,* 60 Md., 36, where the question is fully discussed,

the Court uses this language: "It may be conceded, and was doubtless the case, that the agent had no authority in fact to issue such certificate; he had no real authority as between himself and his princi-
(221) pal, or other parties cognizant of the facts, for doing the particular acts complained of, but the company by its own acts and, as it turned out, misplaced confidence, placed the agent in the position to do, and procure to be done, that class of acts to which the particular act in question belongs; and in such case, where the particular act in question is done in the name of and apparently in behalf of the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority." And again: "Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful, and worthy of confidence; and though he deceived both his principal and the public, by forging and issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should bear the loss."

But a decision was made upon substantially the same facts that we have in this case in favor of the holder of such a certificate in the case of *Titus v. R. R.*, 61 N. Y., 237, in which it was said: "Where the treasurer of a corporation upon the faith and pledge as collateral of spurious certificates, drawn up and executed in the form and manner prescribed by the by-laws (signature of the president having been negligently affixed), purporting on its face to be of stock owned by the treasurer, obtained a loan of one acting in good faith and in ignorance of the fraud, there being nothing upon the face of the certificate to notify the lender of any defect in the title, the corporation is liable to the holder for the value of the stock, if the stock of the com-
(222) pany has been issued up to the full limit fixed by the charter."

Titus v. R. R., supra, has been cited with approval in many courts in this country, and the principles therein stated and applied meet with our unqualified approval as being those most consonant with reason and justice, and we do not see why it should not be decisive of this case. Among the many cases sustaining the principle of that decision, we cite the following: *Holbrook v. Zinc Co.*, 57 N. Y., 616; *Bank v. R. R.*, 30 Conn., 231; *Allen v. R. R.*, 150 Mass., 200, 15 Am.

St., 185, 5 L. R. A., 716; *Craft v. R. R.*, 150 Mass., 207, 5 L. R. A., 641; *Bank v. Ferry Co.*, 137 N. Y., 321, 19 L. R. A., 331, 33 Am. St., 712; *Bank v. Kurtz*, 99 Pa., 349, 44 Am. Rep., 112; *M. B. Co. v. Harned*, 27 Fed., 486; *R. R. v. Bank*, 53 Ohio St., 351, 43 L. R. A., 777; Clark on Corporations, 438; Mechem on Agency, sec. 717.

We do not think there was anything in the face of the certificate to cause the plaintiff to suspect any fraud when she took it as collateral security for the loan to Mehegan. The mere fact that it was issued in the name of Mehegan, we have seen, was not sufficient for this purpose, and the requirement that it should be transferable on the books of the bank cannot, in our opinion, have any such effect. As the principle governing in such cases is so clearly and forcibly stated in *McNeill v. Bank*, 46 N. Y., 325, 7 Am. Rep., 341, we quote at length from that decision: "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title. But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the de- (223) livery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. . . . It was only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. . . .

"It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificate with assignment and power endorsed passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the cor-

poration may have upon it, and excepting the right of voting at elections. . . .

"By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser. But, in this respect, he is in a condition analogous to that of the holder of an unrecorded deed of
(224) land, and possesses a no less perfect title as against the assignor and others, and he would have no action against the corporation for allowing such a transfer in violation of his rights. He also takes the risk of collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

"The holder of such a certificate and power possesses all the external *indicia* of title to stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but apparently, the legal title and the means of transferring such title in the most effectual manner. Such, then, being the nature and effect of the documents with which the plaintiff instructed his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title and claims as against them that he could not be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequence of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?"

See, also, *Loring v. Salisbury Mills,* 125 Mass., 150; *Leyson v. Davis,*
17 Mont., 220, 31 L. R. A., 429; *Stone v. Hackett,* 12 Gray
(225) (Mass.), 231.

The text-writers are equally explicit in stating the doctrine. Morawetz Private Corporations, sec. 185, says: "By general mercantile usage, shares in a corporation are assignable by endorsement and delivery of the certificate issued to the owner as evidence of his rights. It

is well settled that after a certificate for shares has been endorsed by the holder, with an assignment and power of attorney to execute a transfer upon the stock books, the name of the transferee and attorney being left blank, the certificate thus endorsed may be passed from hand to hand, and the last holder will be entitled to fill up the assignment and power of attorney and complete the transfer by entry upon the books of the company. Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market, the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be devised to assure the purchaser that he can buy with safety. He is told under the seal of the corporation that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificate, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in posses- (226) sion of the certificate."

It follows, therefore, from the application of these principles, which are sustained by the highest authority, that the plaintiff was not notified in any way by the certificate itself that it had not been regularly issued; nor was there anything on its face calculated to arouse suspicion or inquiry and to put her on her guard. She was, therefore, as between the bank and herself, the bona fide holder for value of the certificate, with an unimpeachable title thereto, and if the certificate was not an overissue of stock, she is entitled to a transfer of it on the books of the bank and to a new certificate; and if the stock of the bank has been issued to the full limit authorized at the time, which appears to be the case from the facts agreed, she is entitled to recover its value of the defendant. *Bank v. Lanier,* 11 Wallace, 369.

The defendant's counsel in his argument before us relied on the case of *Moores v. Bank,* 111 U. S., 156. That case is quite different from ours, in that the cashier agreed to give the plaintiff in that suit a certificate of stock which he alleged had been issued to himself, whereas he deposited with the plaintiff one in her own name, and the court

attached great importance to this fact, and held that it was notice to her, and rather intimated that if the stock had been issued in the cashier's name the decision would have been the other way. The defendant's counsel also relied on *Farrington v. R. R.*, 150 Mass., 406, 5 L. R. A., 849, 15 Am. St., 222; but upon examination of the facts of that case we find that they are substantially the same as those in the case of *Moores v. Bank, supra.* We think that those cases can easily be distinguished from the one at bar; but if they cannot be, we would refuse to follow them, as we believe that the principles we have laid down as those which should control the decision of this case are perfectly sound and in full accord with reason and right. We (227) are of the opinion that the adoption of any other principle as applicable to such a case would seriously impair the integrity of business transactions, and by destroying public confidence in such securities would prevent the free and untrammeled dealing in stock certificates and other paper of a like kind, which is so essential to the maintenance of their value and usefulness and to the success of many important and legitimate business enterprises. The effect of a contrary rule would indeed be very baneful and far-reaching. It is better to stand by the old and familiar principle, and place the loss upon the one whose negligent, though perhaps, innocent act brought it about.

The judgment of the court below is reversed, and judgment will be entered in that court for the plaintiff in accordance with the facts agreed upon by the parties and in conformity with the principles herein set forth.

PER CURIAM. Judgment reversed.

Cited: Cox v. Dowd, 133 N. C., 540; *Bowers v. Lumber Co.,* 152 N. C., 606; *Bleckley v. Candler,* 169 N. C., 21; *Bank v. Dew,* 175 N. C., 82.

DEANS v. GAY.

(Filed 24 March, 1903.)

1. Wills—Construction—Trusts—Estates.

Where a testatrix devises land to her daughter and her heirs forever, and in a subsequent clause provides that such land be kept for her daughter and her children forever, the daughter takes the legal title impressed with a trust for the children, and may pass such naked legal title by deed.

2. Limitations of Actions—Mortgages—Trusts—Adverse Possession.

Where a trustee, holding a legal title to land for the use of herself and others, executes a mortgage on the same, and the land is sold under the mortgage, the purchaser gets the legal title coupled with the trust; his possession is not adverse to the *cestuis que trustent*, and the statute of limitations does not run against them.

ACTION by S. Madora Deans and others against Albert Gay, heard by *Winston, J.*, and a jury, at November Term, 1902, of NASH. From a judgment for the defendant, the plaintiffs appealed. (228)

T. W. Bickett for plaintiffs.
Jacob Battle and F. S. Spruill for defendant.

CONNOR, J. William Jane Bryant died on 2 September, 1872, having first made her last will and testament, the second item whereof is in the following words: "I will and desire that my daughter Madora Deans have 50 acres of land allotted to her . . . to her and her heirs forever." Item 10 of said will is in the following words: "I will and desire that the 50 acres of land given to my daughter Madora Deans be kept for the benefit of her and her children forever." The said Madora was born in 1850, married in 1872, and became discovert in 1889 by the death of her husband. At the time of her mother's death she had one child, which afterwards died. The case does not disclose at what time the child died. We assume, in the absence of any statement to the contrary, that the child died intestate and without issue. There was born of said marriage and are now living the plaintiffs, George C. Deans, aged 28 years; R. E. Deans, aged 26 years; J. H. Deans, aged 24 years; W. O. Deans, aged 19 years; Mary Deans, aged 17 years; Ellen Deans, aged 16 years, and Hattie Deans, aged 15 years.

The plaintiff Madora joined her husband in the execution of a mortgage deed conveying the said land to John D. Wells and another, dated 9 March, 1874, and duly recorded. On 17 July, 1875, the said mortgagees conveyed and transferred to Albert Gay "all their right, title, and interest in and to" the land conveyed to them as aforesaid, together with the indebtedness secured therein. On 15 September, 1875, the said Albert Gay, by virtue of the power of sale contained in said mortgage, sold and conveyed the said land to Wilson Gay, Jr., (229) by deed duly recorded. On 12 November, 1875, the said Wilson Gay, Jr., sold and conveyed the said land to the defendant Albert Gay by deed duly recorded. The defendant entered into the possession of said land upon the execution of said deed and has remained in pos-

session thereof until the commencement of this action, receiving the rents and profits thereof. His Honor directed the jury to answer the issue in regard to the ownership of the plaintiffs in the negative and rendered judgment accordingly, from which the plaintiffs appealed.

The defendant's counsel in his brief insists that there being an absolute gift of the land to the daughter Madora in the second item of the will, followed by eight clauses having no connection with this land or the daughter, the language used in the tenth item is not sufficient to impress upon her title any limitation or trust. The words are, "I will and desire." If used immediately after and in connection with the second item in which the devise is made, it would seem that there would be no doubt of their effect upon the title. We think that this is not changed by the fact that they are found in the tenth item. It is a well-established rule in the construction of wills that the last clause is given effect, if there be any conflict with other clauses, and that the testator's intention is to be arrived at by reading the whole will in the light of surrounding circumstances. *Holt v. Holt,* 114 N. C., 241. We think that the proper construction of the two clauses, read together, is that the testator's purpose was to give the land to her daughter, who had but lately married, and to impress upon the legal title a trust that it "be kept" for the "benefit" of her and her children. This language is very much like that used by the testator in *Crudup v. Holding,* 118 N. C., 222.

There the trust was to "keep and hold together." We can see sub-
(230) stantial difference in the language used in the two wills. To keep is "to retain in one's power or possession," as, "If we lose the field, we cannot keep the town." The purpose of keeping is for the "benefit"—that is, the "use," enjoyment, support of "her and her children." We have examined with care the argument of defendant's counsel in which he seeks to distinguish the language in the will before us and that in *Crudup v. Holding, supra.* We cannot concur with him, but think that the construction adopted in that case should be followed by us. We are therefore of the opinion that Madora held the legal title in fee for the use of herself and her children, including all of the children born to her. It is clear that such was the intention of the testator, and there is no reason or principle of law forbidding such intention being effectuated. *Scull v. Ins. Co., ante,* 30. To hold otherwise would fail entirely to give effect to her purpose to provide for her daughter and her children.

It was held in *Crudup v. Holding, supra,* that a deed executed by Mrs. Crudup and her children conveyed no title, "as that would at once defeat the intention of the testator." The defendant's counsel insist that if this be the conclusion, the plaintiffs are barred of their action by the statute of limitations. Madora Deans became a *feme sole*

in 1889. The defendant Gay has been in possession of the land since 1875. The summons was issued in 1901. If the principle announced in *King v. Rhew,* 108 N. C., 696, 23 Am. St., 76, applies, it would seem that the plaintiffs are barred. It was held in that case, as we hold in this, that for the purpose of executing the trust the legal title remains in the trustee. There the trustee held for the benefit of Charlotte King during her life, and at her death for her children. Charlotte King undertook to execute a deed, but it was invalid and conveyed no estate or interest. The grantee named in the invalid deed and those claiming under him went into and remained in possession of the land until the bringing of the action. The trustee made no *deed* or did any act affecting his rights. He could have (231) maintained an action at any time against the defendant for the possession of the land. *Shepherd, J.,* in that case says: "The defendant being thus exposed to an action on the part of the trustee and having been in the continuous possession for over seven years under his deed from Chadwick (which was color of title), and it being admitted that his possession was actually adverse, it must necessarily follow that the trustee's estate is barred."

In *Clayton v. Cagle,* 97 N. C., 300, Moore, the president of a corporation, in 1851 executed to Williamson a deed in trust for certain purposes therein set out, the plaintiff being one of the beneficiaries. The defendant went into possession in 1863 *under an independent* title, and remained therein for more than seven years. The Court held that the trustee was barred. *Smith, C. J.,* says: "The interest of the *cestui que trust* is, as against *strangers to this deed,* under the protection of the trustee and shares the fate that befalls the legal estate by his inaction or indifference." In the case before us the trustee executes a mortgage with her husband to Wells and another. The mortgagees convey the land (not assign the mortgage) to Gay, and he sells under the power to Wilson Gay, Jr., who reconveys to him. Thus he is in possession *under* and not *adverse* to the trustee. There is no ouster of the trustee; she puts him in. He takes the legal title, subject to the trust, the declaration of which is in his chain of title, and therefore his possession cannot become adverse to the *cestuis que trustent.* In this respect the case is distinguished from *King v. Rhew, supra,* and other cases cited therein. While neither the plaintiff Madora nor the children can convey the *equitable estate* until the death of Madora and thereby prevent the execution of the trust created by the will, we can see no reason why the naked legal title held by Madora may not pass by her deed. It is said, however, that the sale by the defendant (232) under the power contained in the mortgage was void for that he had not the power. It will be observed that in his deed to Wilson

Gay, Jr., he recites that Wells & Bailey had assigned and conveyed to him all of their right, title, and interest in the land. If this language did not convey the land with the power to sell, it certainly was operative to convey the title to the land which Wells had, and is thus distinguished from *Williams v. Teachey,* 85 N. C., 402. If he had the title and his attempted sale be invalid, he was in possession as mortgagee subject to the trust impressed upon the legal title by the will, and in this point of view his possession was not adverse to the owners of the equitable estate. There is another view of the case which would lead to the same result. Madora had the legal title in trust for herself and her children. Upon her death she could no longer keep the land for "the benefit of herself and her children," and it would seem that, as the purpose of the trust had been accomplished, the beneficial owners would become entitled to call for the legal title and to partition. Her share would pass to her heirs at law; but as she had by her mortgage deed conveyed her entire interest, her mortgagee becomes entitled to her share or interest—became in a certain sense a tenant in common with her children, of the equitable interest, in which case the statute would not begin to run from her death.

We are of the opinion that the plaintiffs are entitled to recover the possession of the land, to the end that the trust declared in the will of William Jane Bryant may be executed. In no other way can we give effect to her intention as expressed in her will.

There must be a

New trial.

---

(233)

DAVIS v. BUTTERS LUMBER COMPANY.

(Filed 24 March, 1903.)

1. Injunctions—Receivers—Banks and Banking.

Where a resident creditor of an insolvent bank brings suit in another State, which hinders the collection of the assets of the bank by the receiver, the receiver is entitled to enjoin the creditor from prosecution of such suit.

2. Banks and Banking—Drafts—Election of Remedies—Fraud.

Where an insolvent bank discounts drafts, such insolvency being known to the officers, and the drawer of the drafts sues to recover the amount of said drafts placed on deposit, he could not in another suit disaffirm the discount for fraud.

3. Injunctions—Receivers—Remedy at Law.

In a suit by a receiver for an injunction to restrain a resident creditor from maintaining a suit in another State against the corporation for which the receiver had been appointed, it is no defense that the plaintiff had an adequate remedy at law.

CLARK, C. J., and DOUGLAS, J., dissenting.

PETITION to rehear this case, reported in 130 N. C., 174. Petition allowed.

Russell & Gore for petitioner.
E. S. Martin and Rountree & Carr in opposition.

CONNOR, J. This cause is before us upon a petition to rehear, filed by the defendant. It was heard at Spring Term, 1902, and the Court being of opinion that certain findings or conclusions of fact made by the court were inconsistent and contradictory, ordered a new trial. 130 N. C., 174. The defendant in its petition suggests that by reason of other findings than those referred to by this Court, those which were deemed contradictory and immaterial, judgment should have been rendered in this Court. The entire record has been argued before us upon the rehearing, and we are enabled to dispose of the cause without sending it back for further proceedings.

The action is brought by the plaintiff, receiver of the Bank (234) of New Hanover, for the purpose of enjoining the defendant from prosecuting a certain action instituted by the defendant against the Bank of New Hanover in the Superior Court of Baltimore City in the State of Maryland. The defendant answered the complaint, and for further answer set up a counterclaim against the said bank. The plaintiff replied, denying the allegations in regard to the counterclaim. The parties waived a trial by jury and the court found the facts. So far as it is necessary to the decision of this cause, the facts as found by the court are:

That the Bank of New Hanover was, on 19 June, 1893, and had been for several years prior thereto, conducting a banking business in the city of Wilmington in this State, having been duly chartered and organized; that on said day the bank, being insolvent, ceased to do business, and in actions properly constituted in the courts of this State the plaintiff was duly appointed receiver of said bank and duly qualified; that the defendant is a corporation duly chartered and organized under the laws of this State and is a citizen and resident of said State; that at various times during the month of June, 1893, just prior to the suspension of said bank, the defendant negotiated

and discounted with said bank several drafts drawn by it on one W. M. Burgan of Baltimore, Md., payable to the order of said bank, aggregating the sum of $1,535.85, and the net amount of said drafts after deducting the discount of $4.08 was duly entered to the credit of the defendant as cash on its general account on the books of the bank. The drafts were duly accepted by the said Burgan, the drawee; that thereafter and up to the time of the suspension of the bank the defendant drew checks from time to time against its account with the bank, amounting to the sum of $109.87, which were duly paid by the bank, and at the time of the suspension thereof there was a
(235) balance to the credit of the defendants on said books of $1,421.90; that there was no specific agreement by the bank with the defendant that the drafts were taken for collection, but it was agreed to take the drafts and credit them to the defendant's account, and if they came back unpaid the bank would charge back the full amount to said account and return the drafts; and this was an agreement with all of the customers of the bank. This was because the defendant was liable on the drafts as drawer equally with the drawee, Burgan. The defendant had a right to draw on the proceeds of the drafts after they had been credited. The defendant understood that the title to the drafts had passed to the bank and that the bank had become its debtor for the net amount of the drafts; that both the bank and the defendant intended at the time when the drafts were discounted that the title thereto should pass to the bank; that the bank was utterly insolvent at the time when it took the drafts from the defendant, and its managing officers were aware of that fact; that after the plaintiff, as receiver of said bank, took charge of its assets, the defendant applied to him to charge against the defendant in said account with the bank the amount of said drafts, and to deliver them up to the defendant that it might collect said drafts of said Burgan for its own benefit, which plaintiff refused to do. The defendant soon thereafter stopped the payment of the said drafts by Burgan and commenced an action in the city of Baltimore, Maryland, against the Bank of New Hanover upon the aforesaid debt of $1,421.90, the said balance of account, and caused an attachment and garnishment to be made upon the debt due to said bank by Burgan by reason of his acceptance as aforesaid, for the purpose of condemning and subjecting the debt, owing by Burgan to the bank, to the payment of the debt aforesaid due by the bank to the defendant, and said action is still pending. The de-
(236) fendant at the time when it brought the suit in Baltimore and attached the proceeds of said drafts, knew that at the time when the drafts were discounted by the bank and credited to its account the bank was utterly insolvent, and that its managing officers

were aware of that fact. Burgan has refused to pay the drafts, and they remain unpaid. The court upon said findings of fact adjudged that the defendant be perpetually enjoined from prosecuting the suit in Baltimore.

This Court was of the opinion, and so held, that the finding of the court that there was no special agreement that the drafts were taken for collection, but that it was agreed to take the drafts and credit them to the defendant's account; that if they came back unpaid the bank would charge back the full amount to said account and return the drafts to the defendant, irreconcilably conflicted with the finding that the defendant understood that the title to the drafts passed to the bank and that the bank had become its debtor, and that the bank so understood the transaction. It will be observed that the court also found that the right of the bank to charge the amount of the drafts back to the defendant, if unpaid, was "because The Butters Lumber Company was liable on the drafts as drawers equally with the drawee, Burgan." We do not think that in the light of the conduct of the defendant, in regard to the suit in Maryland, the said findings materially affect the right of the parties in this action. At the time the bank closed its doors the drafts had not been returned; on the contrary, they had been accepted and the defendant had drawn against them, and, as found by the court, had a right to draw the entire amount, and that the bank could not have prevented its doing so. The right of the plaintiff to enjoin the defendant from prosecuting the action in the Maryland court, so far as he thereby prevented or interfered with the collection of the assets of the bank which passed to him as receiver, is well settled. *Cole v. Cunningham,* 133 U. S., 107. The defendant says that it is immaterial whether the fact be that (237) the bank received the drafts as collecting agent or purchased them outright, for that the court finds that at the time the drafts were deposited or sold, as the case may be, the bank was hopelessly insolvent, and that such insolvency was well known to the managing officers of the bank; that it was therefore by fraudulent concealment that the bank obtained the drafts, and no title passed to it. This proposition is sustained by high authority. *R. R. v. Johnson,* 133 U. S., 566, and many other cases.

It is also true that the drafts passed to the plaintiff as receiver subject to the rights of the defendant to demand and sue for them. The plaintiff says that, while this may be true, the defendant has elected to treat the drafts as the property of the bank and the bank as its debtor for the balance due it on account; in doing so it has ratified the purchase or taking of the drafts. The defendant, while not conceding this, insists that it is not open to the plaintiff to make

this contention, because it is not set up in the pleadings; that by its answer the defendant set up the counterclaim and that the plaintiff in his reply does not set up any estoppel; that an estoppel, to avail the party claiming under it, must be pleaded. We are of opinion that the defense to the defendant's counterclaim is not an estoppel, but that it presents the question of an election to pursue one of two inconsistent remedies, open to the defendant, and that when made it operates as a ratification of a voidable contract; that upon the facts alleged in the pleadings and the facts found by the court the plaintiff may rely upon the conduct of the defendant to raise and present his defense. Mr. Bigelow in his work on Estoppel, p. 693, says that frequently the term "estoppel" is used when the facts present a ratification of a voidable contract by election. We find the authorities, in which (238) the question is discussed, all treat and speak of it as one of election. In *Terry v. Munger,* 121 N. Y., 161, 8 L. R. A., 216, 18 Am. St., 803, *Peckham, J.,* in speaking of the admissibility of a judgment, says: "It was not by way of estoppel, however, that the judgment was admissible; it was admissible for the sole purpose of showing that the plaintiff had elected to treat the taking of his property as a sale, and that was shown by the perusal of the complaint." The question therefore is, Did the defendant by bringing the action in the courts of Maryland elect to treat the bank as its debtor and the drafts as the property of the bank? The defendant undoubtedly had one of two courses open to it upon the failure of the bank. It could demand and sue for the drafts; they were in the possession of the receiver; his rights were not superior to those of the bank. It could, on the other hand, ratify the contract and prove its debt against the bank; it certainly could not do both. It brought suit in Maryland "to recover the sum of $1,421.90 with interest from 18 June, 1893, due and owing from the defendant to the plaintiff for the balance on deposit to the credit of the plaintiff in the hands of the said defendant on said date." (Record, p. 55.) It caused the debt, owing by Burgan by reason of the acceptance of said drafts, to be attached as the property of the bank. "It is for the party defrauded to elect whether he will be bound. But if he does affirm the contract, he must affirm it in all its terms. . . . When the contract is once affirmed, the election is completely determined. . . . Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party, will have the same effect. Taking steps to enforce the contract is a conclusive election not to rescind on account of anything known at the time." Pollock on Contracts, 507. "The contract between Branscom and the plain- (239) tiff was, upon discovery of Branscom's fraud, voidable at their

election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom, their debtor." *Danforth, J.,* in *Conrow v. Little,* 115 N. Y., 387, 393, 5 L. R. A., 693. "The proof that an action of that nature had been commenced would have been just as conclusive upon the plaintiff, upon the question of election, as would the judgment have been (the party knowing all the facts at the time of bringing the action). It was not necessary that a judgment should follow upon the action thus commenced." *Peckham, J.,* in *Terry v. Munger,* 121 N. Y., 161, 8 L. R. A., 216, 18 Am. St., 803. See, also, *O'Donald v. Costant,* 82 Ind., 212.

This case would present the singular spectacle of a party maintaining a suit in Maryland against the bank and attaching its property there, upon the theory that the bank was its debtor, and at the same time, upon the identical state of facts, recovering the same property here, upon the theory that the bank was never its debtor, and that the property was at all times the defendant's. Certainly, this anomaly could not be permitted to exist if both suits were pending in the courts of this State.

We have not discussed the question presented in the brief of the plaintiff, that in any aspect of the case, upon the facts found, the title to the drafts passed to the bank, because, as we have said, conceding that the defendant could have recovered them from the receiver, it has elected not to do so, but to ratify the title in the bank. To the point presented by the defendant's demurrer *ore tenus,* that the plaintiff has no equity because he has a remedy at law, easy and adequate, it should be said that the courts of this State will not permit one (240) of its own citizens to compel the officer of the court, in his administration of a trust under the control of the court, to go into a foreign jurisdiction to litigate his rights. It is the policy and usually the rule of the court to compel all claims to assets in the hands of the receiver to be litigated in the original cause. This course prevents confusion and conflicts, and saves costs and expenses.

The defendant says that the plaintiff got no title to the drafts under the decree of the Superior Court of New Hanover County, and that, therefore, in no aspect of the case can he recover the amount of the drafts from Burgan. The plaintiff's appointment as receiver is by virtue of chapter 155, Laws 1891, providing for the closing up of the affairs of insolvent banks. Certainly, the courts of this State will protect the rights of its receivers in suits brought in such courts. If Burgan

was found in this State, and suit was brought by the receiver against him for the recovery of the drafts, the court would sustain the action. The defendant in its counterclaim has brought the title to the drafts, as between itself and the receiver, into litigation, and we hold that as between them the receiver has the title. The plaintiff in his complaint asks that the defendant be enjoined from proceeding to prosecute his suit in the courts of Maryland. The judgment in this action does not deal with or affect the rights of Burgan or the receiver as against him, but operates only upon the action of the defendant and prevents its interference in the matter. This Court does not pretend to any interference with courts of other States. It acts upon the defendant. *Booth v. Clark,* 58 U. S., 322.

We are of the opinion that the judgment of this Court should be reversed and that the petition be allowed. We are further of the opinion that the judgment of the Superior Court of New Han-
(241) over County should be affirmed.

It may be best for the protection of the rights of all parties that the decree be so modified that the suit in Maryland proceed to judgment, and the proceeds of the drafts be brought into this State. The parties will pursue such course in this respect as they may be advised.

Petition allowed and the judgment of the court below affirmed.

DOUGLAS, J., dissenting: I regret that I cannot concur in the opinion of the Court, but it seems to me that an injustice is done to the defendant on mere questions of practice to the exclusion of the larger equities, which are all on his side. The opinion hinges upon the fact of the implied election by the defendant when he sued by attachment in Baltimore to recover the money from Burgan, on whom the drafts were drawn. I use the expression "implied election" because there is no evidence of an express election to treat the drafts as belonging to the bank. On the contrary, before bringing its action, the defendant called upon the receiver, expressly elected to take back the drafts, and demanded their return. The receiver refused to give them up. It was then, and then only, that the defendant brought its action in attachment, in which the receiver intervened. I do not intend to reflect in the slightest degree upon the receiver, who is simply seeking to protect the assets in his hands. I refer to his actions only as they may affect the rights of the defendant. I admit that, upon his refusal to surrender the notes, the defendant should have made a motion in the cause before the court appointing the receiver. I believe it is conceded that if such motion had been made in apt time, it would have been the duty of the court to have ordered the surrender of the drafts. But who has been hurt

by the defendant's failure to make such motion? No one (242) except the defendant. No other creditor has been prejudiced or misled. If the defendant is now given the drafts or every dollar of their proceeds, it will get no more than it would have gotten in the first instance. Why not let it have them? Simply because it elected to treat them as the property of the bank by bringing a suit, which we say it had no right to bring. Why hold it to an election with one hand and with the other wrench from it every benefit of its election? It has already elected to take back the drafts by vainly demanding them from the receiver. But we say that it reëlected when it brought its action. Why not let it elect a third time? This is a court of equity, dealing with equitable principles; the fund is intact, and all necessary parties are before the court.

I think that as the court has restrained the defendant from pursuing the remedy it elected, it thereby remitted the defendant to its original right of election. In 6 Enc. Pl. and Pr., 366(c), it is said that "If the suitor has in his first action mistaken his remedy and adopted a mode of redress incompatible with the facts of his case, and is defeated on that ground, he is still free to elect and proceed anew." Again, on the same page, the rule is thus laid down: "V. The power to choose between conflicting remedies is substantially coextensive with the right to prosecute or defend an action. Logical and legal consistency would seem to require that the right to litigate and the power to elect should stand on the same footing, the one coördinate with the other."

In the case at bar the defendant has not sought to obtain its money from different funds, but has persistently followed the identical money in Burgan's hands, either indirectly through the surrender of the drafts or directly by attachment. Therefore, the inconsistent rights between which it was required to elect were rather in the nature of remedies. All that it wanted was the money in Burgan's hands. "Only this, and nothing more." Morever, it would seem that the defense of an inconsistent election, being in the nature of estoppel, (243) should be pleaded to be effective.

CLARK, C. J., concurs in the dissenting opinion.

IN RE ANDERSON.

(Filed 24 March, 1903.)

1. Insanity—Inquisition of Lunacy—Revised Statutes, Ch. 57—The Code, Secs. 1670, 1671.

Where, in an inquisition of lunacy, the jury finds the defendant to be of unsound mind and incompetent for want of understanding to manage his own affairs, but not an idiot or lunatic, the court should appoint a guardian.

2. Jurisdiction—Superior Court—Clerks of Courts—Appeal—Laws 1887, Ch. 276—Actions—Special Proceedings.

Whenever any civil action or special proceeding begun before a clerk of the Superior Court shall be for any ground whatever sent to the Superior Court, the said court shall have jurisdiction, although the proceedings originally had before the clerk were a nullity.

A SPECIAL proceeding for the appointment of a guardian of J. T. Anderson, heard by *Bryan, J.*, at September Term, 1902, of PENDER. From a judgment appointing a guardian, J. T. Anderson, through his attorneys, appealed.

Bruce Williams and John D. Kerr for the ward, appellant.
Stevens, Beasley & Weeks for the guardian.

MONTGOMERY, J. This proceeding was originally commenced before the clerk of the Superior Court of Pender County, for the purpose of having a guardian appointed for J. T. Anderson, under the provisions of section 1670 of The Code. The affidavits on which the proceeding was based did not contain matter in which it was averred that Anderson was an idiot, or an inebriate, or a lunatic, but it was affirmed (244) substantially that he was "incompetent, for want of understanding, to manage his own affairs." A most serious matter, both to the public and to the individual person, was involved in the question presented to the clerk, and he should have seen that every requirement of the statute had been strictly complied with. That officer, however, without notice to Anderson and without a jury of twelve men who should inquire into the state of Anderson, as the statute plainly requires, made an adjudication himself of the matter, and appointed the guardian. A motion was afterward made to have that appointment revoked for the reasons above mentioned, which motion the clerk declined to allow. Upon the hearing of the appeal of Anderson from the ruling of the clerk, his Honor ordered and adjudged that "this action be and is hereby remanded to the clerk to convene an in-

quisition of idiocy or lunacy upon notice, as is required by law, upon notice of ten days to J. T. Anderson." Under that order a jury of inquisition was summoned and convened, and two issues were submitted to them: first, "Is J. T. Anderson an idiot or lunatic, or either?" and, second, "Is J. T. Anderson of unsound mind, and incompetent for want of understanding to manage his own affairs?" The jury answered the first issue "No" and the second issue "Yes." An appeal was taken by Anderson to the Superior Court from the order of the clerk appointing a guardian for Anderson upon the verdict of the jury, and at the next term of the Superior Court the judgment of the clerk was in all respects confirmed and the appeal dismissed.

As we said in the beginning of this opinion, the matter involved in this appeal is a most serious one. The question is, Can the custody of the body and property of one who is declared by a jury of inquisition to be incompetent for want of understanding to manage his own affairs be committed to a guardian? If such be the law, then (245) it is plain that abuses may grow up under its practice which will be almost certain, in many cases, to produce most harmful and pernicious consequences. It may appear wise and proper under general principles to restrain drunkards and spendthrifts from wasting their property, but when in doing so we confer upon juries the power to judge of the grade, the quality of the mind, the understanding, we are in peril of subjecting to restraint persons whose free agency ought not to be restrained by law. But the Legislature has the right to enact such a law, and if such a law has been enacted it is our simple duty to uphold it. Under chapter 57, Revised Statutes (Laws 1784, ch. 228), the county courts were authorized and required to appoint guardians for any idiot or lunatic possessed of property, either real or personal, upon the finding of a jury of idiocy or lunacy; and in the Revised Code the same provision of law was brought forward. In The Code, sec. 1670, other classes of persons than idiots and lunatics are added, for whom guardians may be appointed. Those added classes are "inebriates and those who are incompetent for want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause." The additions to Revised Code were made originally in the Code of Civil Procedure, and brought forward in The Code. The law, The Code, sec. 1670, now reads: "Any person in behalf of one who is deemed an idiot, inebriate or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks or other cause, may file a petition before the clerk of the Superior Court of the county where such supposed idiot, inebriate, or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order,

(246) upon notice to the supposed idiot, inebriate, or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate, or lunatic. The juries shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, or lunatic by inquisition of a jury, as in case of orphans."

The above section of The Code clearly makes four classes of persons for whom guardians may be appointed, namely, idiots, lunatics, inebriates, and those who are incompetent from want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause.

An idiot or natural fool is one that has no understanding from his nativity. 1 Blk. Com., 302; Chitty on Contracts, 149.

A lunatic is one who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of the law recover his reason. 1 Blk. Com., 304; 16 A. & E., p. 562.

An inebriate is defined in section 1671 of The Code to be a "person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate." There is a proviso that the habit of indulging in such use of strong drink shall have been, at the time of the inquisition, of at least one year's standing.

The fourth class of persons mentioned in section 1670 of The Code must really be embraced under the head of lunatics, that is, their want of understanding in order to render them incompetent to manage their own affairs must be complete. As in lunacy, there must be a total privation of understanding; mere weakness of mind will not be
(247) sufficient to place a person in the list of those described in the fourth class mentioned in the statute. And in this view, after the classification of persons for whom a guardian may be appointed under section 1670 of The Code has been made, the fourth class is no more particularly mentioned. The jury is to inquire into the state of "such idiot, inebriate, or lunatic." The clerk shall appoint a guardian for any person so found to be "an idiot, inebriate, or lunatic." Our attention was called on the argument to *Armstrong v. Short,* 8 N. C., 11, in which it was said: "An inquisition should therefore be regarded as a nullity which barely found that the party was of such weakness of mind as to be incapable of managing his own affairs." But that decision was made under the act of 1784 above referred to.

Exception is made to the verdict of the jury on account of an alleged inconsistency between the findings on the first and second issues. The jury found that Anderson was not an idiot or lunatic, but that he was of unsound mind and incompetent from want of understanding to manage his own affairs. The last finding is sufficient to meet the language and the spirit of the statute. The conflict is more apparent than real, and the confusion of issues grew out of the difficulty of interpreting the statute.

The exception to the jurisdiction of the Superior Court cannot be sustained. Although the proceedings originally had before the clerk were a nullity for the reasons already pointed out, yet when the matter got into the Superior Court by appeal, that court then acquired jurisdiction. *Roseman v. Roseman,* 127 N. C., 494; *Ledbetter v. Pinner,* 120 N. C., 455; *Faison v. Williams,* 121 N. C., 152.

Affirmed.

Cited: Parker v. Taylor, 133 N. C., 104; *Ewbank v. Turner,* 134 N. C., 80; *Oldham v. Rieger,* 145 N. C., 258; *Batts v. Pridgen,* 147 N. C., 135; *In re Denny,* 150 N. C., 423; *Unitype v. Ashcraft,* 155 N. C., 71; *McLaurin v. McIntyre,* 167 N. C., 356; *Ryder v. Oates,* 173 N. C., 573; *Jerome v. Setzer,* 175 N. C., 398; *Holmes v. Bullock,* 178 N. C., 379; *Hargrove v. Cox,* 180 N. C., 365.

(248)

CAPE FEAR AND NORTHERN RAILROAD COMPANY v. STEWART.

(Filed 24 March, 1903.)

1. Appeal—Case on Appeal—Transcript—Record.

It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal.

2. Appeal—Exceptions and Objections—Judgments.

An appeal is itself a sufficient exception to the judgment.

3. Appeal—Clerks of Courts—Superior Court—Jurisdiction—Eminent Domain—The Code, Secs. 1946, 252—Laws 1887, Ch. 276.

Laws 1887, ch. 276, does not authorize an appeal from a clerk of the Superior Court to a judge at chambers, in a proceeding to condemn land for railroad purposes, on exceptions to report of commissioners.

ACTION by the Cape Fear and Northern Railroad Company against J. F. P. Stewart and others, heard by *Robinson, J.,* at chambers, at

Goldsboro, N. C., 25 November, 1902. From a judgment for the plaintiff, the defendant appealed.

H. E. Norris and McLean & Clifford for plaintiff.
Stewart & Godwin and T. M. Argo for defendants.

MONTGOMERY J. This is a proceeding begun before the clerk of the Superior Court of Harnett for the condemnation of the defendant's land to the use of the plaintiff for railroad purposes. The commissioners appointed by the clerk acted under their appointment and made a report of their proceedings. Within twenty days thereafter the defendant filed exceptions to the report of the commissioners. One of the exceptions was to the inadequacy of the compensation for the land taken. The other exceptions we do not notice, for they seem to be dependent upon the proper construction of the pleadings. The clerk sustained the exceptions and set aside and rejected the report. The plaintiff appealed to the judge of the Sixth Judicial District in chambers, and the clerk sent up the appeal accordingly. The defendant excepted, insisting that (249) the appeal should be taken to the court in term. Upon the hearing of the matter in chambers, the exceptions to the report of the commissioners were overruled and the report in all respects confirmed, and the defendant appealed to this Court. The plaintiff insists that the appeal must be dismissed for the reason that there is no statement of the case on appeal, nor were any exceptions filed to his Honor's ruling. It is not necessary to make out a statement of the case on appeal where the record proper, that is, the pleadings, the verdict, and the judgment, show the grounds of error (*Clark v. Peebles*, 120 N. C., 31), and an appeal itself is an exception to the judgment.

It appears from the record proper that the judge in chambers had no jurisdiction in the premises. In proceedings like the present, upon the filing of exceptions to the report and the determination of the same by the court, either party to the proceeding may appeal to the court at term, and thence, after judgment, to the Supreme Court. The Code, sec. 1946.

Laws 1887, ch. 276, was not intended to abridge the jurisdiction of the Superior Courts, in term, nor to confer on the judge in chambers any additional powers. That act refers to civil actions and special proceedings begun before a clerk of the Superior Court and *for any ground whatever* sent to the Superior Court before the judge, that is, in term. The power of the judge under that act "to proceed to hear and determine all matters in controversy in such action" clearly shows that the act had reference to jury trials on issues of fact, as well as other matters. *Roseman v. Roseman*, 127 N. C., 494. That act (1887, ch. 276) was not intended to give a judge at chambers any greater juris-

diction in appeals from the clerk than to pass upon an issue of law or legal inference. The Code, sec. 252.

The matter before us must therefore be remanded to the Superior Court of Harnett County (the clerk), where the parties may take such steps in accordance with the law as they may deem proper. (250)

Remanded.

Cited: Duckworth v. Duckworth, 144 N. C., 621; *Wallace v. Salisbury,* 147 N. C., 60; *Batts v. Pridgen, ib.,* 135; *Fountain Co. v. Schell,* 160 N. C., 531.

PREVATT v. HARRELSON.

(Filed 24 March, 1903.)

1. Adverse Possession—Evidence—Ejectment—The Code, Secs. 139, 140, 147.

In ejectment, the evidence that the grantor of the plaintiff had raked and hauled straw off the land in question, and that the father of the plaintiff had farmed on an acre or two thereon, is insufficient to show possession.

2. Adverse Possession—Evidence—Sheriff's Deeds—Ejectment—The Code, Secs. 139, 140, 147.

A deed of a sheriff to the grantor of a plaintiff in ejectment is no evidence of possession.

3. New Trial—Demurrer—Evidence—Laws 1897, Ch. 109—Laws 1899, Ch. 131—Laws 1901, Ch. 594—Nonsuit.

Under Laws 1897, ch. 109, as amended, a new trial will be ordered when a motion to nonsuit has been improperly denied.

4. Nonsuit—Judgments—The Code, Secs. 142, 166—Laws 1897, Ch. 109—Laws 1899, Ch. 131—Laws 1901, Ch. 594.

When a nonsuit is granted under Laws 1897, ch. 109, as amended, the plaintiff may bring a new action within one year.

ACTION by James Prevatt against Jackson Harrelson and others, heard by *Robinson, J.,* and a jury, at Fall Term, 1902, of COLUMBUS. From a judgment for the plaintiff, the defendants appealed.

C. C. Lyon for plaintiff.
D. J. Lewis for defendants.

CLARK, C. J. This was an action of ejectment. At the close (251) of the plaintiff's evidence the defendant demurred and moved to nonsuit plaintiff under the statute, and excepted to the refusal of the

motion. As the defendant subsequently introduced evidence, this exception is waived by the terms of the statute. Chapter 594, Laws 1901.

At the close of all the evidence the defendant again demurred and moved to nonsuit under chapter 109, Laws 1897, as amended by above chapter 594, Laws 1901, and excepted to the refusal. In *Mobley v. Griffin,* 104 N. C., at p. 115, it is laid down that the plaintiff must prove his right to recover in an action of ejectment in one of six ways, as follows:

1. He may offer a connected chain of title, or a grant from the State, to himself.

2. Or, without showing any grant from the State, he may show open, notorious, continuous, adverse, and unequivocal possession under color of title in himself and those under whom he claims for twenty-one years.

3. He may show title out of the State by a grant to a stranger, and then (unconnected with such grant) open, notorious, continuous, and adverse possession under color of title in himself and those under whom he claims for seven years.

4. He may show as against the State possession under known and visible boundaries for thirty years or against individuals similar possession for twenty-one years. The Code, secs. 139 and 140.

5. He can prove title by estoppel by showing that the defendant was his tenant, or derived possession from his tenant. The Code, sec. 147.

6. He may connect defendant with a common source of title and show in himself a better title from that source.

The plaintiff failed to show title in himself in either of these ways. The only testimony as to acts of possession by plaintiff or those under whom he claims was that an agent of plaintiff's grantor had raked and hauled straw off the land one or two years, and that in 1881 plaintiff's father had farmed an acre or two of the land in controversy. This
(252) was insufficient. *Hamilton v. Icard,* 114 N. C., 532; *Shaffer v. Gaynor,* 117 N. C., 15; *McLean v. Smith,* 106 N. C., 172.

The plaintiff claimed under a deed executed to him by John Prevatt in 1894. The court instructed the jury that the sheriff's deed to plaintiff's grantor, John Prevatt, in 1856, was some evidence of adverse possession in those under whom plaintiff claims. This was error, for there was no evidence of possession thereunder beyond that above stated, and there is no presumption of law that the purchaser took possession. It was also error to refuse the motion to nonsuit plaintiff under the statute.

In refusing the motion to nonsuit there was error for which, under the uniform practice of this Court, there must be a new trial. On such new trial, if the plaintiff can "mend his lick" by additional and sufficient evidence, well and good. He has not lost the land. If he cannot offer

additional evidence, this, though a new trial in form, will be virtually a finality against him.

As the effect of chapter 109, Laws 1897, as amended by chapter 131, Laws 1899, and chapter 594, Laws 1901, is often presented, it may be well to repeat what we have said in *Means v. R. R.*, 126 N. C., at p. 129 (which was cited and approved in *Parlier v. R. R.*, 129 N. C., 262): "The rule stands now just as it did before the passage of chapter 109, Laws 1897, and the amendment of 1899, except that under this legislation it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss, or not; while, before these acts, it was discretionary with the court whether it would allow the defendant to introduce evidence after resting his case and making the motion." This is the sole change made by the statute, and that change cannot affect the settled practice that when a motion to nonsuit (or a demurrer to evidence) is erroneously refused, a new trial has always been ordered. *S. v. Adams*, 115 N. C., at p. 784; *S. v. Rhodes*, 112 (253) N. C., at p. 858, are exactly in point, besides numerous cases in which it is taken as settled practice. The verdict and judgment being set aside, a trial *de novo* is necessary.

Still less does the statute affect the rights of the plaintiff against whom a nonsuit is ordered, for the statute was directed solely to the enlargement of the rights of the defendant, who formerly was cut off from introducing evidence in his defense after the overruling of his demurrer to the evidence, unless so allowed in the discretion of the court. *S. v. Adams*, 115 N. C., 775; *S. v. Hagan*, 131 N. C., 803. By the statute this is made discretionary with the defendant, who, in addition, if his exception at the close of all the evidence is overruled, can have that exception reviewed on appeal, notwithstanding the verdict of the jury is against him.

As to the plaintiff, from time immemorial he has had the right to take a nonsuit at any time before verdict. The statute was not intended to deprive him of this right by a motion at the close of the evidence. When a motion to nonsuit under the statute is made, the plaintiff's only mode of ascertaining that the court is of opinion that his evidence is insufficient is by the judgment allowing the motion. The statute authorizes an involuntary nonsuit, a judgment "as of nonsuit," but it is none the less a nonsuit in all its features. An action can only be dismissed for want of jurisdiction or failure of complaint to state a cause of action (Clark's Code, 3 Ed., p. 923), but never for want of evidence. In the latter case, as in all other cases of nonsuit, he can bring a new action within one year thereafter, if so advised. The Code, secs. 166 and 142; *Keener v. Goodson*, 89 N. C., 273. The Legislature terms it a "judgment as in case of nonsuit," sec. 1, ch. 109, Laws 1897, and this language is not

(254) changed by either of the amendatory acts. A new action may be brought in all cases of nonsuit. *Meekins v. R. R.,* 131 N. C., 1. An action dismissed in the nature of a nonsuit "does not deprive the plaintiff of bringing a new suit for the same cause of action." *Skillington v. Allison,* 9 N. C., 347; *Long v. Orrell,* 35 N. C., 123; *Freshwater v. Baker,* 52 N. C., 255; *Straus v. Beardsley,* 79 N. C., 59; *Wharton v. Comrs.,* 82 N. C., 11; *Halcombe v. Comrs.,* 89 N. C., 346. In this last case it is said: "The distinction is between non-action, a refusal on account of deficient necessary evidence, and positive action, a refusal founded upon evidence sufficient to determine the question of right and a decision upon the merits."

New trial.

Cited: Evans v. Alridge, 133 N. C., 380; *Clegg v. R. R.,* 134 N. C., 756; *Hood v. Tel. Co.,* 135 N. C., 627; *Lassiter v. R. R.,* 137 N. C., 151; *Hollingsworth v. Skelding,* 142 N. C., 252, 5; *Tussey v. Owen,* 147 N. C., 338; *Lumber Co. v. Harrison,* 148 N. C., 334; *S. v. Killian,* 173 N. C., 794; *Moore v. Miller,* 179 N. C., 397.

WILLOUGHBY v. STEVENS.

(Filed 24 March, 1903.)

1. Demurrer—Judgment—Estoppel—Ejectment.

Where a demurrer goes to the merits of an action (here ejectment), judgment sustaining it is conclusive upon the parties, and will bar another action for the same cause.

2. Judgment—Demurrer—Amendment—Ejectment.

Where a final judgment on the merits of a case is rendered on demurrer, the fact that the trial court permits the plaintiff to amend his complaint does not affect the conclusiveness of the judgment.

ACTION by Emory Willoughby against M. A. Stevens, heard by *Robinson, J.,* and a jury, at May Term, 1902, of ROBESON. From a judgment for the defendant, the plaintiff appealed.

R. E. Lee for plaintiff.
McIntyre & Lawrence and McLean & McLean for defendant.

(255) CONNOR, J. This was an action of ejectment, plaintiff claiming title to a tract of land, a description of which is set out

in the complaint by metes and bounds, and by way of further description he says: "The said land being a part of a tract containing 640 acres granted by patent to Abram Barnes and surveyed by Robert Edwards, 5 November, 1774, and by the said Barnes conveyed by deed to William Hawthorne, then from said Hawthorne to Gilbert Brumble, and from said Brumble to Joel Britt, Sr., and from Joel Britt, Sr., to John Britt."

The defendant denied that the plaintiff was the owner of the land, and for further answer alleged that he was the owner, setting out his claim of title, by which it appeared that he claimed under a deed executed by Joel Britt, Sr., and wife to Enoch Rogers, and by *mesne* conveyances to himself. For further defense he alleges that the plaintiff claims title to said land under the deed of John McN. Britt, dated 28 November, 1899, duly recorded; that the said John McN. Britt instituted on 9 October, 1880, a suit in the Superior Court of Robeson County against the said Joel Britt, Sr., and Enoch Rogers, in which he claimed that he was the owner in fee of the land described in the complaint, claiming title thereto as the only heir at law of John Britt, deceased, to whom, as he alleged, Joel Britt, Sr., conveyed said land by deed dated 19 February, 1862, being the same conveyances referred to in article 1 of the complaint herein, and thereafter in said action, the defendants Joel Britt and Enoch Rogers joined issue with the said John McN. Britt upon demurrer to the complaint filed, a copy of said complaint and demurrer being attached to the answer. That upon the issue joined as aforesaid the following judgment was rendered in said Superior Court, at Spring Term, 1882: "This action having been brought to trial upon the complaint and demurrer thereto, before his Honor, W. M. Shipp, judge presiding, at Spring Term, 1882, of Robeson, and it appearing to the court that the defendants are entitled to judgment upon the (256) demurrer, it is now, on motion of French & Norment, counsel for defendants, adjudged that the said demurrer be sustained and the defendants have judgment for costs. Leave to plaintiffs to amend complaint."

That both plaintiff and defendant in this action are privies to plaintiff and defendants in said former action and are estopped by the judgment therein.

His Honor was of the opinion that the plaintiff was estopped by said judgment, and rendered judgment for the defendant. Plaintiff appealed.

The only question presented for our consideration is his Honor's judgment in regard to the estoppel. It is not denied that the land in controversy is the same land which was in controversy in the case of

John McN. Britt against Joel Britt, or that the plaintiff therein claimed as the heir at law of John Britt, who claimed under the deed from Joel Britt, Sr., or that Joel Britt, Sr., is the identical person under whom the defendant claims *in this* title.

The plaintiff contends that the judgment rendered by Judge Shipp was not such a judgment as works an estoppel; that it did not pass upon and determine the merits of the controversy. This Court has held in *Johnson v. Pate,* 90 N. C., 334, that a judgment upon a demurrer may be a judgment upon the merits, and its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the jury. The plaintiff in the former action set out in full his title, making the deed under which his ancestor claimed a part of his complaint, thus writing into his complaint the deed. The defendants by their demurrer admitted every fact (257) set forth in the complaint and demurred thereto upon the ground that it appeared from the facts of the complaint, (1) that the deed from Joel Britt, Sr., to John Britt conveyed only a life estate; (2) that the said John Britt died before the commencement of the action. The pleadings thus presented to the court every fact material to and upon which the plaintiff relied in that action for his recovery, and upon such facts the court declared that as a matter of law the plaintiff was not the owner of the land and could not recover.

We think this is a judgment upon the merits. It is true that the judge gave the plaintiff leave to amend his complaint, but we do not think that this in any manner affected the force and effect of the judgment. It is evident that the plaintiff had set forth his title and that he could not by amendment change or in any manner affect his status in respect to the land. We think that the language used by *Smith, C. J.,* in *Johnson v. Pate, supra,* is directly in point in this case. The Court says: "Recurring to the complaint in the former case, it asserts particularly a title vesting in the plaintiff in these lands and a consequent right to have possession. The averment the demurrer admits, and the effect is the same as if they had been controverted and found upon issues passed upon by a jury."

This position is fully sustained by the authorities cited in the plaintiff's brief. In 6 Enc. Pl. and Pr., 369, a distinction is pointed out, and it is said: "When a demurrer goes to the merits of the action, judgment sustaining it is conclusive upon the parties, and will bar another action for the same cause; but when it goes only to matters of form it does not have this effect." See, also, Black on Judgments, sec. 707; Freeman on Judgments, sec. 267; Bigelow on Estoppel, p. 33.

We do not think that these authorities conflict with those cited in the

defendant's brief. The cases therein cited are distinguishable from the principles upon which the judgment in this action is rendered.

We think his Honor correctly instructed the jury, and the (258) judgment rendered by him must be

Affirmed.

Cited: School Directors v. Asheville, 137 N. C., 505; *Tussey v. Owen,* 147 N. C., 338; *Marsh v. R. R.,* 151 N. C., 162; *Bank v. Dew* 175 N. C., 82.

PASTERFIELD v. SAWYER.

(Filed 31 March, 1903.)

1. Claim and Delivery—Replevin—Deeds—Trover.

Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it.

2. Justices of the Peace—Jurisdiction—Real Property—Claim and Delivery—The Code, Secs. 836, 837, 838.

In an action for the recovery of a title deed, an allegation in the answer that the title to real property is involved, without any proof thereof, does not oust the jurisdiction of a justice of the peace.

ACTION by Annie D. Pasterfield and husband against J. H. Sawyer, heard by *Jones, J.,* at May Term, 1902, of PASQUOTANK. From a judgment of nonsuit the plaintiffs appealed.

E. F. Aydlett for plaintiffs.
George W. Ward and William Bond for defendant.

WALKER, J. This action was brought before a justice of the peace for the recovery of a deed for real estate. The justice gave judgment for the plaintiffs, and the defendant appealed to the Superior Court.

It appears from the case on appeal that in the lower court "the defendant moved to dismiss the action, and stated that he claimed to hold to the deed in controversy as an escrow, and that the conditions upon which it was held had not been complied with on the part of the plaintiffs. The court, being of the opinion that the justice of the (259) peace had no jurisdiction of the action, intimated that the plaintiffs could not recover in this action, upon which intimation the plaintiffs submitted to a nonsuit and appealed."

The plaintiffs alleged in their complaint that the deed had been executed by M. W. Buffkin and wife to the *feme* plaintiff and was delivered by them to her husband, who deposited it with Mr. Sawyer, the defendant, for safe-keeping, and that the said deed is the property of the *feme* plaintiff and she is entitled to the immediate possession thereof, and has demanded the possession of the defendant, who refused to deliver the deed to her. These allegations are denied by the defendant in his answer.

The general rule is that replevin will lie for the recovery of title deeds, "but neither the common-law action nor the provisional remedy of claim and delivery can be maintained for the unlawful taking or the wrongful detention of a title deed when there is a dispute about its delivery and the controversy involves the determination of the title to the land conveyed by it." *Hooker v. Latham,* 118 N. C., 179.

The court below did not dismiss the action because the action of replevin or an action for the possession with the ancillary remedy of claim and delivery would not lie for the recovery of the deed, but because the justice of the peace did not have jurisdiction. Presumably, the ground for the decision was that, as the delivery of the deed was disputed in one way or another, the title to land was in controversy and the decision of that question would of necessity determine to whom the title belonged. This may be granted, and still we think that the court proceeded irregularly. It is provided by The Code as follows:

"Sec. 836. In every action brought in a court of a justice of the peace where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth (260) in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice.

"Sec. 837. If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for cost.

"Sec. 838. When an action before a justice is dismissed upon answer and proof by the defendant that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the Superior Court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court."

It will be seen that the defendant is required not only to set forth the matter showing that such title will come in question, but it must appear at the trial that such is the fact, and when the action is once dismissed upon an answer *and proof* by the defendant, for that reason, the defendant will not be permitted to question the jurisdiction of the Su-

perior Court, if an action for the same cause is afterwards brought in that court. There must be something besides the mere answer, for, if this is all that is required, any defendant can put an end to the jurisdiction of the court of his own will. The law requires, therefore, in addition to the answer, some proof in order that it may appear in a proper way to the court that there is a genuine controversy concerning the title to real estate.

It seems perfectly clear, therefore, that as there must be not only an answer, but that proof must be offered by the defendant, or it must in some way appear by proof in the case that there is a controversy concerning the title to real estate, the court erred in intimating at that stage of the case that there was no jurisdiction. His ex- (261) pression of opinion was at least premature. For the reasons stated, the nonsuit is set aside and a new trial awarded.

PER CURIAM. New trial.

Cited: *S. c.*, 133 N. C., 42; *Bridges v. Ormond*, 148 N. C., 377; *Walter v. Earnhardt*, 171 N. C., 732; *Jerome v. Setzer*, 175 N. C., 393.

BURNETT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 31 March, 1903.)

Negligence—Contributory Negligence—Fires—Demurrer—Pleadings.

Where a person is injured, as here, in attempting to extinguish a fire negligently set to her premises by a railroad company, the company is liable.

ACTION by Alexander Burnett, administrator, against the Atlantic Coast Line Railway Company, heard by *O. H. Allen, J.*, at October Term, 1902, of CUMBERLAND. From the sustaining of a demurrer to the complaint, the plaintiff appealed.

Thomas H. Sutton for plaintiff.
George M. Rose for defendant.

MONTGOMERY, J. This action was heard on the complaint and the demurrer thereto. The plaintiff alleged that his intestate had been fatally burned in her effort to extinguish a fire set upon the premises through the negligence of the defendant. In the third allegation of the complaint the plaintiff, after describing the nature of the fire and

the threatened danger to her home and property, declared that she attempted to put out the fire, as it was her duty to do. The demurrer, of course, admitted that under the facts set out in the complaint it was her duty to attempt the extinguishment of the fire. That being so, in no sense could it be said that the plaintiff could be guilty of contributory negligence. To do what she ought to have done under a (262) given state of facts cannot be anything but due care on her part.

We can very readily conceive of conditions under which the law would impose a duty upon one whose property was in danger of being destroyed by a fire, carelessly set by another, to attempt its extinguishment; and this case is one where the defendant, by the demurrer, affords an example. The demurrer cannot be held to be one to an erroneous conclusion of law, and therefore without the effect of a demurrer upon the facts.

The demurrer ought not to have been sustained.

Error.

Cited: *Pegram v. R. R.*, 139 N. C., 307; *McKay v. R. R.*, 160 N. C., 262.

AUSTIN v. AUSTIN.

(Filed 31 March, 1903.)

Estoppel—Former Adjudication—Judgments—Executors and Administrators—Res Judicata.

A proceeding by an administrator to sell land for assets to pay debts is not conclusive against the heirs at law as to the validity of the alleged debts.

ACTION by B. D. Austin, administrator of W. H. Austin, against J. K. P. Austin and others, heard by *McNeill, J.*, and a jury, at March Term, 1902, of UNION. From a judgment for the plaintiff, the defendant appealed.

Redwine & Stack for plaintiff.

Adams & Jerome for defendants.

CONNOR, J. This was a special proceeding instituted by the plaintiff administrator against the defendants, distributees of his intestate, for the purpose of having his final account audited and approved and (263) a final settlement of the estate of his intestate. Upon a return

of the summons, a portion of the defendants filed their answers, in which they allege that certain items of credit in the account, for which the plaintiff claimed credit, represented cash retained by him upon notes alleged to be due to himself against his intestate, for the security of which he claimed to hold mortgages upon the real estate of his intestate; that the said mortgages were invalid and void, without any consideration, and they demand that said credits be not allowed the plaintiff in his final account.

The plaintiff filed a reply to the answer denying the allegations in regard to the said items of credit, and by way of further reply alleged that "there was a special proceeding instituted in the said county and State on 15 February, 1897, for the purpose of obtaining an order to sell the land of the deceased, W. H. Austin, for the purpose of creating assets to pay the debts of the said deceased; that in the petition filed in said proceeding it was set forth that there were three mortgages on said land, it being the land covered by the mortgages in dispute or controversy before the court; that said mortgages or the notes secured thereby amounted to about $700, and the mortgages set out in the answer as being void are two of the mortgages referred to in the petition in said proceeding, as hereinbefore referred to; that in said special proceeding the defendants in this cause were the defendants in that proceeding and were legally made parties before the court; that the defendants contending in this cause, except the minor defendants, filed no answer, and the minor defendants, through and by their guardian *ad litem,* Iredell Hilliard, an attorney of this court, filed an answer admitting the allegations therein made; that the summons, petition, answer, orders and decrees filed in the special proceeding hereinbefore referred to are on file in the office of the clerk of this court, and are hereby (264) referred to and prayed to be taken as a part of the replication." The plaintiff pleads said record and proceeding as an estoppel, and says that the defendants should not again bring into litigation the validity of said mortgages or the notes secured thereby.

Upon the pleadings, the proceedings having been duly transferred to the Superior Court, issues were submitted to the jury upon and in respect to the matters set up by way of estoppel and were answered in the affirmative, and judgment was rendered that the defendants are estopped to set up the matters and things alleged in their answer in respect to the validity of said notes and mortgages given to secure the same, from which the defendants appealed.

Allegation 4 of the petition filed by the plaintiff administrator against the defendants, heirs at law of his intestate, for the purpose of obtaining license to sell the real estate to make assets, is in the following language: "That the personal property of the said W. H. Austin is of

small value, and will not sell for more than $100 or $150, and will not be nearly sufficient to pay the debts of the intestate, and it will be, and is now, necessary to sell the real estate above described to make assets to pay the said debts, there being three mortgage debts on the land above described amounting to more than $700, in addition to other debts not secured by mortgages." The two items referred to in the answer represent two notes and mortgages aggregating $657.07.

We think that there was error in the court in holding that, upon the record and findings by the jury, the defendants were estopped to deny the validity of the notes and mortgages claimed by the plaintiff against his intestate. *Latta v. Russ,* 53 N. C., 111, would seem to be decisive of the question. There, the contention was made, as it is here, that the decree by which the land was sold, and to which the devisees were parties, concluded them as to the amount of the debts, etc. The
(265) Court, *Pearson, C. J.,* says: "We do not concur with his Honor in the view taken by him of the question reserved in respect to the effect of the decree giving the administratrix license to sell the lands. The decree was an adjudication that it was necessary to sell, and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt, as against or in favor of creditors, or as against or in favor of heirs." *Finger v. Finger,* 64 N. C., 183. It will be observed that in *Latta v. Russ* it is stated that "the administratrix filed her petition setting forth that she had exhausted the personal estate and that there remained a certain amount of debts (stating them) unpaid," etc. In this case the averment is that the "debts are three mortgage debts on the land above described, amounting to more than $700, in addition to other debts not secured by mortgage."

It would therefore seem that the allegation is much more definite in the first than the present case. In this case no answer was filed by the adult defendants. The infants answered by their guardian *ad litem,* admitting the allegations. The plaintiff contends that the proceeding in *Latta v. Russ, supra,* was conducted under the statute in force prior to 1868, the date at which our judicial system was changed. That case is an authority which should be followed by us. Revised Code, ch. 46, sec. 45 *et seq.,* prescribes the procedure by which the personal representative may obtain license to sell real estate to make assets. Among other things, he is required in the petition to set forth "the amount of the debts as nearly as they can be ascertained." The same requirement is made by sec. 1437 of The Code. The proceedings subsequent to the filing of the petition are substantially the same prior to and since 1868. Jurisdiction is vested in different courts, but the same defenses are open to the heirs under both systems of procedure. The Court of Pleas
(266) and Quarter Sessions had no equitable powers, except when ex-

pressly conferred by statute (*Thompson v. Cox,* 53 N. C., 311); neither has the clerk "acting as and for the court" any jurisdiction to administer equitable relief, but defenses may be interposed raising issues, the ultimate determination of which in the Superior Court, upon the cause being transferred, will involve such rights and remedies. *Wood v. Skinner,* 79 N. C., 92.

In *McBryde v. Patterson,* 73 N. C., 478, *Pearson, C. J.,* discussing the question, says: "But the case was properly instituted before him (the clerk) in the first instance by the petition for partition, and the question of legal and equitable grounds of relief raised by the subsequent pleadings, which questions he had no power to dispose of, did not authorize a judgment dismissing the case. *Helms v. Austin,* 116 N. C., 751; *Vance v. Vance,* 118 N. C., 864; *Roseman v. Roseman,* 127 N. C. 494. While the defendants in the special proceeding might have filed an answer putting in issue the existence of valid debts, and thereby raised issues to be tried by the court in term, we do not think that they were required to do so, or that their failure to do so estopped them from setting up the contention in their answer herein. The only purpose of the proceeding was to ascertain whether it was necessary in the then condition of the estate to sell the real estate for the purpose of making assets to pay debts. The estate was not then in a condition for final settlement. We think that the principle upon which *Tyler v. Capehart,* 125 N. C., 64, is decided is applicable to the facts in this case: "A judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them, but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiffs have joined, but which in fact are neither joined nor embraced in the pleadings"—citing *Williams v.* (267) *Clouse,* 91 N. C., 322; *Gregory v. Hobbs,* 93 N. C., 1; *Jones v. Beaman,* 117 N. C., 259. In the last-mentioned case the Court say: "The judgment can be conclusive only so far as it affects rights presented to the court and passed upon."

We think that the judgment should be reversed and that the Superior Court, in term, should submit appropriate issues, raised by the answer, to the jury. As the cause is now in the court, we think that it should retain jurisdiction and dispose of it. There is

Error.

Cited: Trust Co. v. Stone, 176 N. C., 272; *In re Gorham,* 177 N. C., 276.

EFIRD v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 31 March, 1903.)

Telegraphs—Negligence—Contributory Negligence—Mental Anguish—Messages.

Where the wife delivers to a telegraph company a message for her husband to come home, as "Ira" was sick, but in transmission the name was changed to "Car.," and on receipt of the message the husband requests the agent of the company to ascertain from the relay office whether the message was correct, and was informed that it was correct, the plaintiff husband having a child named Ira and a nephew named Carl, and, thinking that it was his nephew that was sick, did not return home until after receiving a message the next day notifying him of the death of his child, under these facts plaintiff was not guilty of contributory negligence.

ACTION by J. E. Efird against the Western Union Telegraph Company, heard by *Robinson, J.*, and a jury, at October Term, 1902, of UNION.

The following issues were submitted:

1. Was the defendant guilty of negligence in the transmission and delivery of the dispatch, as alleged in the complaint? Answer: (268) "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: "Yes."

3. What damage, if any, has the plaintiff sustained by reason of the negligence of the defendant, as alleged in the complaint? Answer .....

4. Did the plaintiff pay the defendant the sum of 25 cents for the transmission of the telegram set out in the complaint, and is plaintiff entitled to recover the same? Answer: "Yes."

From a judgment for the plaintiff for 25 cents, he appealed.

Adams & Jerome for plaintiff.
F. H. Busbee & Son and Jones & Tillett for defendant.

CLARK, C. J. The plaintiff's wife delivered to the defendant's agent at Monroe, N. C., the following dispatch signed by her and addressed to her husband at Albemarle, N. C.: "Ira very sick. Croup and sore throat. Can you come?"

When delivered to the plaintiff it read: "Car. very sick. Croup and sore throat. Can you come?"

The plaintiff had three children, who were named Ira, Grace, and May. His brother-in-law next door had a son named Carl from whom one of plaintiff's children had contracted scarlet fever the year before,

and he had cautioned his wife against allowing his children to play with Carl, and he understood "Car." to mean Carl. He phoned down to the telegraph office at the depot and asked if the message was correct. A friend of his at the plaintiff's instance (the plaintiff (269) standing by his side), asked the operator to spell the name, and he repeated it over the phone, "Car." He then requested the operator to wire back to Salisbury, where the message had been relayed, and ask if the message was correct. They waited at the phone five or ten minutes, when the operator replied that he had gotten Salisbury and that the message was correct. Being thus satisfied it was not his child, the plaintiff did not go home, but wrote his wife. His wife says she looked for her husband that day in response to the telegram sent early in the morning, and expected him that night, and "the little girl kept asking for him during the night; we told her that we expected him soon; we left his supper on the stove and put in feed for his team, and the next morning she said she wished she could see papa come, and grandma said that maybe he would when daylight came; but instead the Death Angel came." It was in evidence that from Monroe to Albemarle was thirty-six miles, and it is admitted that the incorrectly delivered message was delivered at 10:30 a. m. It was also in evidence that when next day the plaintiff received a message at 11 a. m. announcing his child's death, he set out and reached Monroe with horse and buggy by 7 or 8 p. m. There was also evidence that the child was specially attached to her father, and of his mental suffering by being deprived of the opportunity of seeing her and of possibly securing relief for her, by negligence of the defendant's agents in incorrectly transmitting the message, and in insisting upon its being correct, after being put on notice by the plaintiff's inquiry both of the operator at Albemarle and also at Salisbury.

The plaintiff requested the following instructions:

1. If the jury believe the evidence in this case, they will answer the first issue "Yes" and the second issue "No." (Refused, and the plaintiff excepted.)

2. If the jury find from the evidence that the plaintiff asked (270) the operator if the message was correct, and was assured by the operator of the defendant company at Albemarle that the message was correct, after (he) had made inquiry at the Salisbury office of the defendant company, and that the plaintiff had a nephew at Monroe named Carl, with whom the plaintiff's children associated on a previous visit, and that after such previous visit plaintiff's child had scarlet fever, and that plaintiff had any doubt about the correctness of the message allayed or removed by the assurance of the defendant's operator at Albemarle that the message was correct, then it was not the duty

of the plaintiff to have the message repeated from Monroe, or to ask the defendant to have it done. (Refused, and plaintiff excepted.)

3. If the jury find from the evidence that the plaintiff put the defendant on notice of the doubt he had as to the correctness of the telegram, it appearing upon its face that it was one which gave the defendant notice of its importance, it was the duty of the defendant to have repeated the message without any request of the plaintiff, and the negligence of the defendant in not having the message repeated so as to ascertain its correctness cannot be construed into negligence of the plaintiff, and you will answer the second issue "No." (Refused, and plaintiff excepted.)

These instructions should have been given. On the contrary, the court instructed the jury that if they believed the evidence to answer the first issue "Yes" and the second issue "Yes." There was no foundation on which to submit the issue of contributory negligence to the jury, unless the failure of the plaintiff to have message repeated constituted contributory negligence, and it has been held after full discussion that it was not, and even that an express stipulation on the message blanks that the company will not be liable for delays or mistakes, unless
(271) the message is repeated, is against public policy and invalid. *Brown v. Telegraph Co.,* 111 N. C., 187, 32 Am. St., 293, 17 L. R. A., 648.

There is no controversy as to the negligence of the defendant. The words "Car." and "Ira" are entirely dissimilar. It may be added, indeed, that in the Morse alphabet the dissimilarity is still more striking:

Car being . . ., .—, . . ., . . — — . .

Ira being . ., . . ., .—

(The commas are used here merely to indicate space between the letters.)

The Morse alphabet is referred to in *Borden v. R. R.,* 113 N. C., at p. 580, 37 Am. St., 632. The defendant was put on notice of the urgency of this dispatch by its terms, and further of the importance of its correct delivery by the plaintiff's inquiry of its officials both at Albemarle and Salisbury. The telegraph would fail to serve its purpose if liability for negligence could not be enforced in such a state of facts as is herein shown.

Error.

Cited: Helms v. Tel. Co., 143 N. C., 395; *Young v. Tel. Co.,* 168 N. C., 37.

SHUTE v. DICKSON COTTON MILLS.

(Filed 31 March, 1903.)

Contracts—Construction—Brick—Sales.

A contract for the sale of brick, two-thirds hard and one-third soft, kiln run, does not require the purchaser to take the brick if the proportion is more than one soft for two hard brick, and if the proportion of soft brick delivered is greater he is entitled to an abatement from the price.

ACTION by J. Shute & Sons against the Dickson Cotton Mill, heard by *Robinson, J.*, and a jury, at August Term, 1902, of UNION. From a judgment for the plaintiff, the defendant appealed. (272)

Redwine & Stack for plaintiff.
Adams & Jerome for defendant.

CLARK, C. J. This was an action for the recovery of balance due on sale of brick. The contract was for "two-thirds hard and one-third soft, kiln run," at $4.35 per M, f. o. b. The defense is that more than one-third were soft brick and that a large proportion of them were almost unburnt and hence worthless. There was contradictory evidence on this point. The court charged the jury that "under the contract, if the jury should find from the evidence that the term 'kiln run' meant all brick between the casings, then defendant was bound to take and pay for all between the casings, including bats and soft brick. Defendant was not bound to take soft brick that had never been burned at all." Defendant excepted.

There was error. This instruction gave to the word "kiln run" a meaning that destroyed entirely the other words, "two-thirds hard and one-third soft." Construing the whole sentence, the contract was that the defendant was to take all between casings, *i. e.*, including bats, where a brick was not broken into more than two pieces (on the evidence), but none the less the proportion was not to exceed one soft brick for two hard, and whatever the brick delivered lacked of being as valuable as if they had been in that proportion entitles the defendant to an abatement in the recovery to that extent.

New trial.

(273)

RUSHING v. BIVENS.

(Filed 31 March, 1903.)

Usury—Interest—Payments—The Code, Sec. 3836.

Usury must be paid in money or money's worth before an action can be maintained therefor, and the renewal of the note given for the usury does not amount to payment.

ACTION by B. Rushing against T. E. Bivens, heard by *Robinson, J.*, and a jury, at October Term, 1902, of UNION.

The following issues were submitted:

1. Did the defendant charge the $20 as usury, Answer: "Yes."

2. Has the plaintiff paid the debt due the defendant? Answer: "Yes."

3. What amount, if any, is the plaintiff entitled to recover? Answer: "$40."

From a judgment for the plaintiff, the defendant appealed.

Redwine & Stack for plaintiff.
Adams & Jerome for defendant.

CONNOR, J. This is an action brought before a justice of the peace "for the nonpayment of $60 and interest, and for the relief demanded in the complaint, due by debt for usurious interest charged, taken and received from plaintiff by defendant." The justice rendered judgment for the plaintiff for the sum of $66 based upon the finding of fact that the defendant "charged, took, and received from the plaintiff usury in the amount of $28." The defendant appealed. The jury upon issues submitted in the Superior Court found that the defendant charged the plaintiff $20 usury; that the "plaintiff paid the debt due the defend-
(274) ant," and was entitled to recover $40. Judgment was rendered accordingly, and the defendant appealed.

The plaintiff testified that he made a contract to pay the defendant $85 for a mule and that the defendant was to pay off a lien on his land for $45. He was to have three years to pay the debt and was to pay the defendant $20 for the three years. If he paid all the first year, he was to pay only one-third of the $20. He executed a mortgage on his land to secure $150, payable in three annual installments, with interest from date, and E. C. Griffin took up the notes and mortgages, and he gave Griffin a new note and mortgage 23 January, 1902. He never paid anything on the debt and never paid Griffin anything.

The defendant testified that he sold the plaintiff the mule for $105; that he offered him the mule for $85 cash; plaintiff agreed that the mule was worth $105 and said that he would give that amount if he would also let him have $45 to pay Simpson to take up the mortgage which he (Simpson) held; "that he would give me a mortgage for $150 on his land; charged the additional $20 as the difference between the credit and cash price of the mule, and because mules had gone up between the time we first agreed upon the price and the time we traded."

At the close of the plaintiff's testimony the defendant moved the court to dismiss the action or nonsuit plaintiff. The motion was denied, and defendant excepted. At the conclusion of the defendant's testimony he renewed his motion to dismiss, which was refused, and defendant excepted. The defendant in apt time requested the court to give the following special instructions:

1. If the jury find from the evidence that the plaintiff has never paid E. C. Griffin on the debt due him, and that Griffin simply took up the note and mortgage from plaintiff to defendant, and also took a new note and mortgage for the debt, and that plaintiff (275) never paid defendant anything on the debt, then plaintiff is not entitled to recover, and the jury will answer the third issue "Nothing."

2. If the jury find from the evidence that plaintiff simply agreed to pay defendant the additional $20 for waiting on him for three years before collecting the debt, and that this was only a difference between the cash and credit price of the mule, then plaintiff is not entitled to recover, and the jury will answer the third issue "Nothing." Both prayers were refused, and defendant excepted. The court among other things charged the jury that if they believed the evidence, to answer the second issue "Yes." Defendant excepted and appealed.

We are of the opinion that his Honor was in error in refusing the defendant's motion to nonsuit the plaintiff and in refusing the instructions asked by the defendant. Section 3836 of The Code provides that "The taking, receiving, reserving, or charging a rate of interest greater than is allowed . . . shall be deemed a forfeiture of the entire interest . . . and in case a greater rate of interest has been paid, the person by whom it has been paid . . . may recover in an action, in the nature of an action for debt, twice the amount of interest paid."

We think that before the plaintiff can maintain the action he must pay the usury in money or money's worth. He has done neither. He has paid nothing. It is well settled that the penalty is not incurred by the *charging* of usurious interest; it is by the *taking* the usury that the party incurs the penalty, and that no action lies therefor until it is paid. *Godfrey v. Leigh,* 28 N. C., 390; *Stedman v. Bland,* 26 N. C., 296.

The renewal of the note to Griffin falls very far short of the payment of the original debt. If the plaintiff had given in payment and discharge the note of a third person, it would have been a good payment. *Pritchard v. Meekins,* 98 N. C., 244. The plaintiff may never
(276) pay the renewal notes. The testimony in this case certainly raises no very strong presumption that he will do so at maturity.

We think that the motion of the defendant should have been sustained. For the error in refusing it, he is entitled to a

New trial.

Cited: Riley v. Sears, 154 N. C., 521; *S. v. Davis,* 157 N. C., 653; *Corey v. Hooker,* 171 N. C., 231; *Ragan v. Stephens,* 178 N. C., 101.

HENDLEY v. MCINTYRE.

(Filed 31 March, 1903.)

Bonds—Claim and Delivery—Sureties—Penalties—Replevin.

A surety on a claim and delivery bond is not entitled to have the penalty of the bond reduced because the property has been returned, but he still remains liable for the amount of the penalty for any other default of his principal in the payment of costs and damages.

ACTION by A. E. Hendley against J. P. McIntyre, heard by *Robinson, J.,* and a jury, at October Term, 1902, of ANSON. From a judgment for the plaintiff, McSwain, surety, appealed.

James A. Lockhart for plaintiff.
Bennett & Bennett for surety, M. E. McSwain.

WALKER, J. This action was brought for the recovery of a mule. The plaintiff caused to be instituted, as ancillary to the action, proceedings in claim and delivery. The defendant gave a bond to return the property in the sum of $200 with the appellant, M. E. McSwain, as surety, conditioned as required by law. The plaintiff alleged that the defendant procured the mule by false and fraudulent representations made in order to induce him to exchange the mule for a horse. Issues were submitted to the jury and a verdict was returned in favor of the plaintiff, by which it was found substantially that the plaintiff
(277) was entitled to recover the possession of the mule and damages for detention to the amount of $10, and the value of the mule was fixed at $100. The court rendered judgment that the plaintiff recover the mule and $10 as damages and his costs, and in case the

mule could not be delivered, that the plaintiff recover, in lieu thereof, $100, the value of the mule as assessed by the jury. The court further adjudged that the plaintiff recover of the surety, McSwain, the sum of $200, the penalty of the bond, to be discharged upon the payment of the damages and costs recovered by the plaintiff, the total recovery not to exceed the penalty of the bond. The mule was returned to the plaintiff. The surety excepted to and appealed from the judgment upon the ground that, as the mule had been returned, he was entitled to a credit of $100, the value of the mule, on the bond, leaving only $100 for the satisfaction of the plaintiff's recovery for damages and costs.

Why, in view of the facts of the case, the appellant is entitled to the credit upon the bond which he claims, we cannot see. The several clauses in the condition of the bond are separate and independent, according to all the authorities, and the obligee may recover full damages for each and every item within the limit of the penalty. The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property cannot be had.

The delivery of the property is secured by the obligation of the surety to pay its value, if it is not delivered, and he cannot claim any credit, or, more properly speaking, any reduction or abatement of the penalty, until he has been called upon to pay something and has actually done so. Any other construction of the bond, it seems to us, would present the anomaly of a surety claiming and being allowed a credit for something he has never paid. His contract is strictly one of indemnity, and, until he has suffered a loss or been damnified, he is not entitled to be reimbursed by any payment (278) from his principal or indirectly by a reduction of the penalty of his bond; otherwise, he would receive something for nothing. When the property seized has been returned, it merely relieves the surety from the payment of its value in case it has not been returned and limits the extent of his liability, but does not reduce the amount or penalty of the bond, because he has neither paid nor lost anything on account of his suretyship. He must still answer to the amount of the penalty for any other default of his principal. *Hall v. Tillman*, 110 N. C., 220, cited by the learned counsel for the appellant, does not sustain his position, but we think it decides the contrary of what is contended for by him. We quote from that case at page 224: "Where the property is unjustly withheld by either, and subsequently returned under the decree of the court, compensation is allowed, not only for detention, but for deterioration, because the full measure of justice could not be meted out in any other way." And, also, at page

229: "The plaintiff will be entitled to receive before the bond can be discharged, if he should prevail in the action, not only the value of the property or the balance of the purchase money, as the case may be, with interest, but the costs as incident to his recovery. *Slaughter v. Winfrey,* 85 N. C., 160; *Long v. Walker,* 105 N. C., 90. The language of the statute is not so explicit as that of the original section of The Code, but we think it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond."

The plaintiff has recovered the property and is not entitled to its value, nor does he claim it; but he is entitled to the damages
(279) for the detention and deterioration and the costs, as these, by the strictest construction of the contract which is always made in favor of the surety, are within its letter and spirit.

One of the clauses in the condition of the appellant's undertaking is that "the plaintiff shall be paid such sum as may for any cause be recovered against the defendant in this action." The plaintiff is, therefore, as we have said, entitled to recover the damages assessed for deterioration and detention, and the costs, because it was so nominated in the bond, which is drawn according to law. *Hall v. Tillman,* 110 N. C., 220.

We find no error in the judgment of the court below, to which exception has been taken.

PER CURIAM. No error.

HUNTLEY v. HASTY.

(Filed 31 March, 1903.)

1. Arrest and Bail—Provisional Remedies—Execution Against the Person—Assault and Battery—The Code, Secs. 260, 291—Laws 1891, Ch. 541.

Where a complaint in an action for assault and battery sets out facts justifying an order of arrest, and such facts are essential to the claim of the plaintiff, the complaint being properly verified, the plaintiff is entitled to an execution against the person, after an execution against the property has been returned unsatisfied, though no affidavit or order of arrest had been made.

2. Clerks of Courts—Jurisdiction—Arrest and Bail—Execution Against the Person—Appeal—The Code, Secs. 254, 255.

Where a clerk of the Superior Court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district.

HUNTLEY *v.* HASTY.

ACTION by Charles Huntley against J. W. Hasty, heard by *Neal, J.*, and a jury, at October Term, 1902, of UNION. From an order reversing the refusal of the clerk to grant an execution against the person, the defendant appealed. (280)

Redwine & Stack for plaintiff.
Armfield & Williams for defendant.

MONTGOMERY, J. This action was brought to recover damages against the defendant for an alleged assault and battery with a deadly weapon—a pistol or metallic knuckles. The details of the battery are set forth in the complaint. There was a verdict for the plaintiff, and a judgment thereon was duly entered. An execution in the ordinary form was issued against the property of the defendant, the homestead exemption laid off by the sheriff, and no excess found liable to execution. Upon the return of the execution unsatisfied, the plaintiff applied to the clerk for an execution against the person of the defendant, under section 447 of The Code. The clerk refused the motion upon the grounds, first, that judgment was taken and docketed before any demand for an order of arrest; second, that the complaint made no demand for an order of arrest; third, the plaintiff accepted the judgment without an order of arrest; and, fourth, that no affidavit accompanied the motion for the order of arrest. His Honor reversed the action of the clerk who had refused to grant the motion.

Peebles v. Foote, 83 N. C., 102, is decisive of this case. The question is whether in such case execution can be issued against the person of a defendant without an order of arrest having been served before the judgment. The section of The Code under which the order of arrest was granted reads: "If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor unless an order of arrest has been served as (281) provided in Title Nine, subchapter 1 of this chapter, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 291." That section was amended by chapter 541, Laws 1891, by adding to the end of it these words, "whether such statement of facts be necessary to the cause of action or not." In *Peebles v. Foote, supra, Ashe, J.*, for the Court, said: "The section 260 (C. C. P.), under which the defendant was arrested, contemplates three classes: (1) Where the cause of arrest is not set forth in the complaint; (2) where the cause of action is

set forth in the complaint, but is only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause of arrest set forth in the complaint is essential to the plaintiff's action." Our case falls under the third class, and, as was said in *Peebles v. Foote, supra,* no affidavit for the order of arrest was needed, and no order of arrest is required before an execution may be issued against the person of the defendant, provided the complaint has been properly and sufficiently verified. The complaint was properly verified in the case before us. A cause of arrest was set forth in the complaint. The Code, sec. 291, subsec. 1; *Carroll v. Montgomery,* 128 N. C., 278; *Kinney v. Laughenour,* 97 N. C., 325.

The judge who made the order for the execution was the judge residing in the district, but was not the judge who was at that time holding the courts of the district, and, for that reason, the defendant contends that the order was void, the judge not having jurisdiction. The question for decision before the clerk was a mere matter of law, and the appeal was properly sent up to the judge residing in the district. The Code, secs. 254, 255.

No error.

Cited: Turlington v. Aman, 163 N. C., 559, 561.

---

(282)

HAMRICK v. BALFOUR QUARRY COMPANY.

(Filed 7 April, 1903.)

Negligence—Contributory Negligence—Personal Injuries—Assumption of Risk.

Where an employee undertakes to do something which it is not his duty to do, he thereby assumes the risk.

ACTION by Samuel Hamrick against the Balfour Quarry Company, heard by *Robinson, J.,* and a jury, at October Term, 1902, of UNION. From a judgment for the plaintiff, the defendant appealed.

Redwine & Stack for plaintiff.
Julius C. Martin for defendant.

CLARK, C. J. The plaintiff was engaged to drill holes in defendant's rock quarry, and had been in such employment several months. His evidence is that on the day of the injury complained of he was told by the foreman to go to a place near the center of the quarry and

drill rock there; that after drilling two holes he found a hole near by which was filled up; it proved to be loaded, but had no fuse in it to indicate that it was, and supposing the hole was not loaded, he took a piece of steel eighteen inches long and a hammer weighing three and a half pounds and began to drill in it, when the load went off, injuring the plaintiff. It was in evidence by the defendant's foreman that all the men were instructed not to scrape out any hole which had been loaded, and which had failed to explode; that he had another man (Johnson) employed especially for that purpose, and if he was not there the foreman did that work himself; that he never instructed the plaintiff to scrape out a hole and never knew him to scrape out one.

By the plaintiff's own evidence he was sent there to drill rock, and there being evidence tending to show that, contrary to instructions, he attempted to drill out a hole previously drilled, (283) which proved to be loaded, it was error to charge "the whole case depends upon whether the plaintiff reasonably supposed the hole was not loaded, and if he did he can recover." This made the case turn solely upon the question whether the plaintiff was guilty of contributory negligence, leaving out of view entirely the primary question whether the defendant was guilty of negligence. If the plaintiff was injured in attempting to drill out a filled-up hole which he was not ordered to do, or was prohibited from doing, another man being employed for that work, there was no negligence on the part of the defendant. If the plaintiff volunteered to drill out such hole, the fact whether he reasonably supposed that it was not loaded is not the sole question in the case. The court should have given the sixth prayer for instructions, "If you find that the plaintiff undertook to do something which it was not his duty to do, then he assumed all risk in that undertaking; and in that case, if you believe the evidence, you should find the first issue 'No.'" In failing to so instruct the jury there was

Error.

PERRY v. FARMERS' MUTUAL INSURANCE COMPANY.

(Filed 7 April, 1903.)

Insurance—Fire Insurance—Assessments—Waiver—Notice—Private Laws 1893, Ch. 343—Private Laws 1895, Ch. 15.

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy.

PERRY *v.* INS. CO.

ACTION by T. J. Perry against the Farmers' Mutual Fire Insurance Company, heard by *Robinson, J.*, and a jury, at October Term, 1902, of UNION. From a judgment for the plaintiff, the defendant (284) appealed.

Adams & Jerome for plaintiff.
Redwine & Stack for defendant.

CONNOR, J. This is an action on an insurance policy issued by the defendant company through its Union and Stanly Branch, covering several houses and contents belonging to the plaintiff, including his dwelling, for the amount of $300. The total insurance was $900. The defendant was incorporated by chapter 343, Private Laws 1893, and amended by chapter 15, Private Laws 1895. It was provided by the charter that the insurance business of the association should be conducted by and through branches thereof, which should consist of fifty or more persons. That said branches should be organized in the manner set out in the by-laws. That the territorial limits of any branch should not comprise more than two nor less than one county. That membership in the association should be acquired only through some regularly organized branch. That all losses accruing to the association should be paid by a *pro rata* assessment of all the members of the branch of the association in which said losses should occur, according to the amount of the insurance held by said member, and no member should be liable for any loss occurring outside of the branch of which he was a member. The policy was issued by "The Farmers' Mutual Fire Insurance Association of North Carolina, by and through the Union and Stanly Branch," and bears date 9 April, 1896. The by-laws of the association known as the "Rules and Regulations" governing branches are made a part of the policy. Article IV of the by-laws and regulations provides, "That losses accruing to the association shall be paid by a *pro rata* assessment from all the members of such branch of the association in which loss may occurr. That (285) the time for collection of any assessment shall be sixty days from date of notification of loss. Any member failing to pay his assessment within sixty days from date of notice forfeits all rights, claims and privileges in the association and his policy shall be canceled without further notice. Any member forfeiting his policy may be reinstated upon the approval of the president of his branch by the payment within sixty days of all arrears. But there shall be no liability under his forfeited policy until such reinstatement and payment."

The plaintiff was a member of the Union and Stanly Branch. At a meeting of the supervisors of said branch on 18 October, 1900, a

resolution was adopted that the two counties forming said branch each form a separate branch. That said resolution take effect 1 November, and that the old organization be liable for all losses occurring up to 1 November, 1900. On the same day a meeting of the members of Union County Branch was held. Officers were duly elected and it was resolved that the former members in Union County of the Union and Stanly Branch be members of the Union County Branch and that their policies now held by them be valid in the new organization. The plaintiff resided in Union County. The plaintiff's dwelling was destroyed by fire on 16 November, 1900.

The plaintiff testified that he notified Mr. A. R. Edwards, who was township supervisor and adjuster for defendant, of the loss. He went a day or two after the fire and after viewing the premises estimated the loss at over $1,000. Plaintiff wrote F. H. Wolfe, who was secretary and treasurer of the defendant company, and received a reply from him. Before the fire plaintiff had received a notice of an assessment, and came to Monroe to pay it to Mr. Dillon, who was collecting assessments for the company, before expiration of the time for its payment, but he was out, and he went off and forgot it. After the destruction of the property the defendant continued to levy and collect assessments on the entire amount of the insurance as though none of the property had been destroyed. The plaintiff introduced notices (286) of assessments and receipts therefor. The plaintiff also introduced a letter from F. H. Wolfe, bearing date 1 March, 1901, in which he acknowledged the receipt of notice of loss and explained reason why assessment to pay the same had not been made, the reason having no reference to the failure to pay assessment. He promised to write again. Plaintiff testified that after the receipt of the letter he saw Mr. Phipher, and he said he could not pay, as plaintiff was one assessment behind. After the fire Mr. Stewart went to Monroe to pay assessment for plaintiff. G. M. Stewart testified that he paid Mr. Dillon the premium overdue by plaintiff, after the fire, and told him plaintiff was burned out and asked him if it would be all right after plaintiff had failed to pay for sixty days. Dillon accepted the money, but gave no receipt for it, as the notices of assessment with the blank receipt at the bottom of it had been destroyed by fire.

T. P. Dillon testified that F. H. Wolfe was secretary and treasurer of defendant company, but he lived in the country and asked witness to collect the assessment for him, which he did and paid to Wolfe. G. M. Stewart paid assessment for plaintiff due at the time of the fire. He told witness at the time he paid that plaintiff was burned out and that he was behind in the payment of his assessments. Witness did not give receipt, but credited amount on book of the company.

Witness asked Dr. Ashcraft, the president of the company at that time, as to what he should do in cases when members offered to pay assessments after the time within which they were to be paid had expired. "He told me to accept them, and I did so." Defendant objected. Objection overruled. Defendant excepted. Witness was not authorized to reinstate any one who had forfeited by failure to pay assessments.

"I told Mr. Wolfe what Stewart told me. Ashcraft did not
(287) tell me to receive this money nor in any case to receive money after the fire."

James McNeely, a witness for defendant, was asked if he was authorized to reinstate a person who had forfeited his rights by failing to pay assessments. Plaintiff objected; objection sustained. Defendant excepted.

The court directed the jury that if they believed the evidence, to answered the first and second issues "Yes," the fourth issue "$400," the fifth issue "No." The third issue was by consent answered $1,000. The defendant excepted.

In the view which we take of the case it is unnecessary to pass upon his Honor's ruling upon the questions presented by the exceptions in regard to the admissibility of testimony. We do not think the evidence in regard to instructions given by the president to the secretary and treasurer to accept payment of assessments after they were due, sufficient to establish a custom to do so at variance with the by-laws and regulations. Nor do we think that a custom to do so would by implication be extended to a general authority to accept such assessments after the property insured had been burned. The plaintiff's right to recover in this action is not based upon such alleged custom. We do not think that in this case it was material to the rights of the parties to inquire whether the witness was authorized to reinstate members who were behind in their assessments. The plaintiff was not reinstated. The real question is whether upon the whole of the evidence if believed there was a waiver of the forfeiture of the policy by the acceptance of the overdue assessment after the fire, with full notice thereof. We think that it is clear that the failure to pay the assessments in accordance with the terms of the contract worked a forfeiture of the policy. We think it equally well settled that the company may by acts of unequivocal character waive such

forfeiture. "If after a breach of the conditions of the policy
(288) the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they still recognize the validity of the policy and consider him as protected by it, and

induce him to incur expense, they will be deemed to have waived the forfeiture and will be estopped from setting it up as a defense." *Grubbs v. Ins. Co.,* 108 N. C., 472, 23 Am. St., 62. This elementary principle of law has been frequently applied to cases arising upon insurance policies, and while in the extent of its application there is not perfect uniformity, we think that the best considered cases sustain the position that the acceptance and retention of the premium or assessment after loss, with full knowledge of the facts, operates as a waiver. We cite only a few of the many cases found in the reports and text-books bearing on the question.

In *Schoneman v. Ins. Co.,* 16 Neb., 404, the Court says: "In other words, where there has been a breach in the conditions of a policy, the company, if it see fit, may take advantage of such breach and cancel the policy. It need not do so, however, but may waive the forfeiture, and this may be done by acts as well as words. But the company, as well as the insured, should act in good faith. If there has been a failure to pay the premium promptly at the day, the company certainly may waive this condition, and if it afterward receive and retain it and deliver the policy, there would seem to be no good reason why the company should not be bound by it. The consideration for the insurance is the premium, and if this is paid and appropriated by the company, the time of its payment would not seem to be material."

In *Ins. Co. v. Bowen,* 40 Mich., 147, *Cooley, J.,* uses the following language: "Where a mutual insurance company imposes forfeiture in case a loss occurs while its assessments are still unpaid, but its local agent receives past-due assessments with knowledge of a (289) loss, and forwards them to the company without notifying them of it, and they received them and two or three weeks afterward ordered the loss to be paid when adjusted, they cannot afterward refuse payment on the ground of delay in paying the assessments, since they have waived that by receiving them when overdue and ordering payment."

In *Titus v. Ins. Co.,* 81 N. Y., 410, the Court says: "But we are of the opinion that the claim of the plaintiff is well founded that the forfeiture caused by the foreclosure proceedings was waived by the defendant. After the fire, and after the defendant had notice of the proceedings, it required the insured to appear before a person appointed by it for that purpose, to be examined under the clause in the policy hereinbefore mentioned, and he was there subjected to a rigorous inquisitional examination. It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given it by the policy. It then recognized the validity of the policy and subjected the insured to trouble and expense, after

it knew of the forfeiture now alleged, and it cannot, therefore, assert its invalidity on account of such forfeiture.

"When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the for-
(290) feiture. But it may be asserted broadly that if in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived; and it is now settled in this Court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

We conclude that by the acceptance and retention of the overdue assessment after the burning of the property, with full notice thereof, the defendant waived forfeiture and continued the policy in force.

His Honor rendered judgment directing the defendant company to make an assessment upon the members of the Union and Stanly Branch thereof to pay the amount of the judgment. It appears that this branch has ceased to exist, and that liability was assumed by the Union Branch for all losses occurring after 1 November, 1900. While this change of liability could not be made without the consent of the policyholders, if it has in fact been accomplished and there is now no such body or organization, it would seem to be impracticable to enforce the judgment in the manner directed. We think that the Union Branch is liable to the plaintiff, and if the defendant fails or refuses to make the assessment, the plaintiff would be entitled to a mandamus compelling it to do so. The Union Branch is not a corporation and is not a party to this action. The remedy must be worked out through the defendant corporation. The judgment thus modified is affirmed.

Modified and affirmed.

Cited: *S. c.*, 139 N. C., 375, 378; *Weddington v. Ins. Co.*, 141 N. C., 243.

(291)

DAVIS v. SEABOARD AIR LINE RAILWAY.

(Filed 7 April, 1903.)

Negligence—Trespasser—Railroads.

A person who goes upon the train with his family, after giving notice to the conductor thereof, is not a trespasser, and if he is injured in alighting from the train by the negligence of the railroad company, the company is liable.

ACTION by L. A. Davis against the Seaboard Air Line Railway Company, heard by *Robinson, J.*, and a jury, at October Term, 1902, of UNION. From a judgment for the plaintiff, the defendant appealed.

Redwine & Stack for plaintiff.
Adams & Jerome and J. D. Shaw for defendant.

MONTGOMERY, J. This action was brought to recover damages against the defendant for personal injuries alleged to have been received by the plaintiff through the negligence of the defendant. According to the plaintiff's evidence, he had seated his wife and children on the defendant's train, bound for Charlotte, at Marshville, having purchased a ticket for them, and on reaching the bottom step of the coach, with the intention to alight, he was suddenly jerked by a motion of the train from his footing and thrown violently to the ground, whereby he was hurt on the leg. His evidence is that he was jerked from the step, and not that he had actually moved from the step. He further said the conductor knew he was going to put his wife and children on the cars and that he asked him to hold the train until he got them on, and that he got on as quickly as he could and turned to go out of the coach as quickly as he could. The defendant offered no evidence, and moved to nonsuit or to dismiss the plaintiff's action under the statute. We think there was no (292) error in the refusal of his Honor to grant the motion. The case of *Whitley v. R. R.*, 122 N. C., 987, seems to be substantially like this one, and is decisive of this case.

We notice in the assignments of error three to the refusal to give the defendant's first, second, and third prayers for instructions, but the record does not contain any such prayers, nor indeed any prayers for instructions of any kind.

Affirmed.

Cited: Gordon v. R. R., post, 569; *Graves v. R. R.,* 136 N. C., 4.

CLEGG v. SOUTHERN RAILWAY COMPANY.

(Filed 14 April, 1903.)

1. Appeal—Superior Court—Supreme Court Rule 5.

Where an appeal in a cause tried in the Superior Court during a term of the Supreme Court is docketed at that term, it stands regularly for argument.

2. Negligence—Evidence—Sufficiency of Evidence—Presumptions—Personal Injuries.

In an action to recover damages for personal injuries, there being no evidence tending to show negligence on the part of the railroad company, no presumption of negligence arises upon the simple proof of injuries or death caused by the company, if the injured party is not a passenger.

ACTION by G. W. Clegg against the Southern Railway Company, heard by *McNeill, J.*, and a jury, at January Term, 1903, of IREDELL. From a judgment for the plaintiff, the defendant appealed.

W. G. Lewis, Armfield & Turner, and J. F. Gamble for plaintiff.
L. C. Caldwell for defendant.

(293) CLARK, C. J. This case was tried below since this term began, and the defendant asks for a continuance. Rule 5 of this Court permits the appeal to be filed at this term, and it is imperative it shall be filed not later than next term. Being filed in proper time at this term, it stands regularly for argument. *Avery v. Pritchard,* 106 N. C., 344; *S. v. Deyton,* 119 N. C., 880; *Caldwell v. Wilson,* 121 N. C., 424.

This is an action for negligence in killing the plaintiff's intestate. The evidence offered to show negligence on the part of the defendant is that plaintiff's intestate was seen going in the direction of defendant's track and was later found dead, lying by the side of the track where a dirt road ran parallel with it, but not at a crossing, and with bruises from which it might be reasonably inferred that he had been knocked off the track and killed by defendant's engine. The track was straight at that point for half a mile, possibly more. Part of the back of intestate's head was knocked off. There was no eye-witness to the death, whether he was killed by the engine, or, if so, whether he was on the track or close by it when struck, or whether he was walking or sitting down or lying down on the track. There was no sign of the intestate having been dragged, nor had he been run over by the engine. The killing was at night. There was evidence by plaintiff's

witnesses that there was no sign of blood on the cross-ties and some evidence to the contrary.

If the deceased was either walking or sitting or lying down on the track, this was evidence of contributory negligence. *Hord v. R. R.*, 129 N. C., 305. If walking or sitting down, the engineer (nothing else appearing) had a right to presume he would get off before the train struck him, and there would have been no negligence on the part of the defendant, inferable from the mere fact, without further evidence, that the deceased was killed while on the track, for the engine had the right of way. If deceased had been helpless, lying down on the track, and the engineer with proper outlook could have seen him in time to avoid killing him, and did not do so, this (294) would have been negligence rendering the defendant liable, notwithstanding the previous contributory negligence of deceased; and that the track was straight for half a mile or more was evidence to go to the jury that if he had been lying down the engineer, with proper lookout, could have seen him; but there was no evidence tending to show that he was lying down (*McArver v. R. R.*, 129 N. C., 380), and the burden of showing that the deceased was helpless on the track was upon the plaintiff. *Hord v. R. R.*, 129 N. C., 305. The evidence of some blood on the track (though contradicted by plaintiff's other witnesses) was equally consonant with deceased having been struck while walking or sitting down.

In *Powell v. R. R.*, 125 N. C., 373, the deceased was found killed lying by the track, but there was evidence of negligence in that no whistles were blown at three public crossings, all close by, in an incorporated town, and the heavy freight train was running 25 to 35 miles an hour, and as further evidence of an insufficient lookout it was a bright moonlight night when, according to the evidence, a man could have been seen 200 yards away, and the engineer testified that he saw no one, though the evidence was uncontradicted that the deceased was knocked off on the right-hand side, on which the engineer was sitting. That was more than a scintilla of evidence of negligence, and the case was properly left to the jury. Here the witnesses cannot say that the whistles were not blown at the nearby crossings, and the engineer being dead, no one testified as to whether he saw deceased or not.

In *Fulp v. R. R.*, 120 N. C., 525, the negligence in evidence was that the man was killed near a crossing, and no whistle was blown at the crossing. In *Hord v. R. R.*, 129 N. C., 305, there was evidence that at two crossings between which the man was killed and one of them in 50 yards of the spot, the whistle was not sounded. (295) In *Cox v. R. R.*, 123 N. C., 604, the deceased was run over and

crushed by a train running backwards at night without sounding a whistle or ringing a bell.

The facts of this case are very much like *Upton v. R. R.*, 128 N. C., 173, in which this Court sustained a nonsuit, saying, "There is no presumption in this State of negligence against railroad companies upon simply proof of injuries or death caused by their trains"—meaning, of course, when the parties killed or injured are not passengers.

The motion for judgment as of nonsuit should have been sustained.

Error.

Cited: *S. c.*, 133 N. C., 303; *Thompson v. R. R.*, 149 N. C., 157; *Strickland v. R. R.*, 150 N. C., 8; *Henderson v. R. R.*, 159 N. C., 584; *Holder v. R. R.*, 160 N. C., 6; *Smith v. R. R.*, 162 N. C., 36; *Hill v. R. R.*, 169 N. C., 741, 743.

MAUNEY v. HAMILTON.

(Filed 14 April, 1903.)

1. Pleadings—Time to Plead—Answer—Trial Judge—Discretion—The Code, Sec. 273.

It is discretionary with the trial court to allow the defendant to file an answer at the trial term.

2. Evidence—Incompetent—Withdrawal from the Jury—Instructions.

The erroneous admission of evidence is cured by its withdrawal from the jury.

3. Evidence—Judgments—Executions—Insolvency—Fraudulent Conveyances.

In an action to set aside a fraudulent conveyance, a judgment and a return of execution thereon unsatisfied is strong but not conclusive evidence of insolvency.

ACTION by V. Mauney against E. B. Hamilton and others, heard by *Neal, J.*, and a jury, at December Term, 1902, of STANLY. From a judgment for the defendants, the plaintiff appealed.

(296) *Montgomery & Crowell for plaintiff.*

J. M. Brown, Adams, Jerome & Armfield, and R. E. Austin for defendants.

PLAINTIFF'S APPEAL.

CONNOR, J. The plaintiff alleged that the defendant E. B. Hamilton was indebted to him in the sum of $180 and interest; that said indebtedness had been reduced to judgment, which was duly docketed in the Superior Court of Stanly County, 6 January, 1896; that prior to said

date the defendant E. B. Hamilton, for the purpose and with the intent to defraud him, conveyed to his wife, the defendant Mary E., a lot in the town of Albemarle and a tract of land in Stanly County containing 40 acres; that thereafter the defendants C. B. and N. F. Little, with notice of said fraudulent intent and purpose in the execution of said deed, purchased the town lot from the *feme* defendant. The plaintiff demanded judgment that said deed be set aside and that said real estate be subjected to the payment of his judgment.

The defendants E. B. Hamilton and wife denied the fraudulent intent and purpose in the execution of the deed, and averred that the same was made upon a full and fair consideration. They also denied that E. B. Hamilton was indebted to the plaintiff. The other defendants denied any knowledge of the fraudulent intent and purpose in the execution of said deed, and alleged that they purchased said land for full value and without notice of any vitiating element in said deed or the execution thereof.

When the case was called for trial the defendant M. F. Little had filed no answer, and the plaintiff moved for judgment against him for the want of an answer. The motion was denied, and the judge in the exercise of his discretion permitted the defendant to file an answer, and the plaintiff excepted.

It was entirely within the discretion of the judge to permit (297) the defendant Little to file an answer. In view of his relation to the controversy, no judgment could have been rendered against him until the preliminary issues between the plaintiff and the other defendants had been settled. It would have been manifestly improper to render judgment against him at that stage of the proceedings. The wisdom of his Honor's course was vindicated by the finding of the jury upon the second issue. The exception cannot be sustained. Clark's Code, sec. 273.

The court submitted the following issues:

1. Is E. B. Hamilton indebted to V. Mauney, the plaintiff, as alleged in the complaint?

2. Did E. B. Hamilton make the deed set out in the complaint to his wife to delay, defeat, or defraud the plaintiff?

3. Did the defendant Mary E. Hamilton take the deed from her husband, knowing his intent to hinder, delay, or defeat the plaintiff and to prevent the plaintiff from collecting the debt her husband owed him?

4. Did the defendants Little, or either of them, take the deed from E. B. Hamilton and his wife Mary E. with notice of the fraudulent intent of Hamilton and his wife?

The plaintiff introduced the judgment docket of the Superior Court showing judgment in his favor against E. B. Hamilton, dated 14 December, 1895, and docketed 1 January, 1896, which was unsatisfied, and under which the defendant Hamilton's homestead and personal property exemption had been allotted. The plaintiff also introduced a deed from E. B. Hamilton to his wife, dated 13 August, 1895, and a deed from Hamilton and wife to Little, dated 6 May, 1896. He also introduced evidence tending to show that Hamilton was insolvent at the time he conveyed the land to his wife. He also introduced a witness who testified that a few days after Little had purchased the land from Hamilton's wife, he told him (Little)
(298) that Mauney had a judgment against Hamilton which was unsatisfied, and Little replied that there was $100 of the purchase money unpaid, and that he would hold that back.

The defendant offered a deed from V. Mauney to I. W. Snuggs, dated 1 January, 1898, conveying certain land which had been conveyed to Mauney as trustee by the defendant Hamilton. The plaintiff objected, the objection was overruled, and the plaintiff excepted.

The defendant offered to prove by one Austin the present value of the land conveyed to Mauney as trustee. The plaintiff objected, the objection was overruled, and the plaintiff excepted.

The deed from the plaintiff to Snuggs had no bearing upon the issues being tried upon this appeal, nor did the testimony as to the value of the land conveyed by the deed from Hamilton to the plaintiff trustee, and this testimony was expressly withdrawn from the consideration of the jury by his Honor in the charge. As will be seen in the disposition of the defendant's appeal, this testimony would have been relevant upon the defendant's equitable counterclaim. The action of the court in withdrawing the deed and testimony cured any error in its admission. We cannot perceive how, in view of the charge of his Honor, it could have been prejudicial to the plaintiff. The exception cannot be sustained.

The plaintiff in apt time requested his Honor to charge the jury that the proof that judgment has been obtained against the defendant Hamilton and execution was issued and placed in the hands of the sheriff, who laid off the homestead, and no surplus was found belonging to the defendant with which to satisfy the plaintiff's debt, shows that the defendant at the time he made the deed to his wife was insolvent, "and I charge you, if you believe the evidence of the plaintiff on the question of insolvency, you will find that the defendant Hamilton was insolvent at the time he made the deed to his wife."
(299) In lieu thereof, the court instructed the jury as follows: "The proof that judgment has been obtained against the de-

fendant Hamilton and execution issued and was placed in the hands of the sheriff, who with appraisers allotted the homestead, and no surplus was found belonging to the defendant with which to satisfy the plaintiff's debt, is very strong evidence tending to prove that the defendant at the time he made the deed to his wife was insolvent, but it is not conclusive, and it is the duty of the jury in passing upon the question of insolvency to take into consideration all the evidence which has been introduced tending to show his real financial condition." The defendant excepted.

We think that his Honor's instruction was a correct statement of the law in respect to the weight to be given to the judgment and the return of execution unsatisfied. As his Honor very properly said to the jury, this testimony is very strong evidence of the fact sought to be proved, and in the absence of any further testimony would have fully justified the jury in finding the fact as contended by the plaintiff, but it was not conclusive evidence. The exception must be overruled.

The other prayers for instruction were directed to the fourth issue, in regard to the purchase by the defendant Little, and as the jury found the second issue in the negative, they were not called upon to settle the fourth issue. It is therefore unnecessary for us to consider the exceptions in regard to the sufficiency of the evidence as tending to fix Little with notice of the condition of the defendant and the circumstances under which he purchased.

We do not find any error in the record, and the judgment upon the plaintiff's appeal must be

Affirmed.

Cited: Hubbard v. Goodwin, 175 N. C., 177.

---

(300)

WILLIAMS v. COMMISSIONERS OF IREDELL COUNTY.

(Filed 14 April, 1903.)

1. Submission of Controversy—Actions—Judgments—Prayer for Judgment—The Code, Secs. 567-569.

In an action submitted without controversy no prayer for judgment is necessary.

2. Intoxicating Liquors—Licenses—Purchase Tax—Taxation—Laws 1901, Ch. 9, Sec. 83, and Ch. 7, Sec. 58.

Under Laws 1901, ch. 9, sec. 83, and ch. 7, sec. 58, a liquor purchase tax should be assessed on the amount paid for the liquor, and is not subject to deduction by the amount of the internal revenue tax.

WILLIAMS *v.* COMMISSIONERS.

ACTION submitted without controversy between D. J. Williams and the Commissioners of Iredell County, heard by *McNeill, J.*, at January Term, 1903, of IREDELL. From a judgment for the defendant, the plaintiff appealed.

L. C. Caldwell for plaintiff.
Armfield & Turner and W. G. Lewis for defendant.

CLARK, C. J. This is an action submitted without controversy under The Code, secs. 567 and 569, with proper affidavit, as there required, that the controversy is real and that the proceedings are in good faith to determine the rights of the parties.

Upon the "facts agreed" it appears that the plaintiff, a retail liquor dealer, in July, 1902, returned to the county commissioners the total amount of his purchases of liquor for the preceding six months, as required by section 83, chapter 9, Laws 1901, to be $400, being at the rate of 15 cents per gallon, which would make his purchase tax, at 2 per centum each for State and county, $16. The defendants, the said county commissioners, declined to receive said returns, and summoned the plaintiff before them, as authorized to do by section 58,
(301) chapter 7, Laws 1901, who stated that he had "estimated the whiskey at 15 cents per gallon, which was the cost of the same, less $1.10 U. S. internal revenue tax paid thereon by the distiller from whom he had purchased the same, and which he had deducted." It further appeared from the "facts agreed" that "the price paid to the distiller by the plaintiff was $1.25 per gallon, which amount includes the $1.10 U. S. internal revenue tax which was paid to the Government by the plaintiff for the stamp to be placed upon each gallon of whiskey purchased from the distiller, the stamp tax being made out in the distiller's name and upon his withdrawal papers." By order of the county commissioners, the clerk of said board was ordered to add the $1.10 per gallon to the total purchases by plaintiff as returned by him, and to turn over the assessment thus corrected to the sheriff for collection. This increased the plaintiff's taxes from $16 to $133.33. He demanded the addition should be struck off, but the defendants refused to do so.

There is no prayer for judgment, and indeed it is not required in this form of proceeding. Even when a complaint is filed, it is held immaterial if the prayer for relief is omitted, or if the wrong relief is asked, for the court will give any relief which the facts alleged and proved entitle the party to receive. Clark's Code (3 Ed.), sec. 233 (3), and cases cited. The plaintiff evidently desired a mandamus to compel a correction of the tax list, which was within the jurisdiction of the

court, but his Honor held that the facts agreed entitled him to no relief and that the sheriff should proceed to collect the $133.33, the amount of tax assessed against him by the county commissioners.

It being agreed that "the price paid to the distiller by the plaintiff was $1.25 per gallon," the purchase tax was due upon that sum. It may be inferred from the facts agreed that the $1.10 was advanced on the whiskey to enable the distiller to pay the United States tax, but that is immaterial. The distiller could not sell and deliver the whiskey till he had paid the Government tax of $1.10, under (302) penalty of an indictment in the Federal court. U. S. Rev. Stat., 3251 (as amended); see, also, sections 3259-87. The purchaser did not have possession of nor title to the whiskey and power to sell it till he paid, or agreed to pay, whether at the time or part in advance, $1.25 per gallon, and that being the purchase money to enable him to get it, the purchase tax is payable thereon, *i. e.*, 5 cents per gallon to State and county combined instead of 6-10 of one cent per gallon actually paid. We were told in the argument that this evasion of the State revenue law has been widely prevalent. If so, there are large amounts of revenues of which the State and counties have been illegally deprived and which it was and is the duty of the proper officers to collect, for clearly in such cases less than one-eighth of the tax legally due has been paid.

It was argued to us that the tax of 2 per cent, if levied upon the $1.25, would be a tax upon the United States governmental agency. But $1.25 was the purchase price, and it is immaterial to the purchaser and to the State how much of this was for material, how much for labor, or how much for tax, or whether the purchaser advanced money for either or all three purposes. Most articles sold by merchants are enhanced in price by the tariff, either because actually paid when the goods are imported or added by reason of the fact that the seller can compel a higher price on account of the tariff, but no merchant could deduct the amount of the tariff from the total of his purchases in returning his purchase tax.

Laws 1901, ch. 9, sec. 83, provides: "Every person who shall buy for the purpose of selling spirituous, vinous, or malt liquors shall, in addition to the *ad valorem* tax on his stock and the license tax levied in sections 71 and 72, pay as a *license tax* 2 per centum on the total amount of his purchases in and out of the State, for cash (303) or credit, whether such person shall purchase as principal or as agent or through a commission merchant." And section 102 of the same chapter provides: "In any case where a specific license tax is levied for carrying on any business, trade or profession, the county may levy the

same tax and no more: *Provided,* no provision to the contrary is made in the section levying the specific license tax."

The State being entitled to 2 per cent on the purchase price of $1.25 per gallon, the county was entitled to levy the same, making 4 per cent, as was here levied.

No error.

Cited: Davis v. Smith, 144 N. C., 298.

MAUNEY v. HAMILTON.

(Filed 14 April, 1903.)

Judgments—Counterclaim—Foreclosure of Mortgages—Estoppel—Equitable Defenses.

A judgment in an action for the balance due on a mortgage note after sale under the power given in the mortgage, the defendant having failed to plead as a counterclaim the purchase by the mortgagee, does not estop the mortgagor from pleading this counterclaim in a subsequent action.

ACTION by V. Mauney against E. B. Hamilton and others, heard by *Neal, J.,* and a jury, at December Term, 1902, of STANLY. From a judgment for the defendant, but from a refusal to submit issues as to his counterclaim, he appealed.

Montgomery & Crowell for plaintiff.

J. M. Brown, Adams, Jerome & Armfield, and R. E. Austin for defendants.

CONNOR, J. In this action the defendant E. B. Hamilton in his answer alleged, by way of equitable counterclaim upon which he asked for affirmative relief, that the debt claimed against him, to wit, (304) the judgment for $180, is the balance of a note given to the plaintiff by said Hamilton for $400 which was secured by a mortgage containing a power of sale on certain real estate therein described; that the mortgage has never been foreclosed; that the plaintiff pretended to sell the land under his mortgage, but that said sale was only colorable; that the plaintiff bid off and bought the land at his own sale through and by his son-in-law, J. M. Badgett; that the land did not bring a fair price and was really worth at that time more than the amount due on the note, and that said pretended sale should be set aside and a resale ordered, to the end that the whole of the plaintiff's original debt with interest be paid, and that the plaintiff be required to account for the rents and profits on said land. The land was bid off by said Badgett for $285, leaving a balance on the said note of $400, including interest of $180 upon which the plaintiff obtained judgment as set forth in the complaint.

The defendant further alleged that the plaintiff has since the said pretended sale conveyed the said land to I. W. Snuggs; that said conveyance to Snuggs, as defendant is informed and believes, was made with full knowledge on the part of Snuggs of the circumstances under which the plaintiff purchased the property and with a distinct agreement that, if the plaintiff should be declared to be still the mortgagee, the said deed should be considered void and that no title should vest in the grantee; that if said Snuggs did not take the said deed with knowledge of the facts herein alleged, then the defendant alleges that the plaintiff is responsible to him for the full value of the land and for such rents as he may have received or ought to have received. The defendant upon said equitable counterclaim tendered the following issues:

1. Did the plaintiff Mauney at the sale of the house and lot, for which the note and mortgage mentioned in the pleadings were given, become the purchaser of said property, either directly (305) or indirectly?

2. What is the value of the said house and lot mentioned in the pleadings?

3. What is the annual rental of the said house and lot?

The court refused to submit the issues tendered by the defendant E. B. Hamilton, and he excepted.

At the close of the evidence the court held that the justice's judgment in the case of *V. Mauney v. E. B. Hamilton* was *res judicata* and constituted an estoppel against the defendant E. B. Hamilton to plead that the plaintiff purchased the mortgaged property at his own sale. The defendant excepted.

His Honor erred in refusing to submit the issues raised by the defendant's answer in respect to the foreclosure of the mortgage and the alleged circumstances attending the purchase by the plaintiff. The issue was raised by the answer, and the defendant Hamilton was entitled to have it passed upon by the jury. It may be that, as the facts set out in the answer in respect to this phase of the controversy constituted an equitable counterclaim upon which the defendant Hamilton asked for affirmative relief in the absence of a reply thereto by the plaintiff, the defendant was entitled to judgment for want of an answer; but as no motion was made therefor, and as he treated the matter as being denied under The Code, the question is not presented for our consideration. We think that his Honor erred in holding that the justice's judgment recovered by the plaintiff against the defendant Hamilton for the $180, estopped the defendant from setting up his alleged equitable rights under the mortgage and sale made thereunder. The

only matter decided by the court in that case was that the land had been sold for $285, which being applied to the note for $400, left a balance of $180. Whether the defendant Hamilton could have
(306) set up his equitable defense in that action is not by any means clear. The facts relied upon by the defendant would not have sustained a plea of payment in the action upon the balance due upon the note. It could only have been used, if at all, in the nature of a defense or counterclaim. It is well settled that he was not required to do so in that action.

Smith, C. J., in *Mfg. Co. v. McElwee,* 94 N. C., 425, says: "There is no obligation imposed upon the defendant to bring forward a set-off or defense to an action. He may make it the subject of an independent action of his own."

In *Woody v. Jordan,* 69 N. C., 189, *Rodman, J.*, says: "It is not a general rule that a defendant is obliged to assert a set-off or counterclaim in an action against him whenever he may do so. If he does plead a counterclaim, he cannot during the pendency of that action have a separate action upon it, and he is bound by any adjudication on it. But he is not bound by the plaintiff's recovery as to any set-off or counterclaim which he did not plead." See, also, *Jones v. Beaman,* 117 N. C., 259; *Tyler v. Capehart,* 125 N. C., 64; *Shankle v. Whitley,* 131 N. C., 168.

We do not pass upon the question whether there was any evidence to sustain the defendant Hamilton's contention. It may be that if the issues had been submitted he could have produced other testimony. We are of the opinion that he was entitled to have the issues submitted, and that the judgment was not an estoppel upon him in respect thereto. For the error in his Honor's ruling in respect to these questions there must be a

New trial.

Cited: Shakespeare v. Land Co., 144 N. C., 521; *Cook v. Cook,* 159 N. C., 50.

(307)

GRAVES v. CURRIE.

(Filed 14 April, 1903.)

1. Chattel Mortgages—Description.

A chattel mortgage conveying "a thousand pounds of lint, good cotton, corn, fodder, etc.," "which I may make or have made this year on lands of my own or any land I shall cultivate," is sufficient to convey the corn raised during that year.

2. Mortgages—Claim and Delivery—Estoppel—Judgments—Evidence.

In replevin by a mortgagee for a safe, where defendant did not allege ownership of the safe, nor was there any testimony that he had purchased it from the mortgagor, a judgment for the mortgagee in a former suit between the mortgagee and mortgagor to recover the safe and other property covered by the mortgage, reciting that the cause came on to be heard on the admissions of the mortgagor, was conclusive against defendant's rights in the safe.

3. Claim and Delivery—Chattel Mortgages—Marshaling Assets—Judgments.

In replevin by a mortgagee for a safe, where defendant did not allege that he was the owner of the safe, or a purchaser for value from the mortgagor, he cannot avail himself, in defense, of the action of the mortgagee in partially releasing, to defendant's prejudice, a judgment obtained by the mortgagee against the mortgagor, sufficient to pay the claim for which the mortgage was given.

ACTION by G. C. Graves against A. C. Currie, heard by *Shaw, J.*, and a jury, at April Term, 1902, of MONTGOMERY. From a judgment for the plaintiff, the defendant appealed.

U. L. Spence and J. A. Spence for plaintiff.
Adams, Jerome & Armfield for defendant.

CONNOR, J. This was an action for the recovery of one Mosler safe. The plaintiff alleged that he was the owner and entitled to the possession of the property by virtue of a mortgage executed by D. C. Blue on 21 June, 1897, and registered in Montgomery County, the domicile of the mortgagor, and that the said property was in (308) the wrongful possession and unlawfully detained by the defendant. The defendant denied the material allegations set out in the complaint, and further alleged that the plaintiff had taken enough of other property mentioned in the mortgage to fully pay off and discharge the debt secured by the mortgage. The following issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to the possession of the Mosler safe, as alleged in the complaint?

2. Was the defendant in the possession of the same at the beginning of the action?

3. What is the value of said safe?

The plaintiff put in evidence the mortgage referred to in the complaint. The property described therein is: "All the cotton, corn, fodder, shucks, potatoes, and feed of any kind which I may make or have made this year on the land of my own, etc., or any other land, and one six-horse wagon, one four-horse wagon, one two-horse wagon,

one one-horse wagon and one Mosler safe"—this mortgage being given for the security of a note for $105, which was also put in evidence.

The defendant introduced a part of the judgment roll, duly certified, in an action heard and determined in the Superior Court of Moore County, in which the plaintiff herein was plaintiff and D. C. Blue was the defendant. He also introduced a certain chattel mortgage executed by D. C. Blue to the plaintiff, bearing date 16 February, 1897, in which was conveyed "one thousand pounds of lint (good cotton), corn, fodder, shucks, potatoes, and feed of any kind which I may make or have made this year on the lands of my own in Sandhill Township, Moore County, or any land I shall cultivate," etc. This mortgage was given for the purpose of securing four notes of $60 each, and contains the following recital: "This mortgage is given as collateral security on three mortgages, heretofore given to said Graves, which are registered in the register's office of Moore County in Book 3." The defendant
(309) also introduced a chattel mortgage executed by D. C. Blue to the plaintiff, bearing date 29 April, 1897, on the following property: "All the corn, cotton, fodder, shucks, and potatoes and feed of any kind which I may make or have made this year on the lands of my own . . . and two large mules." Said mortgage was given to secure a note for $95.

The action brought by the plaintiff against Blue in Moore County was for the purpose of recovering the possession of all of the property described in the several mortgages, including the one in which the Mosler safe was conveyed. It appeared from the judgment that the total value of the property recovered in said action was assessed at $480, and the deterioration thereon was assessed at $55. At that time the total indebtedness secured by the said several mortgages was $462.50. The judgment recovered by the plaintiff against D. C. Blue and his sureties was compromised by the plaintiff for the sum of $370.

The plaintiff testified: "I brought an action in Moore Superior Court against D. C. Blue upon the mortgage sought to be foreclosed in this suit and other mortgages. I seized the crop under all my mortgages. The property described in the judgment in the case of *Graves v. Blue* embraced all the property covered by the $105 mortgage. When I received the money under the judgment, in the case of *Graves v. Blue,* I applied it to older mortgages. When I applied the amount received for the mules to the other mortgages I did not have any other security for this mortgage or the $95 mortgage, except cotton and corn. There was then due $95 and interest on that mortgage. There was $11.10 interest on it at the time, making a total of $106.10. I applied the money to the mortgages in the order they were given. I only received

about $370 under the judgment. I took $370 for the judgment, and this was paid in compromise by the sureties on the replevy bond in the case of *Graves v. Blue;* these sureties were solvent. I (310) brought suit in the case of *Graves v. Blue* on all my mortgages, including the one sued on in this case. The way I applied the money left the mortgage now in controversy all due. The safe sued for in this action is embraced by the mortgage foreclosed in the case of *Graves v. Blue.* The crop raised by Blue in 1897 and the other property mentioned in the judgment in the case of *Graves v. Blue* was worth the amounts as found by the jury. The $240 mortgage was given as collateral, the three other mortgages and the value of corn and cotton realized in the said sale in Moore County, to the said three mortgages, and this did not discharge them in full." It was admitted that the value of the two mules described in the $95 mortgage was applied to the payment of other prior and valid mortgages upon said mules.

The defendant asked the court to charge the jury that the mortgage on the corn, in the mortgage conveying or purporting to convey 1,000 pounds of cotton, etc., was void as to the cotton and corn. The court refused to charge that the mortgage was void as to the corn, but held that it was void as to the cotton, and the defendant excepted.

It was agreed by counsel for the plaintiff and defendant that there was no conflict in the evidence, and that the evidence, if believed by the jury, raised only a question of law. The court instructed the jury that if they believed the evidence, to answer the first two issues "Yes" and the third issue "$38," and the defendant excepted.

The exceptions which were argued in this Court were:

1. That the court erred in holding and charging the jury that the corn was conveyed in the mortgage from Blue to the plaintiff. We think that in doing so the court committed no error. We think that the language properly construed conveys all of the "corn which I may make or have made this year," etc., and is sufficient, the lands (311) being pointed out upon which it was to be made.

2. That the court erred in instructing the jury that the recital of the judgment in the case of *Graves v. Blue,* to the effect that the cause came on to be heard upon the admissions in the answer of the defendant, amounted to an adjudication and that the mortgage on the corn was good and binding on the defendant in this action. It will be observed that the defendant does not allege ownership of the safe in controversy, nor is there any testimony tending to show that he had purchased it from the mortgagor. We think that, as the case is presented to us, his Honor properly held that the judgment in the case of *Graves v. Blue* was binding upon the defendant. If it had appeared that he was a purchaser for value prior to the rendition of the judgment, he

would not be affected thereby, but the burden was upon him to allege and show this fact. *Wallace v. Robeson,* 100 N. C., 206.

3. The defendant's counsel in this Court contended that the plaintiff having recovered a judgment in the case of *Graves v. Blue* for an amount more than sufficient to pay the total mortgage indebtedness, could not as against the defendant release any part thereof, and throw the burden of any balance of the mortgage indebtedness upon the safe in controversy. If it had been alleged and shown that the defendant had purchased the safe for a valuable consideration subsequent to the execution of the mortgage, we think that this defense would have availed him. But there is no allegation of ownership, nor are there any facts set up in the answer upon which he could invoke the equitable relief to which he would be entitled if a purchaser for value. It is well settled that when one has a lien upon two funds and another a lien upon only one of them, the former will be compelled to exhaust the subject of his exclusive lien before he can be permitted to resort to the other, and then only for the purpose of making up the deficiency. *Pope v.*
(312) *Harris,* 94 N. C., 62; *Butler v. Stainback,* 87 N. C., 216. "The status of the mortgage relation for the transfer of any interest by the mortgagor to a third party cannot be changed to the detriment of the latter without his consent." *Ballard v. Williams,* 95 N. C., 126. In *Large v. Vandorn,* 14 N. J. Eq., 208, it is said: "It is not in the power of the mortgagor to revive the lien for the former amount by refunding or returning the money paid to the prejudice of a bona fide encumbrancer whose encumbrance is subject to the mortgage, but prior to the repayment."

This equitable right of a purchaser from a mortgagor is not based upon contract or upon any right against the mortgagee, but is afforded to a purchaser for value from the mortgagor to prevent a disturbance of the relation between himself and the subsequent purchaser from him.

In this case the defendant does not occupy this position. So far as the pleadings and testimony show, he has no right in or to the property, and hence is not in a position to invoke this equity. Upon the whole testimony, the legal title to the safe is in the plaintiff, and no other title being in controversy in this action, he is entitled to recover the same. The judgment of the court below is

Affirmed.

PEPPER v. CLEGG.

(Filed 14 April, 1903.)

Judgments—Setting Aside Judgments—Excusable Neglect—The Code, Sec. 274.

The facts set forth in the opinion in this case do not constitute sufficient ground upon which to set aside a judgment for excusable neglect.

ACTION by C. G. Pepper against W. G. Clegg, heard by (313) *McNeill, J.*, at August Term, 1902, of ORANGE. From a judgment setting aside a judgment for the plaintiff, he appealed.

John W. Graham for plaintiff.

Charles M. Stedman and John N. Staples for defendant.

CLARK, C. J. This is a motion to set aside a judgment for excusable neglect. The findings of fact by the judge are conclusive if there is any evidence, except only when there is an omission to find material facts. If upon the facts found the judge correctly adjudges there is excusable neglect, whether he shall set aside the judgment or not lies in his irreviewable discretion, except where there is gross abuse of discretion, but by the terms of the statute (The Code, sec. 274) the discretion to set aside the judgment is not given, unless there has been excusable neglect. See *Norton v. McLaurin,* 125 N. C., 185; *Marsh v. Griffin,* 123 N. C., at p. 669, and *Morris v. Ins. Co.,* 131 N. C., 212, where the authorities are collected.

So the only question presented by this appeal is whether the facts found establish excusable neglect. We think they do not. In brief, the facts are: The case regularly stood for trial in Orange Superior Court at the term beginning 4 August, 1902. The defendant retained counsel living in Greensboro who did not regularly attend that court, and who on 29 July addressed a letter to counsel for plaintiff, stating that he wished to take a vacation and asking a continuance. Counsel for plaintiff received this letter that night and after seeing his client, replied by mail on the next day, 30 July, that his client was unwilling to a continuance, but that the case could not be called till Wednesday, 6 August, and would be the first civil case called, and to notify his witnesses not to attend till that day. This letter was not (314) received at Greensboro till 8 p. m., 30 July, being after the general delivery had closed. Defendant's counsel left on the train that night on a visit to Washington, D. C., and Atlantic City, N. J. Plaintiff himself left for Virginia about the same time "in the latter part of July." On 5 August the plaintiff's counsel wrote a letter to defendant's counsel in Greensboro, notifying him that the case would be called on 6 August, and that the defendant and his counsel and witnesses

must come on the morning train on the 6th. This courtesy did not avail the defendant's counsel, however, because he remained at Atlantic City till the morning of 6 August and did not get to Greensboro till 7:40 a. m., Thursday, 7 August. He then went immediately to Hillsboro, but the case had been regularly reached and tried in the afternoon of the day before. The plaintiff's counsel declined to agree to set aside the verdict and judgment, and the judge refused to set them aside as a matter of discretion, as he could have done. Subsequently, this motion to set aside for excusable neglect was made and continued to October Term, when it was allowed. It further appears that the defendant went off to Virginia for his health, but it is found that "the affidavits do not disclose that he was physically unable to attend Orange court." The defendant did not show that any attention was paid by him to the case after the trial term began except that on 6 August, the very day of the trial, and two days after the term had begun his counsel received a letter from him at Atlantic City, or en route, and not getting a reply, the defendant, some time subsequent thereto, wired another counsel at Greensboro to represent him.

When the defendant's counsel did not receive a reply on 30 July as soon as he expected, he could easily have telegraphed or possibly have telephoned to Hillsboro, and it was not excusable neglect for him to leave on a pleasure trip, as he states, or for his client to leave, till he had received assent to his request for a continuance. Even had (315) he been compelled to leave on urgent business, he should at least have placed the matter in the hands of another counsel in Hillsboro, or even in Greensboro. The defendant himself is in no better condition. Had he gone to court, as it was his duty to do, he could have gotten other counsel or have made an affidavit for a continuance, if the facts justified it. *Waddell v. Wood,* 64 N. C., 624. In *Bradford v. Coit,* 77 N. C., 72, it was held: "Where it appeared that a party had not determined to attend court unless advised by counsel that it was absolutely necessary, and after correspondence with his counsel concerning the trial of the case failed to leave home in time to reach court before the trial began, this was not excusable, but gross neglect, and the court below erred in vacating the judgment." Here, there was no correspondence even with his counsel till too late. The numerous cases in which *Bradford v. Coit* has been approved need not be cited here, as they can be found at the end of that case in the *Annotated Reprint* of 77 N. C.

The plaintiff, who was a railroad station agent, doubtless had to get leave of absence to attend the trial, and probably not only lost his pay while doing so, but had to employ a substitute. The jury of twelve men and the judge had left their own homes to try this matter at the

appointed time. The defendant and his counsel were absent without legal excuse. It is not strange under the circumstances that the plaintiff refused to give up his verdict. In all cases, however, counsel and their clients are sole judges of what should be done as a matter of courtesy. The courts administer only legal rights.

A lawsuit is a serious matter. He who is a party to a case in court "must give it that attention which a prudent man gives to his important business." *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391. That was not done in this case. The State affords its courts at considerable expense to the public and at an inconvenience to jurors and others, that matters of difference may be (316) judicially determined. The regular and orderly course of court procedure must be followed, and litigants who disregard this have no cause to be surprised if they find themselves in the condition of those who, not observing the schedule, arrive at the station after the train has left. "Punctuality is the politeness of kings," was said by a great sovereign. It is a necessity in the courts, and litigants and their counsel who without legal excuse fail to be present when a cause is reached for trial, cannot be surprised that the opposite party and the courts shall decline to give them "another day." To procure that exceptional favor *laches* must be clearly negatived.

The employment of counsel does not excuse the client from giving proper attention to the case. *McLean v. McLean,* 84 N. C., 366; *Vick v. Baker,* 122 N. C., 98; *Norton v. McLaurin,* 125 N. C., 185. In *Manning v. R. R.,* 122 N. C., at p. 831, this Court distinctly said that it would not sustain a leisurely manner of "attending to legal proceedings at long range." A client summering in Virginia, with his counsel at a seaside in New Jersey, cannot ask that a court trying a cause, in regular course in North Carolina, shall set aside the verdict and judgment because it did not suit their convenience to attend. *Vigilantibus, non dormientibus leges subveniunt.* 2 Inst., 690. In *Gwaltney v. Savage,* 101 N. C., 103, the defendant employed counsel regularly attending the trial court, and was guilty of no negligence himself.

When a man has a case in court the best thing he can do is to attend to it. If he neglects to do so he cannot complain because the other party attended to his side of the matter. There being "not excusable, but gross neglect, the court below erred in vacating the judgment." *Bradford v. Coit,* 77 N. C., 72; *Marsh v. Griffin,* 123 N. C., at p. 670.

Judgment reversed.

Cited: Osborne v. Leach, 133 N. C., 431; *Stockton v. Mining Co.,* 144 N. C., 596; *McClintock v. Ins. Co.,* 149 N. C., 36; *MacKensie v. Development Co.,* 151 N. C., 278; *Peltz v. Bailey,* 157 N. C., 169; *Luns-*

ford v. Alexander, 162 N. C., 530; *Land Co. v. McKay,* 168 N. C., 85; *Allen v. McPherson, ib.,* 437; *Estes v. Rash,* 170 N. C., 342; *Queen v. Lumber Co., ib.,* 502; *Seawell v. Lumber Co.,* 172 N. C., 325; *S. v. Martin, ib.,* 978; *Lumber Co. v. Cottingham,* 173 N. C., 328; *Grandy v. Products Co.,* 175 N. C., 514; *Cahoon v. Brinkley,* 176 N. C., 7; *Shepherd v. Shepherd,* 180 N. C., 495.

(317)

BRIGHT v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 14 April, 1903.)

1. Telegraphs—Mental Anguish—Relationship.

Where suffering actually results from failure to deliver a message, the relationship being one of affinity only, such relationship will warrant recovery for mental anguish.

2. Telegraphs—Mental Anguish—Relationship.

Where a telegram relates to illness or death, it is sufficient to put the telegraph company on notice of its importance.

3. Telegraphs—Mental Anguish—Free Delivery Limits.

The failure of a telegraph company to deliver a message is not excused, though it appears that the sender lived beyond the free delivery limits, and extra charge for delivery beyond the limits had not been paid; it not appearing that the sender knew the company had any free delivery limits, or that it demanded payment of any extra charge.

4. Telegraphs—Mental Anguish—Office Hours—Waiver.

Where a telegraph company undertakes to deliver a telegram at other than its office hours it thereby waives the benefit of its office hours.

5. Telegraphs—Mental Anguish—Damages.

A wife sending a telegram to her husband's uncle from W., announcing the husband's death and that he would be buried in L., was entitled to recover for mental anguish caused by the company's failure to deliver same, and for the uncle's consequent failure to be with her during her journey from W. to L., and at the latter place.

6. Telegraphs—Mental Anguish—Evidence.

In an action for mental anguish from failure to deliver a telegram, the sendee may testify as to what he would have done if he had received it.

7. Telegraphs—Mental Anguish—Evidence—Free Delivery Limit.

It is competent to show that a telegraph company had delivered other telegrams beyond the alleged free delivery limits, it being some evidence tending to show that there were no free delivery limits, and if there were, that the company disregarded them.

ACTION by Lillian Bright against the Western Union Telegraph Company, heard by *McNeill, J.,* and a jury, at September Term,
(318) 1902, of ALAMANCE.

BRIGHT *v.* TELEGRAPH CO.

This action was brought by the plaintiff to recover damages for the defendant's negligent failure to deliver a telegram. The plaintiff alleged, and there was evidence tending to show, that on 29 May, 1900, she moved with her husband and their children from Liberty, Randolph County, to Wilkesboro, and they were living in the latter place on Friday, 24 August, 1900, when her husband suddenly fell dead upon the street, and that she immediately sent to her husband's uncle, Bob Cooper, who lived at Burlington, N. C., the following message:

NORTH WILKESBORO, N. C., 8-24, 1900.

To MR. BOB COOPER, *Burlington, N. C.:*

Mr. Bright is dead. Will bury at Liberty Sunday evening.

LILLIAN BRIGHT.

The message was filed with defendant's operator at 8 p. m., 24 August, 1900, and was received in Burlington within thirty minutes thereafter. It was written on one of the company's blanks containing the usual stipulations. But it was agreed that no stipulation should be binding except the following: "All messages taken by this company are subject to the following terms: Messages will be delivered free within the established free delivery limits of the terminal office for delivery. At a greater distance a special charge will be made to cover the cost of such delivery."

The toll for the message was prepaid. Bob Cooper was an uncle of plaintiff's husband and "was devoted to him and her, and they had come to regard him much as a father." They had frequently visited his house since their marriage in 1892. The father of (319) plaintiff's husband was killed in the war and Mr. Cooper had raised her husband from his infancy and educated him, and he was the plaintiff's nearest living relative. There was evidence tending to show the close and intimate relationship between plaintiff and her husband's uncle, Mr. Cooper, and the parental affection which he entertained for plaintiff and her husband, the evidence tending strongly to show that he stood towards them in the place of a father. The plaintiff testified that her husband "looked upon him (Cooper) as a father, and, her own father being dead, she likewise was devoted to him and regarded him as a father."

Cooper never received the message, nor did he know of Bright's death until ten days after it occurred, although he was at his home in Burlington during the entire day on which the message was sent and received by the operator at Burlington. He lived near Lakeside Cotton Mill, which is less than a mile from defendant's office in Burlington, though outside the corporate limits, and he had lived there two years

and was well known by the leading citizens of Burlington, such as the postmaster, hotel keeper, druggist, lawyers, merchants, and policemen. There was a telephone line connecting the telegraph office and the Lakeside Cotton Mill, and Cooper was well known by the officers of the mill. When he heard of Bright's death he went to the telegraph office and demanded the message, but the manager was unable to find it, and instead of producing the original, he gave him a copy. It further appeared that Cooper would have gone to Wilkesboro by the first train, which left at 2:30 a. m., Saturday, and accompanied the plaintiff to Liberty. There was also evidence on the part of the plaintiff that there were no free delivery limits in Burlington and that messages had been delivered outside of Burlington, and the defendant had no rule requiring prepayment of charges for delivery beyond its free delivery limits,
(320) but collected the charges after delivery, and the charges were for the benefit of the messenger boys.

The defendant introduced evidence tending to show that Cooper was not well known in Burlington, that the office hours of the defendant company at Burlington were between 7 a. m. and 7 p. m., though an operator stayed in the office during the night, and he received this message about 8:30 p. m., 24 August, 1900. It was delivered the same night to a messenger boy, who testified that he inquired of the chief of police and of several prominent persons, and at the postoffice and various other places, as to Cooper's residence, and could get no information. He then returned to the office and sealed the message and hung it on a hook, where it was found the next morning by the manager, the night operator having left the office. The manager delivered it to another messenger boy, who attempted to deliver it the following day, and the manager thereupon sent a service message to the operator at Wilkesboro, asking for a better address, and the operator at Wilkesboro replied that Mrs. Bright had left Wilkesboro and no better address could be secured. This service message was not sent until the afternoon of Saturday. The manager stated that he found the message Saturday morning about 9:30 o'clock on the hook, but that he did not know the contents of it.

The plaintiff introduced in reply the postmaster, who stated that the messenger boy had made no inquiry of him about Cooper, but that he had frequently inquired of him about persons for whom he had messages; that he knew Cooper and had known him before he moved to Burlington, and if the messenger boy had inquired of him he could have told him the whereabouts of Cooper.

It further appeared that the plaintiff, Mrs. Bright, remained in Wilkesboro until 2 o'clock p. m. Saturday, 25 August, 1900, and neither received a service message nor heard anything whatever from the
(321) message sent to Cooper. With the dead body of her husband,

and alone with her three children, she left Wilkesboro at 2 o'clock on 25 August and had to stop over for the night in Greensboro and renew her journey to Liberty the next day at 12 o'clock. There was no one to assist her or console her, or to look after her husband's remains or to prepare for the interment. She brings this action for damages for the negligence of the defendant in failing to deliver the message so sent by her.

There were many prayers for instructions and many errors assigned, but we think the exceptions of the defendant may be fairly and fully stated as follows:

1. That the court admitted testimony to prove the relationship and state of feeling between Cooper, sendee, and Mr. and Mrs. Bright, and allowed it to be considered by the jury to establish the defendant's liability, and that the relationship between the plaintiff and Cooper was too remote to admit of a recovery of damages for mental anguish.

2. That the message did not sufficiently disclose its purpose so as to charge the defendant in damages for failure to deliver it.

3. That Cooper lived outside the free delivery limits, and the defendant was not bound to know that fact, or to deliver the message without prepayment of the extra charge, as required by the rule of the company.

4. That as the message was not received at Burlington during office hours, the defendant was not bound to deliver it until Saturday at 7 o'clock a. m., the office hours being from 7 a. m., until 7 p. m., and that Cooper could not have reached Wilkesboro before the plaintiff left there, if he had left Burlington after 7 a. m. on Saturday.

5. That the message does not show that the plaintiff desired Cooper to come to Wilkesboro.

6. That the court refused to charge as requested by defendant that if Cooper could not or would not have gone to Wilkesboro if the message had been delivered in time for him to have done so, the (322) plaintiff cannot recover actual damages, and the jury should give the plaintiff as damages the cost of the message.

7. That the court allowed the witness Cooper to testify that if he had received the message in time he would have gone to Wilkesboro by the first train.

8. That the court permitted the witness Thurston to testify that prior to 1895 he was operator of the defendant at Burlington, and that messages were delivered beyond the free delivery limits at that time, especially at Lakeside Cotton Mill.

From a judgment for the plaintiff, the defendant appealed.

A. L. Brooks, W. H. Carroll, and W. P. Bynum, Jr., for plaintiff.
King & Kimball and F. H. Busbee & Son for defendant.

WALKER, J. We are unable to see why the relationship between Mrs. Bright and Mr. Cooper was not such as to form the basis for a recovery of damages in this case. It was contended by the learned counsel for the defense that there must be consanguinity, or relation of the persons by blood, in distinction from mere affinity or relation by marriage. We are not aware of any such distinction in cases of this kind by which the right of recovery is altogether denied when there is only affinity, and no authority was cited to us which induces us to think that it exists. The law does not regard so much the technical relation between the parties or their legal status in respect to each other as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation (323) by blood, but if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown and damages recovered.

A woman suddenly bereft of her husband and who has no father or other relative or friend to whom she can turn in her distress, except the uncle of her husband, might well call upon him for consolation and assistance, especially when, as is abundantly shown by the evidence in this case, he was her husband's nearest living relative and had raised and educated him and was "devoted to her husband and herself," and stood towards them in the place of a parent. She had every right to expect that as soon as the sad news of the death of her husband had reached him he would come at once to her and give her that comfort, consolation, and assistance which she sorely needed. If he was not her father, he entertained for her all of the tender regard and affection of a parent, and was as much interested in her welfare as if he had been her father, and she could therefore reasonably expect that he would do under the circumstances precisely what her father would have done if he had been living.

It is needless to discuss the question further, as this Court has settled it against the defendant. "We do not mean to say," says *Douglas, J.*, speaking for the Court, "that damages for mental anguish may not be recovered for the absence of a mere friend, if it actually results; but it is not presumed. The need of a friend may cause real anguish to a helpless widow left alone among strangers with an infant child and the dead body of her husband. In the present case the plaintiff seems to have received the full measure of Christian charity from a generous community, but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove it." *Cashion v. Telegraph Co.*, 123 N. C., 267.

It is not a valid objection to the plaintiff's right of recovery (324) that the message did not sufficiently disclose its purpose, or show

that the plaintiff desired Cooper to come to Wilkesboro. It has repeatedly been decided by this Court, in cases where the relationship of the parties was not disclosed and the special purport of the message could not possibly have been understood, that it was not necessary for the company to know the relation between the sender and sendee from the terms of the message, or to know anything more than that the message is one of importance, and that this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suffering for which damages may be recovered. *Lyne v. Telegraph Co.*, 123 N. C., 129; *Sherrill v. Telegraph Co.*, 109 N. C., 527; *Hendricks v. Telegraph Co.*, 126 N. C., 310, 78 Am. St., 658.

The contention that Cooper lived beyond the free delivery limits of the defendant at Burlington, and therefore the defendant was not bound to deliver the message until the extra charge for delivery beyond the limits had been paid, is not tenable. There is no evidence that Mrs. Bright knew that the defendant had any free delivery limits, nor is there any evidence that the defendant demanded of her the payment of any extra charge or even informed her that there were free delivery limits at Burlington and that an extra charge was made by the company for delivery beyond those limits. *Hendricks v. Telegraph Co.*, 126 N. C., 310, 78 Am. St., 658.

The defendant had regular office hours between 7 a. m. and 7 p. m. only, and it received the message at 8:30 p. m. We do not think that under the facts of this case its failure to deliver the message could be excused. There is one thing certain, that the defendant, notwithstanding any office hours it may have had, undertook to deliver the message Friday evening just after it was received at Burlington, and it thereby waived its right to claim the benefit of the rule (325) as to office hours, even if that rule be a reasonable one. It does not seem to have occurred to the defendant at the time that it had office hours, and was not bound, therefore, to deliver the message, as it introduced evidence to show that it made strenuous efforts to deliver the message as soon as it was received. Its reliance now upon the rule would seem to be an afterthought. It cannot be heard to say that it received and delivered messages only within certain hours, when it appears that at the time this message was received its office was open, an operator was there to receive messages, and a messenger boy was there to deliver them. In addition to this, it may be said that the company did not deliver the message at all, nor did it send a service message to get a better address until the afternoon of the next day, when Mrs. Bright had left Wilkesboro. Nothing was ever said by the

defendant about free delivery limits or office hours, as far as appears, until the answer in this case was filed.

In *McPeak v. Telegraph Co.*, 107 Iowa, 356-364, the Court says: "It may be that the defendant can fix office hours which are reasonable. This we do not decide. The company received this message with the understanding that it was to be delivered about 9 o'clock. The agent at Winfield received it and the company, having undertaken to deliver it, was bound to do so with reasonable diligence. He was acting within the scope of his agency, although not within the hours fixed for the active discharge of his duties. This would not relieve the company from discharging the obligation incurred by receiving the message to be delivered out of office hours." Joyce on Elec. Law, sec. 761.

The defendant requested the court to charge the jury that if Cooper could not or would not have gone to Wilkesboro if the message had been delivered to him in time for him to have done so, the (326) plaintiff cannot recover any actual damage, but only the cost of the message. This instruction could not have been given by the court without confining the plaintiff's right to damages to those resulting from the mental anguish caused by his failure to be with her at Wilkesboro only, whereas she was entitled to recover damages for any mental suffering arising from his failure to be with her at any time during her long and sad journey from Wilkesboro to Liberty, or at the latter place. He was evidently expected by her to go to Wilkesboro, and the mere fact that the message was sent from Wilkesboro would indicate to him that such was her expectation. If he could not reach that place, then she had the right to expect that he would join her at some intermediate point, or at Liberty.

In this connection may be noticed another of the defendant's objections, that the court permitted the witness Cooper to testify that he would have gone to Wilkesboro if he had received the message in time. We are unable to understand why this is not competent. It tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plaintiff to prove in order to recover substantial damages, and it was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for the mental anguish which resulted from his failure to go to Wilkesboro.

The testimony of the witness Thurston, that messages were delivered beyond the free delivery limits at Burlington prior to the year 1895, when he was operator for the defendant, becomes immate-

rial in the view we have taken of the case. If the defendant had any free delivery limits at that place, its conduct shows that it did not rely on the rule as to them in the handling of messages. Besides, the testimony of Thurston, when considered with the other facts and circumstances in the case, was some evidence tending to show that there were no free delivery limits, or, if they were ever (327) established, that they had been disregarded by the defendant.

We have given the case a careful and thorough consideration and cannot find any error in the rulings of the court below.

PER CURIAM. Judgment affirmed.

Cited: Cogdell v. Tel. Co., 135 N. C., 436; *Hunter v. Tel. Co., ib.*, 464, 468, 469; *Hood v. Tel. Co., ib.*, 627; *Harrison v. Tel. Co.*, 136 N. C., 384; *Green v. Tel. Co., ib.*, 496; *Hancock v. Tel. Co.*, 137 N. C., 503; *Dayvis v. Tel. Co.*, 139 N. C., 83; *Alexander v. Tel. Co.*, 141 N. C., 79; *Whitten v. Tel. Co., ib.*, 366; *Carter v. Tel. Co., ib.*, 376, 378; *Kernodle v. Tel. Co., ib.*, 422; *Helms v. Tel. Co.*, 143 N. C., 394; *Suttle v. Tel. Co.*, 148 N. C., 482; *Holler v. Tel. Co.*, 149 N. C., 344; *Cates v. Tel. Co.*, 151 N. C., 506; *Battle v. Tel. Co., ib.*, 631; *Beal v. Tel. Co.*, 153 N. C., 333; *Carswell v. Tel. Co.*, 154 N. C., 115; *Alexander v. Tel. Co.*, 158 N. C., 478; *Penn v. Tel. Co.*, 159 N. C., 309; *Betts v. Tel. Co.*, 167 N. C., 78; *Smith v. Tel. Co.*, 618 N. C., 518; *Lawrence v. Tel. Co.*, 171 N. C., 245; *LeHue v. Tel. Co.*, 174 N. C., 333.

WRIGHT v. SOUTHERN RAILWAY COMPANY.

(Filed 14 April, 1903.)

Negligence—Trestles—Hand-cars—Railroads—Trespassers.

The operator of a hand-car may assume that persons on a trestle will step off, and he owes no duty to them until he discovers by their conduct that they cannot or do not intend to leave the track, and this conduct must manifest itself positively and not be inferred from remaining on the track.

ACTION by Edna Wright against the Southern Railway Company, heard by *McNeill, J.*, and a jury, at November Term, 1902, of GRANVILLE. From a judgment for the plaintiff, the defendant appealed.

B. S. Royster and F. P. Hobgood for plaintiff.
Hicks & Minor and F. H. Busbee & Son for defendant.

MONTGOMERY, J. The plaintiff brought this action to recover damages for personal injuries alleged to have been received through the

negligence of defendant. She, together with three other persons, all women, was walking on a trestle, a part of the defendant's railroad, when a hand-car under the management of one of defendant's section masters was driven upon the trestle and partly over the (328) body of the plaintiff. The four were walking behind each other, the plaintiff being next to the rear, and the approach of the hand-car was from that direction. The plaintiff had notice, and said to one of the party, "Don't be scared; Mr. Daniel will not run over us." One of the party crossed over the trestle in safety and the two others than the plaintiff stepped to one side on the trestle.

The plaintiff testified that on account of her nerves she could not step off and stand on the cross-ties. "I was," she said, "scared, and I knew I could not have stood on account of my nerves." The plaintiff said she saw a card stuck up at the end of the trestle, which contained a notice forbidding persons to go on the trestle, but she did not read it. All of the evidence on the size and construction of the trestle was that it was 11 feet wide; that the width of the track up to the outer edge of the rails was 5 feet, and that the car did not project beyond the rails. The track was straight for about 500 yards, and the section master saw the four persons on the trestle and could have stopped the car with ease after he saw them. He said that he had frequently encountered people on the trestle and that they always stepped aside on the approach of the car. He testified further: "When I first came in sight of the trestle about a quarter of a mile off, I saw four women on it. As I came nearer behind the women I saw first one and then another get off, the speed of the car having then greatly slackened. When I saw the third person apparently did not intend to step off, but was apparently hurrying, I did everything in my power to stop the car. It stopped just about as it reached her, striking her slightly. Her leg slipped between the cross-ties. I saw her in plenty of time to stop if I had known that she would not step to one side, as the others had done. After I found that she apparently did not intend to step aside, which I saw after the two persons between her and the car stepped off, when she was about thirty feet from me, I used every exertion to stop, but could not prevent (329) the car from slightly running against her."

1. The main question which the defendant's appeal presents for decision is, What, if any, is the degree of care which railroad companies are required to use, when operating hand-cars upon their tracks, towards pedestrians crossing trestles? The defendant's counsel admitted that if in the present case the plaintiff's injury had been caused by the handling of a locomotive engine, the defendant would have been guilty of negligence and the plaintiff would be entitled to damages, although she herself contributed to her own injury. But it is contended for

the defendant that a different rule of law ought to be applied to the same facts where the injury has been caused by the operating of a hand-car, and from that point of view his Honor was requested to instruct the jury as follows:

2. "The rule of law in regard to persons in charge of a locomotive, when a trespasser or pedestrian is seen walking upon the trestle, does not to apply to persons in charge of a hand-car crossing a trestle, if the jury shall find there was a space three feet wide outside the rails upon which inexperienced women could stand, and did stand safely."

3. "That persons in charge of a hand-car have a right to presume that a woman walking on a trestle is in the possession of her faculties and will step off the track to a place of safety, if there is such place in easy access which any ordinary person could safely reach, and upon which such person could safely stand; and if such person be injured because, on account of her state of nerves, unknown to defendant's employees, she thought she could not stand on such place, the injury will not be attributed to defendant's negligence, if defendant acted upon the presumption that she would act as ordinary persons do."

His Honor refused to give the last sentence of the defendant's third prayer, and added to the first section, which was substan- (330) tially given in the charge, these words: "And this assumption (that the plaintiff was in possession of her ordinary faculties, and that on the approach of the car she would either leave the track, if she could, or get into a place of safety, if under the circumstances she could do so, and if there was such place), he, the section master, might act on until, discovering the peril of a nearer approach, he then failed to use all the proper and necessary vigilance and care to check the speed of the car, and if in consequence of this failure the plaintiff was injured, you ought to answer the first issue (as to the negligence of the defendant) 'Yes'."

We are of the opinion that the prayer for instructions ought to have been given, and that the modification of the third prayer ought not to have been made. Railroad companies are entitled to the full and free use and enjoyment of their property, including the right to operate their trains and cars to fit their schedules, unrestrained and unfettered by individuals, and to use their hand-cars to repair their tracks and construct new ones. Persons who use these tracks for private purposes, except at crossings, have no legal right to do so. In some of the decisions of the courts of the States of the Union the responsibility of railroad companies through their engineers in charge of moving trains as to persons on the track begins when the engineer actually sees the peril of the trespasser. But under the decisions of our Court the

engineer is required to keep a lookout, and if he could have seen a person on the track and failed to do so, and through that failure to keep a lookout an injury occurs, the company is negligent and liable for the injury, except "where an engineer sees on the track in front of the engine, which he is moving, a person walking or standing whom he does not know at all or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming (331) up to the last moment that the latter would step off the track in time to avoid injury, and if such person is injured, the law imputes it to his own negligence and holds the railroad company blameless." The quotation is from *High v. R. R.*, 112 N. C., 385. The decisions to that effect, both before and after that of the case last mentioned, are numerous. Our decisions, however, as to the duty of engineers towards persons walking or standing on trestles or bridges mark out a very different rule from that which prevails as to persons walking or standing on the track, but not on a trestle or bridge. The engineer is required to use such diligence and care to prevent injury to a person on a trestle or bridge as a reasonably prudent man would use under like circumstances. The reasons for this rule are apparent. Amongst them may be mentioned the terror and nervousness produced by the rapid movement of a heavy train—engine and cars; the danger from smoke and cinders and escaping steam, the narrow width of the structure, the insecure footing, and the peril of a leap from the structure. In such cases the law requires a strict lookout on the part of the engineer, and although the person on bridge or trestle is a trespasser, yet, because of the sacredness of human life, and then because of the circumstances above mentioned, proper and reasonable care must be taken that he be not injured. The reason of the rule which governs in those cases cannot be urged as applicable to the facts in this case now before us. The hand-car was a simple platform on wheels, propelled probably by chain or crank, and just covering in width the rails. There was a space of three feet on each side of the car. The section master on the hand-car had frequently met persons on that trestle, who invariably had stepped aside without injury. On the present occasion, two of the party moved to one side and were unhurt, and the plaintiff gave as her only reason for not doing as the others did, that she was nervous and afraid to stand to one side. That condition of the plaintiff was (332) unknown to the section master. We cannot think that the same rule of liability ought in reason to obtain in a case like this as controls in a case where one is in peril upon a bridge or trestle upon the approach of the locomotive and train.

We think the true rule is, and ought to be, in a case like the one before us, that the section master, the operator of the hand-car, might

assume that the pedestrian would step off like other persons in possession of their faculties had done, and that he would owe no duty to a person on the trestle until he had discovered by the behavior and conduct of such person that he could not, or did not intend to leave the track; and that behavior or conduct to manifest itself positively, and not to be inferred from simply remaining on the track. After discovering, as above described, that the plaintiff did not intend to leave the track or could not, then it would be the duty of the section master to use every available means to prevent injury. This is what the section master testified he did, and there was no evidence to the contrary. There was error, for which there must be a

New trial.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. FLEMING.

(Filed 14 March, 1903.)

Bonds—Official Bonds—Public Officers—Officers—Principal and Surety—County Commissioners—Sheriffs and Constables—Laws 1893, Ch. 300, Sec. 5—The Code, Secs. 702, 707 (28), 1874.

A board of county commissioners cannot release a surety from the official bond of a sheriff, and any other bond they may take will be cumulative during any one term of office.

ACTION by the Fidelity and Deposit Company of Maryland against S. A. Fleming, heard by *Neal, J.*, at February Term, 1902, of GRANVILLE. (333)

This action was brought by the plaintiff to recover of the defendant the sum of $135, the amount of the premium alleged to be due the plaintiff for becoming surety on his bond as sheriff, and was tried in the court below upon the following statement of facts, to which the parties agreed:

1. That the defendant was duly elected sheriff of Granville County, N. C., on 2 August, 1900, for the term of two years from 1 December, 1900, and was duly inducted into the office of sheriff of said county on the first Monday in December, 1900.

2. That the defendant applied to the plaintiff to become surety upon his bond as said sheriff, and agreed to pay the plaintiff the sum of $135 per annum as a premium therefor so long as said defendant remained in office, unless said defendant should notify said plaintiff of his desire to cancel the same and have plaintiff legally released from all liability as such surety upon said bond during said term of office.

3. That such notice was given, and that the board of commissioners of Granville County, on 6 January, 1902, made the following order: "S. A. Fleming, sheriff, and J. F. Edwards, treasurer, of the county,

having this day filed their official bonds for the remainder of their terms of office as such sheriff and treasurer, and the same being accepted and approved, it is ordered by the board of commissioners that the Fidelity and Deposit Company of Maryland, surety on the bonds of said sheriff and treasurer heretofore filed, be and it is hereby released from any and all liability that may arise or occur from and after this date."

4. That the bond given by the defendant sheriff was given for the faithful performance of his duties as such sheriff during the term of said office.

5. That the plaintiff company has been, and is now, fully authorized by the laws of this State to write surety bonds and charge
(334) premiums for the same.

6. That said sheriff gave bond in another surety company as a renewal of his said bond as sheriff, and refused to pay plaintiff the annual premium due on his bond given by plaintiff.

Now upon consideration of the foregoing facts, it is ordered and adjudged by the court, that said board of commissioners had no power or authority to release the sureties upon said bond executed by the plaintiff, and that said plaintiff is now and remains liable upon said sheriff's bond during the full term of his said office.

It is further adjudged that the plaintiff recover of the defendant the sum of $135, with interest on same from 3 February, 1902, and the costs of action.

The defendant excepted to the judgment, and assigned as errors:

1. The ruling of the court that the board of commissioners had no power or authority to release the sureties from said bond executed by the plaintiff.

2. That the plaintiff is now and remains liable upon said sheriff's bond during the full term of his said office.

3. That the plaintiff company recover of defendant $135, with interest on same.

From a judgment for the plaintiff, the defendant appealed.

H. M. Shaw for plaintiff.

Royster & Hobgood, J. W. Graham and A. W. Graham for defendant.

WALKER, J. The only question presented for our decision is whether the board of commissioners had the power to release the plaintiff from any and all liability on the bond that might have arisen after the date of the release. If it had not the power to do so, the plaintiff is
(335) entitled to recover the amount of the premium; but if it did have the power, it is not entitled to recover. This seems to have been conceded in the argument.

It will be observed that the condition of the sheriff's bond secures the faithful performance of his official duties during the entire term of his office, and this being so, and the law requires that it should be so, the surety on the bond necessarily would be liable for any default of the sheriff committed at any time during his term. *Dixon v. Comrs.*, 80 N. C., 118.

It has too often been held by this Court to be now questioned, that official bonds given during any one term of the officer are cumulative. The principle is clearly set forth by *Pearson, C. J.*, in *Pool v. Cox*, 31 N. C., 71, 49 Am. Dec., 410: "We consider the principle well settled, that where a term of office is for more than one year, the bonds given for a proper discharge of the duties of the office at the time of appointment, and the new bonds given from time to time afterwards, are cumulative, that is, the first bonds continue to be security for the discharge of the duties as at first intended, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are entered into. This principle is deduced from two considerations. The new bonds are not required for the relief of the sureties upon the first bonds, but are taken for the benefit of those who may be concerned in the proper discharge of the duties of the office, and when the office is to continue for more than one year it was presumed that the bonds taken at first might become insufficient from the insolvency of the sureties or other cause; hence, the Legislature took the precaution to require new bonds to be given from time to time, and the courts, in order to give effect to the intention of the lawmakers, consider the new bonds not as taking the place of the old ones, but as additional thereto." *Oats v. Bruan*, 14 N. C., (336) 451; *Bell v. Jasper*, 37 N. C., 597; *Pickens v. Miller*, 83 N. C., 543; *Moore v. Boudinot*, 64 N. C., 190; Murfree on Official Bonds, sec. 318; Throop on Pub. Officers, sec. 215.

It comes, therefore, to this proposition, that the plaintiff is liable for the default of the sheriff during his whole term, unless the county commissioners had the power and authority under the law to release him from liability for any default occurring from and after the date of the release.

The boards of commissioners in the several counties possess only the powers which have been prescribed by statute and those necessarily implied by law, and no others. This is the general rule, and it has also been expressly declared by statute to be the rule which ascertains the true scope and limit of their power and authority. The Code, sec. 702. We know of no provision by statute for the release of sureties on the bonds of public officers. Indeed, the learned and diligent counsel who argued the case in behalf of the defendant before us, were unable

to refer us to any such statute. The power, therefore, to release does not exist unless it can be implied from those powers which are conferred by law. The commissioners are authorized and required to qualify and induct into office the several officers of the county, and to take and approve their official bonds, which they shall cause to be registered. The Code, sec. 707, subsec. 28. Provision is also made for the renewal of official bonds by the said officers before the commissioners. The Code, sec. 1874. The sole power given by statute is to take and approve official bonds and any renewals thereof, and when this is done the commissioners have fully performed their duty and completely exhausted the power conferred.

If it be suggested that this power to release should be implied from the power to receive and approve the bond and to sue upon it if there should be a default, the sufficient answer is that the bond does (337) not belong to them, nor is it made payable to them, and all that is prescribed for them in connection with it by the statute is merely the duty of protecting the interests of the public for whom the bond is given. They are not even trustees of those for whose benefit the bond is taken, and really have no more interest in it than the judge or clerk of a court who passes upon and approves a bond taken in an action pending therein. Their powers and duties in this respect are very analogous.

But this Court has already met the suggestion with a most conclusive answer in the case of *Comrs. v. Clarke,* 73 N. C., 258. The Court says: "We think the county commissioners had no power to release the sheriff from his liability to pay the county taxes. The commissioners are a public corporation which has no powers except such as are given by statute, and there is no statute which expressly or by reasonable implication gives it the power in question. If it were true that the board of commissioners was the proper relator in this action, it would not follow that it had power to release the debt. The rule that he who can recover a demand can also release it, does not apply to trustees and others who sue in another's right. An unlawful release by a trustee is disregarded in equity. *Dockery v. French,* 69 N. C., 308."

There can be no doubt as to the intention of the commissioners to release the plaintiff as surety for the sheriff, but it is not a question of intention, but one of power, and the authority to release must be derived, either by expression or implication, from some statute. If the statutory power did not exist at the time the commissioners attempted to release the plaintiff, then the act of the commissioners was invalid, no matter how clearly and explicitly they expressed their intention to release. "An act which places in the power of the board

of commissioners of a county the approval of the official bonds of certain officers does not confer upon it the power to release sureties on those bonds on presentation of a new bond." Beach (338) on Pub. Corp., sec. 793. This principle has been adopted by many of the courts. Indeed, we have not been able to find a case deciding the contrary.

In *Sullivan v. State,* 121 Ind., 352, the Court discusses this question very fully, and in summing up the matter it says "The conclusion we reach is, that the board of commissioners are only empowered to accept the official bonds of the officers, and have no authority to accept new bonds whereby sureties on the original bonds are released, and that the proceedings had before the board of commissioners for the release of Burton are without authority and void, and do not release the defendant Burton from liability on the bond." *Clark v. Surety Co.*, 117 Ill., 235; *Wood v. Williams,* 61 Mo., 63.

In *Rudolph v. Malone,* 104 Wis., 472, the Court says: "This Court has recently decided, after full consideration, that county courts had no power, by the taking of a new bond or otherwise, to discharge sureties from liability for either past or prospective misconduct of an executor, administrator, or trustee, but that such new bond, if taken, was merely cumulative. *Richter v. Leiby,* 101 Wis., 434. This being the law, it is evident that the giving of the second bond in this case in August, 1893, did not discharge the liability of any surety on the first bond."

We are referred to some authorities by the defendant's counsel to the point that if the second bond is given with the intention of releasing sureties to the first, it will have the desired effect, provided the intention is clearly expressed. But these cases were decided in States where there are statutes expressly authorizing a release of sureties in certain cases and upon complying with certain conditions, and the question in the cases cited was whether the requirements of the statute had been complied with. It seems to us that there is no possible reason for holding under the facts and circumstances disclosed (339) in this case and in the present state of our law that the commissioners had the power to release the plaintiff as a surety for the sheriff, and that being so, it remained liable during the second year of his term of office, and for the benefit of its suretyship for that year the plaintiff is entitled to receive the stipulated compensation or premium.

The defendant's counsel referred us to several statutes of this State allowing corporations or security or indemnity companies, as they are called, to become sureties on official bonds. The said acts contain the following or some similar provision: "Any company executing such

bond, obligation, or undertaking may be released from its liability as surety on the same terms as are, or may be by law, prescribed for the release of individuals upon any such bond, obligation, or undertaking." Laws 1893, ch. 300, sec. 5. It is manifest that by this provision no power to release a surety on an official bond was intended to be conferred, as there is no provision of the law for releasing individuals who may have become sureties on such bonds. The law does provide for the relief, and in some cases for the release, of a surety on the bond of an executor, administrator, or collector who is in danger of sustaining loss by his suretyship; but we know of no statute authorizing a release in the case of individuals who are sureties on official bonds.

There was no error in the ruling of the court below that the plaintiff was entitled to recover upon the facts submitted for its decision.

PER CURIAM. Affirmed.

Cited: Comrs. v. Henderson, 163 N. C., 116.

---

(340)

DENNY v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 14 April, 1903.)

Negligence—Contributory Negligence—Personal Injuries—Passengers—Stations.

A passenger who voluntarily goes upon the platform of a moving train for the purpose of alighting at the station, and is injured by reason of a jerk in the train, is not entitled to recover therefor.

ACTION by W. R. Denny against the North Carolina Railroad Company, heard by *Neal, J.,* and a jury, at February Term, 1902, of GUILFORD. From a judgment of dismissal as of nonsuit, the plaintiff appealed.

Scales, Taylor & Scales for plaintiff.
King & Kimball for defendant.

CONNOR, J. This is an action to recover of the defendant damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on a train of the defendant's lessee. The portion of the evidence necessary to be considered in passing upon the exceptions to the ruling of his Honor is as follows:

The plaintiff testified that he purchased a ticket of the agent of the defendant's lessee at Greensboro, from that point to McLeansville, a

station on the road, and paid therefor the sum of 25 cents; that he went into the defendant's car, and after the train left Greensboro the conductor came through the car to gather tickets of the passengers; that he handed the conductor the ticket, calling his attention to the fact that he wished to get off at McLeansville, saying, "Do not forget me"; he spoke loud, and the conductor nodded his head, and he understood that the conductor heard him; as the train approached McLeansville it was a little late and was going at a pretty rapid speed; plaintiff kept his seat until after the train had blown the regular (341) station whistle about a mile from the regular stopping place; the whistle blew to stop at the station; plaintiff knew that it meant for the train to stop at the station; some time after the whistle blew, the plaintiff got up and went to the end of the car, and by that time the train had gotten nearly to the stopping place; he got up because he knew the train was getting near the station, knew the whistle had blown, and knew that they had promised to stop there and let him get off; there is a regular stopping place there—a regular platform; the train stops there only long enough for a person to get off; on this occasion it did not stop at the regular stopping place, but ran past about 150 yards; after it passed the regular stopping place, it began to slow up, continued to get slower; just as it was coming to the stopping place the plaintiff went out on the platform, and after it had gone 75 or 100 yards past the stopping place the plaintiff got on the steps, and then the train got slower and slower; it was going too fast for him to get off, and he was waiting for it to get slow enough; he was holding with his left hand to one of the rods and there was a sudden jerk of the entire train, and at the same time his hold was broken and he had to pick his way the best he could to the ground; the jerk broke his hold and caused him to go off then; the snatch of the car which broke his hold was really the cause of the injury; the train did not stop entirely until after he fell; when this jerk came, the speed was quickened and the train ran on some distance. The plaintiff also testified in regard to his injuries.

Upon cross-examination he testified that he had seen the notice posted up by the door that persons must not get on the platform while the train was moving, and that he knew that was the rule of the company; that if he had kept his seat until the train stopped the accident would not have happened, and that it would not have happened if they had not jerked the train, and he also knew that it was (342) the rule of the company to stop at the regular prepared platform.

A. M. Rumley, a witness for the plaintiff, testified that the train was running about 8 or 10 miles an hour when he fell.

The defendant moved to nonsuit the plaintiff. The motion was denied, and defendant excepted. At the conclusion of the evidence the defendant renewed its motion to nonsuit the plaintiff. The motion was allowed and judgment rendered dismissing the action "as upon nonsuit." The plaintiff excepted and appealed, assigning as error the ruling of the court upon defendant's motion.

The plaintiff relies upon the principle announced by this Court in *Nance v. R. R.*, 94 N. C., 619. The correctness of the rule laid down in that case has not been questioned by any decision of this Court, nor are we disposed to do so now. We fully approve it. It was the obvious duty of the defendant to stop its train at the station named on the plaintiff's ticket and permit him to get off safely, and if the movement of the train had been brought gradually slower until it had been brought "nearly—almost to a full stop," it would not have been negligence for the plaintiff to go out of the car on the platform and step to the platform of the station. *Merrimon, J.*, speaking for the Court, says: "By *'nearly—almost to a full stop,'* is meant very slow, a slight, gentle creeping movement." The learned justice further says: "The reasonable inference was that it was intended by such stoppage to let passengers get on and off the train. At least, the *feme* plaintiff might draw such inference. There was therefore at least an implied suggestion from the conductor that she could do so." In that case the allegation in the complaint was that the train had already slackened its speed to nearly a "full stop," when there was no real or apparent danger, that the car had reached the usual place for getting off, and when it was safe and without danger for her to do so she stepped off,

and while in the act of doing so was by a sudden jerk thrown (343) down and injured.

In *Tillett v. R. R.*, 118 N. C., 1031, the plaintiff was on the train, and before he could by the exercise of reasonable diligence procure and occupy a seat the car was brought into sudden and violent collision with another car in making a coupling, when the plaintiff was thrown down and injured. The Court sustained a verdict for the plaintiff.

There can be no doubt that a sudden or violent jerk, movement, or collision of the train by the engineer, while the train is at a station where passengers are known to be or have the right to be in the act of alighting from or going upon the cars—and in this is included leaving their seats for exit or passing to their seats—is *per se* negligence, and the company is liable for any injury sustained thereby. It is also well settled that if the passenger be invited by the conductor or other employee of the company, whose duty it is to assist or advise passengers in that respect and to know the dangers, to alight, he may

rely and act upon such invitation, unless the danger in doing so is apparent. Wood on Railways, 1297.

In the case before us the train was a little late and was running at a rapid speed. When it blew for the station, the plaintiff left his seat and went to the end of the car. The train at that time had got nearly to the regular stopping place. Knowing that it stopped only for a moment, he stepped out upon the platform. By that time the train had gone nearly 75 or 100 yards past the stopping place, and the plaintiff got on the steps, and the train began to get slower. It is manifest that the train was moving at a high rate of speed as it passed the platform. The plaintiff says that he knew the rule, and saw the notice posted up by the door that passengers must not go upon the platform while the train is in motion. It was negligence for him to go there and to go upon the steps of the car. The train at the time he was thrown from the car was moving at the rate of about 8 or 10 miles an hour. He says: "It was going too fast for (344) me to get off, and I was waiting for it to get down slow enough." He says that the conductor was not on the platform, and he never "heard him say a word."

We think that upon the plaintiff's own evidence there was no negligence shown on the part of the engineer. The duty to avoid jerks and sudden movements is imposed only when the train was stopped at a station for passengers to get off and on. While the train is in motion and in the absence of evidence, there is no presumption that a jerk is caused by his negligence. It was his duty to bring the train to a stop without danger or injury to passengers on the inside, or getting on and going to their seats. He cannot be presumed to know or anticipate that passengers, in defiance of the rules, have gone upon the platform and are standing upon the steps of the car while in motion. If it were shown in evidence that the engineer needlessly or carelessly caused a sudden and violent jerk of the train while in motion, and passengers who were not guilty of contributory negligence were injured thereby, the company would be liable. We must be understood as dealing with the case before us or such as come directly or reasonably within the rule.

There is no suggestion in the plaintiff's evidence that the conductor was upon the platform, or knew or had any cause to think that the plaintiff was there. "No recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them." Wood on Railways, 1304.

The plaintiff says that he went upon the platform to wait for the train to slow down enough to enable him to get off. It was that very thing which for his own safety he was notified not to do. "The plain-

tiff must have been aware of the dangerous position in which he placed himself. He was warned of this danger by the regulation of
(345) the defendant forbidding passengers to ride upon the platform." *Malcom v. R. R.*, 106 N. C., 64.

"The general rule is that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury." *Brown v. R. R.*, 108 N. C., 34

In *Lambeth v. R. R.*, 66 N. C., 494, 8 Am. Rep., 508, *Mr. Justice Dick* uses the following language: "That it is contributory negligence to 'attempt to alight' from a moving vehicle, although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited by some employee of the carrier whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent and the attempt was not obviously dangerous." This language is approved in *Burgin v. R. R.*, 115 N. C., 673. The fact that the conductor had promised to stop the train at McLeansville in no manner affected or increased the obligation to do so. If it made any impression at all upon the mind of the plaintiff, it would seem that it should have assured him that he might safely wait until the train stopped, as it was slowing down. The distinction between the case before us and *Johnson v. R. R.*, 130 N. C., 488, is clear.

This case is peculiarly similar to that of *Schieber v. R. R.*, 61 Minn., 499, in which it is held: "The plaintiff was a passenger upon the defendant's railroad train operated by steam, and it was approaching the station at a dangerous rate of speed. He went, in anticipation of its stopping and for the purpose of being ready to get off when it should stop, upon the platform of the car and stood upon the steps thereof, and was thrown therefrom by a sudden jerk of the train.
(346) There was no evidence of any necessity for him to assume such position, or invitation, express or implied, by the defendant's agent in charge of the train for him to do so: *Held,* that he was guilty of contributory negligence as a matter of law." The same rule is announced in *Jamison v. R. R.*, 92 Va., 327, 53 Am. St., 813; *Godwin v. R. R.*, 84 Me., 203. There is an obligation imposed upon passengers to observe the reasonable regulations of the company in entering, occupying, and leaving the cars. If a party be injured in consequence of the known violation of such regulations, the company is not responsible. *Turnpike Road v. Cason,* 72 Md., 377.

We think that upon the plaintiff's evidence, considered in the light most favorable to him, his Honor properly entered judgment of nonsuit.

We find no evidence of negligence on the part of the defendant. Affirmed.

Cited: Morrow v. R. R., 134 N. C., 99; *Whisenhant v. R. R.*, 137 N. C., 353; *Peterson v. R. R.*, 143 N. C., 266; *Shaw v. R. R., ib.*, 315; *Whitfield v. R. R.*, 147 N. C., 239; *Kearney v. R. R.*, 158 N. C., 526; *Thorp v. Traction Co.*, 159 N. C., 37; *Mincey v. R. R.*, 161 N. C., 469; *Carter v. R. R.*, 165 N. C., 252.

BELL v. COUCH.

(Filed 21 April, 1903.)

1. Evidence—Deeds—Probate—Acknowledgments.

The fact that a deed has been three times probated and registered does not affect its competency as evidence.

2. Deeds—Description—Parol Evidence—Wills.

A will describing land devised as "one-half of the remainder of my farm, including the house wherein I now live," is not too indefinite to exclude identification by parol evidence.

3. Deeds—Registration—Wills—Laws 1885, Ch. 147—The Code, Sec. 1245.

Laws 1885, ch. 147, requiring conveyances of land, contracts to convey, and leases to be recorded, apply when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value.

ACTION by W. F. Bell and others against J. B. Couch, heard (347) by *Winston, J.*, and a jury, at May (Special) Term, 1902, of WILKES. From a judgment for the plaintiffs, the defendant appealed.

T. B. Finley for plaintiff.
F. B. Hendren for defendant.

CONNOR, J. This is an action brought by the plaintiffs pursuant to chapter 6, Laws 1893, for the purpose of removing a cloud from and quieting the title to the real estate described in the complaint.

The plaintiffs allege that they are the owners and in possession as tenants in common of a tract of land situated in Wilkes County, fully described in the complaint, containing six acres. That the defendant claims an estate or interest therein adverse to them. They ask that such adverse claim may be determined by the court, and for such other

and further relief as may be appropriate, etc. The defendant denies that the plaintiffs are the owners of the land in controversy, and alleges that he is the owner thereof. The plaintiffs upon the trial introduced in evidence the will of George Parks, bearing date 17 January, 1894, and admitted to probate and registration 14 December, 1898. The portions of said will material to the decision of the question presented are as follows:

"Item I. I will and bequeath unto my oldest daughter, Julia, four acres of land where she now lives and $1 in cash.

"Item II. I will and bequeath unto my son Felix one-half of the remainder of my land, including the dwelling-house, whereon I now live."

Plaintiff introduced a deed from Felix Parks to Henderson Allen, bearing date 13 June, 1895, conveying, in consideration of $50, "my entire interest in the tract of land whereon I now live, known as the homestead of my father, George Parks, deceased, adjoining the lands of Elmira Parks, Mrs. Sprinkle, and Elijah Parks," etc., re-
(348) corded 14 December, 1898. The defendant objected to the introduction of this deed. There seems to have been some doubt in the minds of the parties in regard to the probate, as they procured a second and third probate and registration. The defendant states his objection to be that the deed consists of two distinct instruments. His Honor overruled the objection, and defendant excepted. We concur with his Honor's ruling, and think that the deed was properly admitted in evidence.

Henderson Allen conveyed the same land to the plaintiffs 7 January, 1899. This deed was recorded 9 January, 1899.

Defendant introduced a deed from George Parks to himself, dated 30 September, 1891, and recorded 16 March, 1899. The defendant objected to any evidence tending to locate the land claimed by the plaintiffs, for that the description contained in the will was too indefinite to be aided by parol evidence. The objection was overruled, and the defendant excepted. His Honor's ruling was correct. The description, "one-half of the remainder of my farm, including the house," etc., may be aided by parol evidence. If the words "my farm" stood alone, it would be competent to show that the testator had but one farm. The only difficulty suggested, that there is no reference to the county or State in which it is located, is removed by the words, "including the house, whereon I now live." This language brings the case clearly within the principle announced in *Farmer v. Batts,* 83 N. C., 387, in which the cases in our reports are cited and classified. See also, *Thornburg v. Masten,* 88 N. C., 293. The devisee took one-half un-

divided interest in the land, with the right, when partitioned, to have his share so allotted as to include the house.

There was testimony tending to locate the land in controversy as a portion of the land devised to Felix Parks, and conveyed by him to Henderson Allen and by Allen to plaintiffs. There was also testimony tending to show that it is the same land conveyed by (349) George Parks to the defendant. It was conceded that plaintiffs and the defendant derived their title from and claimed under George Parks. The issue was therefore directed to the inquiry as to which had the better title. His Honor instructed the jury, "That if the land embraced in the deed to Bell and Poplin—the six acres—is included in the land willed to Felix Parks, they would answer the issue as to the ownership 'Yes'." The exception thereto presents the question, and its solution is dependent upon the construction of chapter 147, Laws 1885. It was contended that the language of the act included wills, and that no devise would be valid until the will was proven and recorded. It will be observed that the act of 1885 is an amendment to section 1254 of The Code, which applies only to deeds, contracts to convey, and leases of land. The statute is directed to the protection of creditors and purchasers for value. The evil which it was intended to remedy was the uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. This evil could not exist in regard to wills, as the devisee was not a purchaser for value, but took as donee or volunteer. When there is a doubt in regard to the meaning of language used in a statute, that construction should be adopted which will suppress the evil and advance the remedy; and that meaning should be given to words which is well known and received in general use. Potter's Dwarris on Statutes, 186. While in a certain sense a will is a conveyance of real estate, in common, we may say in legal language it is not so understood or referred to. The one who takes comes to his estate by purchase and not by descent, but he is a "devisee" and not a "grantee." We do not think, looking to the purpose of the Legislature and the meaning of the language used, that the statute can by construction include wills under the general term "conveyance." (350) George Parks, in 1881, conveys the *locus in quo* to the defendant, who withholds his deed from the record until 16 March, 1899. Parks in the meantime executes a will devising the same land to his son Felix, and dies in 1894. The will is proven and recorded 14 December, 1898. Felix for value conveys to Allen by deed, recorded 14 December, 1898, who conveys for value to plaintiffs by deed recorded 9 January, 1899—all prior to the registration of the defendant's deed. The plain-

tiffs are purchasers for value, with deed recorded prior to that of the defendant, and are clearly within the provisions of the statute. The case comes clearly within the mischief intended to be remedied. Defendant for some reason withholds his deed from registration until 16 March, 1899. The plaintiffs, relying upon the record to disclose the condition of the title, purchase the land for a valuable consideration. The deed to the defendant, as against him, was valid only from registration, or, as was said by *Reade, J.*, in *Robinson v. Willoughby*, 70 N. C., 358, "took effect only from and after registration, just as if it had been executed then."

The judgment of his Honor was correct and must be

Affirmed.

Cited: Harris v. Lumber Co., 147 N. C., 633; *Cooley v. Lee*, 170 N. C., 22; *Lynch v. Johnson*, 171 N. C., 632; *Barnhardt v. Morrison*, 178 N. C., 564.

MITCHELL v. MITCHELL.

(Filed 21 April, 1903.)

1. Executors and Administrators—Parties—Legacy.

A legatee cannot maintain an action against the executor of another legatee who has taken possession of the property of the deceased devisor, but the action must be brought by the personal representative of the devisor.

2. Contracts—Wills—Legacies.

A contract between two legatees whereby one of them agrees to pay a bequest to the other is void.

(351) ACTION by A. Mitchell against Francis and Jacob Mitchell, administrators of William Mitchell and others, heard by *Starbuck, J.*, and a jury, at August Term, 1901, of SURRY. From a judgment for the defendants, the plaintiffs appealed.

J. B. McGuffin, V. E. Halcombe, T. W. Folger and Shepherd & Shepherd for plaintiff.

Carter & Lewellyn for defendants.

MONTGOMERY, J. William Burge, in his last will and testament, after providing for the payment of his debts, bequeathed to the plaintiff Alexander Mitchell $200, when he should become of age, and devised

and bequeathed to William H. Mitchell "all my property, both real and personal, by his procuring for me a comfortable maintenance for life." Drewry and Nicholas Freeman were named as executors, but did not qualify and no administration was ever had on the estate. William H. Mitchell took possession of the property and afterwards died. The defendants, Francis Mitchell and Jacob Mitchell, are the administrators of William H. Mitchell. This action was brought against them to recover the legacy bequeathed to the plaintiff in the will of William Burge. There was a judgment against the plaintiff upon the findings by the jury. The verdict was that the legacy had not been paid, and that the plaintiff's cause of action was barred by the statute of limitations. Without going into a discussion of the statute of limitations, we will simply say that upon the pleadings the judgment must be affirmed.

There was no cause of action stated in the complaint against the defendants. The legacy having been resisted according to the complaint and it becoming necessary for the plaintiff to bring an action for its recovery, administration should have been taken out upon the estate of William Burge. The personal representative of William Burge was the proper person to collect the assets (352) and to pay the legacy due to the plaintiff. In *Davidson v. Potts,* 42 N. C., 272, this Court said: "It is only through the medium of the personal representative that courts of law will interfere in the administration of a deceased person's estate. Such representative is the proper person to collect the assets, and to be answerable to those who may be entitled to them." It does not alter the rule that no administration has taken place upon the estate of William Burge. It was the duty of the plaintiff to have had a personal representative appointed. *Martin v. McBryde,* 38 N. C., 531.

If the plaintiff and William H. Mitchell, the other legatee and devisee in the will of William Burge, had made an agreement by which the legacy given to the plaintiff was to be paid by William, the agreement could not be enforced, for the law would not recognize such a contract. In *Sharp v. Farmer,* 20 N. C., 122, the plaintiff was entitled to a distributive share in the estate of a deceased person, and upon an agreement that another distributee should collect the estate of the deceased, pay his debts, and then divide the residue among the distributees, it was held that the plaintiff could not recover his distributive share from the other distributees after the estate had been collected and the debts paid according to the agreement. There the Court said: "It is an agreement between the next of kin of an intestate for an administration of the estate and its distribution by one of them, without ob-

taining letters of administration, or taking the oath of office or giving bond. This is prohibited by the act. After a vast number of cases upon the subject, it seems to be now perfectly well settled that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute. The distinction between an act *malum in se* and one merely *malum* (353) *prohibitum* was never sound, and is entirely disregarded, for the law would be false to itself if it allowed a party, through its tribunals, to derive advantage from a contract against the intent and express provisions of the law."

Affirmed.

ROBINET v. HAMBY.

(Filed 21 April, 1903.)

1. Specific Performance—Abandonment—Contracts—Bond—Bond for Title.

The evidence in this case is sufficient to be submitted to the jury to show abandonment of a bond for title to land.

2. Specific Performance—Abandonment—Waiver—Bonds—Bond for Title—Evidence.

Parol waiver of a written contract to convey land, amounting to a complete abandonment, will bar specific performance; but the acts and conduct constituting such abandonment must be positive, unequivocal, and inconsistent with the contract.

ACTION by N. H. Robinet against C. L. Hamby, heard by *Starbuck, J.*, and a jury, at October Term, 1901, of WILKES. From a judgment for the defendant, the plaintiff appealed.

Glenn, Manly & Hendren and W. W. Barber for plaintiff.
Finley & Greene for defendant.

CLARK, C. J. The defendant executed to Eli Wolfe 16 October, 1895, a bond to make title for the land in controversy. The notes for purchase money ($250) were all paid, except one note for $50, due 16 October, 1896. This note the defendant assigned in 1897 to one Vannoy for $39 he owed him, Vannoy to pay the overplus, when (354) collected, to defendant. In September of that year the mill and dam were washed away by a freshet. On 7 December, 1898, Vannoy learning that the land had thus become valueless, obtained

judgment against Wolfe on the $50 note. In the summer of 1900 the defendant commenced paying off the amount he owed to Vannoy, and by January, 1901, had paid it up. In January, 1901, the plaintiff, who had a controversy pending with defendant over this land, obtained Wolfe's bond for title, "paying him $1 or $2" therefor, and soon after began this action, averring his readiness to pay the balance of the purchase money and asking that defendant be decreed thereupon to execute a deed for the premises. The answer alleges abandonment of the contract, and that plaintiff is not a bona fida owner of the bond, but that if he is he shall be adjudged to pay balance of purchase money and for the improvements placed on the property by the defendant before recovering possession.

The sole controversy raised by the exceptions is whether Eli Wolfe had abandoned his contract of purchase prior to his assignment of the bond to the plaintiff. Upon this point it was in evidence that soon after the $50 note fell due the defendant called on Wolfe for payment, and on his failure to pay notified him the note would be transferred to Vannoy, as above stated; in the September (1898) freshet the mill and dam were washed away and the bare land was worth nothing, it being a rough bluff, only of value as a mill site. There was evidence by defendant that "Eli Wolfe told him that what was left of the property was not worth half the debt against it; that he was not going to have anything more to do with it and was going to move away." Two other witnesses testified to substantially the same, and a fourth witness testified that "after the freshet Eli Wolfe told him he was going to move away; that he would not pay a cent on the note." When sued on the note, December, 1898, Wolfe did not attend trial, and the same month moved off. In the fall of 1899 Hamby (355) took possession of the property, began rebuilding the dam and mill, and in 1900 employed Eli Wolfe and his son to get boards to cover the mill and paid them therefor. There is testimony for plaintiff that in 1900 defendant agreed to give Wolfe's unpaid note to his daughter, who had married Wolfe's son, Lemuel, and that Wolfe gave the bond for title to Lemuel, who ran the repaired mill in partnership with his father-in-law; but soon becoming dissatisfied, Lemuel moved off and defendant paid him for his labor; that Lemuel returned the bond for title to his father. The defendant remaining in possession, spent in repairs on the mill and building a pin factory $400, according to his testimony. Plaintiff admitted that he gave Wolfe only $1 or $2 for the bond. This is substantially the evidence, omitting some details.

The first exception, that the court refused to charge that "there

is no evidence of the abandonment of his bond for title on the part of Eli Wolfe," was properly refused. The only other exception is to this part of the charge: "The plaintiff is entitled to have specific performance of the contract, unless, before the assignment to plaintiff of the title bond, the contract set out in said instrument had been abandoned by Eli Wolfe and the defendant; the contract is presumed to have remained in force, and the burden is on the defendant to clearly satisfy you that the contract was abandoned by mutual consent, that is, was considered and treated by both said Wolfe and defendant as no longer in force; to establish the alleged abandonment the defendant is required to clearly prove acts and conduct of said Wolfe inconsistent with the idea that he intended to perform the contract on his part and assert his rights thereunder, and which, on the contrary, unmistakably show that he relinquished and renounced all rights and interest in the land under said contract; and the de-
(356) fendant must further clearly prove that he himself assented to the abandonment of the contract and treated and considered it as being no longer in force." The plaintiff has no good ground to complain of this charge, which is a correct statement of the law as to abandonment. "It has long been settled that a parol waiver of a written contract within the statute of frauds, amounting to a complete abandonment and clearly proved, will bar specific performance." *Holden v. Purefoy,* 108 N. C., p. 167, and cases there cited. "But it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal, and inconsistent with the contract." *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., p. 389. The jury must have so found the fact to be, under the charge given.

The rest of the charge not being excepted to, is presumed correct, and hence is not sent up, the case merely stating: "The court presented to the jury the contention of the parties arising upon the evidence as to the question of abandonment." To the first issue, "Is the plaintiff entitled to have specific performance?" the jury responded "No," and hence did not pass upon the others. It may be that the jury decided that plaintiff was not the bona fide holder of the bond, or that the price paid, "$1 or $2," was merely evidence corroborative of previous abandonment. It does not appear how this was.

Eli Wolfe not being a party to this action, the court did not and could not pass upon any question as to his right to a cancellation of his unpaid bond, or rather of the judgment into which it had been merged. As the jury find in effect that there was a mutual abandonment of the contract, the judgment should have provided for a can-

cellation of the Vannoy judgment if Wolfe had been a party to this action and asked it.

No error.

Cited: State's Prison v. Hoffman, 159 N. C., 571; *Palmer v. Lowder,* 167 N. C., 333; *Harper v. Battle,* 180 N. C., 377.

(357)

PATTERSON v. FREEMAN.

(Filed 21 April, 1903.)

1. Judgments—Evidence—Justices of the Peace—Record.

A judgment of a justice of the peace is not competent evidence without proof of his handwriting.

2. Jurisdiction—Justices of the Peace—Mortgages.

A justice of the peace has jurisdiction of an action on a note given for a contract to convey land, the only defense being that payments had been made on the note.

ACTION by M. L. Patterson against R. C. Freeman, administrator of W. A. Jones, and others, heard by *Bryan, J.,* and a jury, at Spring Term, 1901, of SURRY. From a judgment for the defendants, the plaintiff appealed.

Watson, Buxton & Watson for plaintiff.
Carter & Lewellyn for defendants.

CONNOR, J. The plaintiff alleges that he contracted in writing to convey to W. A. Jones, deceased intestate of defendant Freeman, and ancestor of the other defendants, a tract of land, the boundaries of which are set out. That to secure the purchase money therefor said Jones executed his promissory note, upon which he afterwards recovered judgment before a justice of the peace—said judgment, with interest, amounting to $190. That plaintiff has at all times been ready, willing, and able to perform his part of the contract. That said Jones died leaving but a small amount of personal property, wholly insufficient to pay his debts. That a sale of the said land is necessary to pay said note. He demanded judgment that the land be sold by a commissioner and the proceeds applied to the discharge of the note or judgment. The defendants, heirs at law of W. A. Jones,

file answers admitting the contract and denying that any judgment was rendered on the note. They allege that many payments
(358) have been made on the note and that there is a very small sum, if any, now due thereon, and that the defendants are ready, willing, and able to pay the same. They further allege that, as they are informed, the plaintiff did bring suit against W. A. Jones upon the same obligation that he alleged W. A. Jones had executed to him, and did obtain judgment thereon, but that said judgment in no way affects the rights of defendants; that a court of a justice of the peace had no jurisdiction to enforce specific performance of a contract; that the items of payment made by W. A. Jones on the purchase money for said land are numerous and so complicated that a reference is necessary to ascertain the exact amount due, etc. The administrator answers, admitting the several allegations of the complaint.

The case on appeal states that "to establish his claim, the plaintiff offered a judgment purporting to be signed by E. F. Wall, a justice of the peace"; that the defendant objected to the judgment upon the following grounds:

1. That the judgment was not properly proved.

2. That a justice of the peace had no jurisdiction of the subject-matter of the action.

3. That the justice undertook to declare the judgment a lien upon land, and that the judgment was for that reason void.

His Honor sustained the objections and rendered the following judgment: "This cause coming on to be heard, etc., upon the pleadings before me, and it is adjudged that the judgment of E. F. Wall, justice of the peace, set out in the plea be and the same is declared null and void," etc. His Honor thereupon ordered a reference to take and state an account. The plaintiff excepted and appealed.

The record leaves us in doubt as to the grounds upon which his Honor's judgment is based. If upon the ground that the judgment was not proved, we would concur with him. The judgment of a justice is not such a record as entitles it to be introduced without
(359) proof of the handwriting of the justice who rendered it. *Reeves v. Davis,* 80 N. C., 209.

It seems, however, that his Honor was of the opinion that the justice did not have jurisdiction of the subject-matter of the action. In this we think he was in error. While it is true that the justice had no jurisdiction to administer equitable relief, foreclosure of defendant's equity, and to order a sale of the land, he had jurisdiction of an action *in personam* or to hear and determine whether the defendant was indebted to the plaintiff—the amount claimed being less than $200. If

the defendant had desired to interpose any defense involving the title to land of which the justice had no jurisdiction, he may have done so, as provided by section 836 of The Code, and the action, if it appeared upon the trial that the title to land was in controversy, would have been dismissed. It appeared from the answer that the only defense was that payments had been made on the note. The justice was competent to try that question. If the plaintiff had in his complaint asked for equitable relief, this would not have ousted the jurisdiction; the justice would simply have declined to hear and determine such question or grant such relief. The practice in such case is pointed out in *Deloatch v. Coman,* 90 N. C., 186; *Mfg. Co. v. Barrett,* 95 N. C., 36; *Starke v. Cotten,* 115 N. C., 81, *Hargrove v. Harris,* 116 N. C., 418; *Proctor v. Finley,* 119 N. C., 536. The judgment recites that it is rendered upon the pleadings. While this would indicate that a motion to dismiss was made and sustained, it is evident from the "case on appeal" that this is an inadvertence. We would, however, be compelled to adopt the judgment as the basis of our ruling. In either aspect of the case, there was error in holding that the judgment was void. We can see no reason why, upon proper proofs, the judgment is not competent evidence of the amount due the plaintiff by W. A. Jones, under whom the defendants claim an interest (360) in the land. There must be a

New trial.

Cited: McPeters v. English, 141 N. C., 493.

MURPHY v. MURPHY.

(Filed 21 April, 1903.)

Deeds—Construction—Description.

Where the owner of a one-fifth undivided interest in a tract of land executes a deed purporting to convey his entire interest in the land, but refers to his interest as a one-sixth undivided interest, such deed passes his entire interest in the land.

ACTION by Thomas Murphy and wife against Clarence Murphy and others, heard by *Shaw, J.,* and a jury, at September Term, 1902, of ROWAN. From a judgment for the defendants, the plaintiffs appealed.

Craige & Craige for plaintiffs.
Overman & Gregory for defendants.

CONNOR, J. This was a special proceeding commenced in the Superior Court of Rowan County for the sale of a lot of real estate in the city of Salisbury, known as the "Murphy's Granite Row," upon which are located four storehouses. The answer filed by the defendants denied the material averments in the complaint, whereupon issues were drawn and the cause transferred to the Superior Court in term for trial. Thereafter the cause was referred to Hon. Armistead Burwell to hear and determine all issues of law and fact and report his conclusions to the court. So much of the report as is material
(361) to the decision of the question presented upon the appeal is:

"1. That the property described in the petition as Murphy's Granite Row was the property of William Murphy, and upon his death in 1867 the plaintiff, Thomas Murphy, became the owner of one undivided sixth part thereof in fee simple.

"2. That upon the death of Jane Murphy in December, 1871, Thomas Murphy inherited one-fifth part of her one-sixth part of said property, and thereafter and up to 4 January, 1873, was seized and possessed of one undivided fifth of said Murphy's Granite Row."

On 4 January, 1873, the plaintiff Thomas Murphy and his wife executed a deed to Mrs. Susan W. Murphy, conveying "to her and her heirs and assigns all his interest in a lot of land lying in the county of Rowan and State of North Carolina, bounded as follows: Situate in Main Street in the town of Salisbury and known as 'Murphy's Granite Row,' the interest of the party of the first part in and to said real estate being one undivided sixth interest therein. And all of the estate, right, title, interest, claim or demand, dower and right of dower in law or equity, or otherwise howsoever, of the said Thomas Murphy, party of the first part, of, in and to the same, and every part and parcel thereof," etc.

It appeared that subsequent to the execution of said deed the plaintiff became the owner of one-twentieth undivided interest in said real estate.

The referee found as a conclusion of law: "That the effect of the deed dated 4 January, 1873, executed by the plaintiff Thomas Murphy and delivered to Mrs. Susan W. Murphy is such that she thereby acquired a good title in fee to all of the interest in the said 'Murphy's Granite Row,' which Thomas Murphy owned at that date, to wit, one undivided fifth part thereof."

To this conclusion of law the plaintiff duly excepted. The exception upon the hearing before his Honor, Judge Neal, was
(362) overruled, and the report of the referee confirmed. Plaintiff excepted and appealed.

The solution of the single question presented upon the exception is dependent upon the construction of the deed from Thomas Murphy to Mrs. Susan W. Murphy.

There are well-settled rules adopted by the courts in construing doubtful or ambiguous expressions in deeds. Those which will aid us in the solution of the question presented are:

1. That the entire deed must be read and such construction of particular clauses be adopted as will effectuate the intention of the parties as gathered from the whole instrument.

2. That such construction shall be adopted as will, if possible, give to every portion thereof effect.

3. That when terms are used which are clearly contradictory, the first in order shall be given effect to the exclusion of the last. *Wheeler v. Wheeler,* 39 N. C., 210; 4 Am. & Eng. Enc. (2 Ed.), 800.

4. That when language is of doubtful meaning, that construction shall be put upon it which is most favorable to the grantee. *Cox v. McGowan,* 116 N. C., 131.

"Contradictory descriptions in a deed, one of which is sufficient to distinguish the thing granted, shall not frustrate it, but if the descriptions can be reconciled, both must stand." *Sheppard v. Simpson,* 12 N. C., 237.

"If there is a full and clear description contained in one part of a deed, and in another part one less clear and full which cannot be reconciled with the first, the weaker shall give way, and if it cannot be disposed of otherwise, entirely rejected. Thus, if A grant to B 'Blackacre' which he purchased of C, 'Blackacre' will pass, although A purchased it of B and not of C." *Henderson, J.,* (363) in *Sheppard v. Simpson, supra.*

"Where there is a general description as to the property conveyed, followed by a definite and particular description, the latter will control; as if a deed convey land known as the 'Mount Vernon Place,' followed by a specific description setting forth metes and bounds, the latter would control and such land would pass as is included therein." *Cox v. McGowan, supra.*

In *Dodge v. Walley,* 22 Cal., 225, 83 Am. Dec., 61, the language of the deed was: "All right, title, and interest of said Daniel S. Clark, etc., in and to the following described property, to wit," etc. This was followed by a more particular description. There being some controversy as to what passed under the deed, the Court said: "It distinctly conveys 'all the right, title, and interest of the said Daniel S. Clark' in and to the ranch. If it stopped here, there could be no room for doubt as to its meaning. To this point it clearly con-

veys all the interest of Clark in the property, which would carry the interest he acquired from Walley and every other person. The latter part of the description where it says 'being a leasehold unexpired,' etc., are not words limiting the extent of the previous terms of conveyance, or excepting out any interest conveyed by the previous terms, but merely a statement of the officer and grantor of what he supposed or understood was the nature and character of the interest of Clark. He uses no terms limiting or confining his conveyance to such unexpired leasehold interest. If he had used such terms, it would have presented a case of greater difficulty, but in the absence of language qualifying or limiting the general terms conveying all his interest, we would not be justified in restricting the conveyance as contended by the appellant. Deeds are always to be construed most strongly against the grantor where there is any ambiguity or uncertainty."

In *McLennon v. McDonnell,* 20 Pac. (Cal.), 566, the deed (364) conveyed "all the right, title, and interest of the party of the first part, the same being a one-half undivided half interest in and to the following described property," etc., whereas the grantor in fact owned a larger interest than one-half. The Court said: "This deed clearly conveys 'all right, title, and interest' of Campbell. The words 'being a one-half undivided interest' are not words limiting the extent of the previous terms of conveyance or excepting out any interest conveyed by the previous terms."

In *Moran v. Somes,* 154 Mass., 200, it is said: "We think the deed from Somes to Rand must be held to convey all the interest which the grantor had at the time of its execution and delivery in the tract described in it. It must be taken most strongly against the grantor, and the words 'all my right, title and interest' are not to be cut down by the subsequent reference to the two deeds; and the statement that his interest in the estate is three undivided fifths, which may well have arisen from forgetfulness, was evidently a mistake." See, also, *Green v. Hewett,* 55 Wis., 96, 42 Am. Rep., 701.

The construction which we have adopted is very much strengthened by the language following the description, "and all of the estate, right, title, interest, claim, demand, dower and right of dower, in law or equity or otherwise howsoever, of the said Thomas Murphy, party of the first part, of, in and to the same," etc. This language is inconsistent with the idea that he was conveying or intended to convey any less than his entire interest and estate in the land.

The reasoning of the Court in the cases cited leads us to the conclusion that the judgment should be affirmed.

PER CURIAM. Affirmed.

Cited: Deaver v. Lumber Co., 171 N. C., 169; *Bourne v. Farrar,* 180 N. C., 138.

(365)

SMITH v. BROWNE.

(Filed 21 April, 1903.)

1. Agency—Declarations—Principal and Agent.
The declarations of an agent are not competent to show his agency.

2. Agency—Brokers—Evidence.
The letter to a real estate agent from the owner, set out in the opinion in this case, does not show that the agent had authority to receive purchase money.

3. Agency—Contracts—Parol.
The parol authority to negotiate a sale of real estate does not imply authority to receive payment therefor.

4. Agency—Contracts—Parol.
The authority of an agent to sell estate need not be in writing.

ACTION by T. T. Smith, Jr., against W. T. Browne, heard by *McNeill, J.,* and a jury, at October Term, 1902, of GUILFORD. From a judgment for the plaintiff, the defendant appealed.

King & Kimball for plaintiff.
John A. Barringer and L. M. Scott for defendant.

MONTGOMERY, J. The plaintiff brought this action to compel specific performance of an alleged contract entered into with him by Sturgis & Co., the agents of the defendant. It is declared in the complaint that Sturgis & Co., known as real estate agents in the city of Greensboro, were authorized and empowered by the defendants to sell the lot of land described in the complaint, and that the plaintiff bought the same from Sturgis & Co., acting as the agents of the defendant, and paid to them the full value of the lot ($300), and that the defendant has refused to make a deed to the plaintiff to the lot. The defendant in his answer admits that he owned the lot of land and that he put it in the hands of Sturgis & Co., that they might find for him (366) a purchaser, and report to him in case they were successful; but he denied that he gave to them any authority to sell the property or to enter into any contract concerning it or to receive any

money upon any contract concerning its sale. The agency was entirely in parol. The agents, however, executed and delivered to the plaintiff a receipt as follows, dated Greensboro, 12 September, 1900: "Received of Thomas T. Smith, Jr., $300 in full payment of lot No. 22, of the McMahon plat No. 2. Deed to be delivered to him for house complete, turn-key job, and the said lot when the house is complete. One hundred dollars additional to be paid when house is raised, and the balance of $506 to be paid when the house is in tenantable condition. It is distinctly understood that Mr. Smith is to pay only for house and lot complete the sum of $900, the $6 being for fence, as per note on plan." Signed, L. H. Sturgis & Co.

On the trial the plaintiff undertook to prove that Sturgis & Co. were the authorized agents of the defendant to sell the land. He offered himself as a witness to show the agency through the declarations of Sturgis, which evidence his Honor properly refused to receive. The plaintiff then, for the same purpose, introduced over the defendant's objection a letter from the defendant to Sturgis & Co., dated Blowing Rock, N. C., 17 September, 1900, and addressed to L. H. Sturgis & Co., at Greensboro, N. C., which is as follows: "Dear Sirs:—Yours of the 13th instant has been forwarded and received here, but you have not said whether that $265 is the net amount or includes your commission. I had hoped that you could have gotten at least $300 for it, as you thought it should bring $325. Please let me have full information about the matter, and when the deed should be made out, as I may be out of the State again on my usual trip south; and please send me a blank deed or two, with name and residence of purchaser, and all necessary informa-
(367) tion. Address here. Yours very truly, W. G. Browne."

We think the letter was not only no evidence of the agency as claimed by the plaintiff, but that it was clear evidence going to show the truthfulness of the matter averred in the defendant's answer on that question. The letter, when considered together with the receipt which the defendant passed to the plaintiff, makes it clear that the defendant had received no information from Sturgis & Co. about the complications of building a house, etc., on the lot. Another thing is clear from the letter, and that is, that the real price for which the lot had been sold was not communicated to the defendant, nor was the net amount for the defendant separated from commissions. It also appears that the money was not sent by Sturgis & Co. to the defendant, and that the defendant did not anticipate that it would be sent or paid until the deed should be made by the defendant and forwarded. Besides, as a matter of law, under the most favorable aspect of the evidence for the plaintiff, Sturgis & Co. were not authorized to receive the

money for the lot of land. The authority of Sturgis & Co., if it extended to the power to make sale of the land, was only in parol, and under such authority they could not receive payment for the land. 1 Am. & Eng. Enc. of Law, p. 1008, and the authorities there cited. There are a few authorities which apparently are to the contrary, but upon a close investigation it will be seen that the conflict is only apparent. As for instance, in *Johnson v. McGruder,* 15 Mo., 365, the agent was authorized to sell the land and loan the purchase money, and the Court held that the express power to loan clearly implied the power to receive the purchase money.

It is not intended to be said in this opinion that it is necessary that the authority of an agent to sell the real estate of an owner must be in writing. Such is not the law. *Blacknall v. Parris,* (368) 59 N. C., 70, 78 Am. Dec., 239.

There was error in the refusal of his Honor to dismiss the action at the request of the defendant.

New trial.

Cited: Palmer v. Lowder, 167 N. C., 333.

---

(369)

KELLY v. DURHAM TRACTION COMPANY.

(Filed 21 April, 1903.)

1. Evidence—False Imprisonment—Malicious Prosecution.

In an action for false arrest and malicious prosecution, admissions by other persons arrested at the same time are not competent, there being no allegation of conspiracy.

2. Malicious Prosecution—Evidence—Sufficiency of Evidence.

In this action for malicious prosecution there is evidence to show that the plaintiff was caused to be arrested by the defendant through its agents acting within the general scope of their authority.

3. False Imprisonment—Malicious Prosecution—Illegal Arrest—Malice.

In an action for false arrest and malicious prosecution, if the arrest without a warrant is illegal, it is no defense that the defendant acted without malice.

4. Malicious Prosecution—Warrant—Evidence.

In an action for malicious prosecution, it is not necessary to show who swore out the warrant, if it was done at the instigation of the defendant.

5. Malicious Prosecution—Evidence—Circumstantial Evidence.

In an action for malicious prosecution, circumstantial evidence is competent to show that the defendant instigated the prosecution.

6. Malicious Prosecution—Evidence—Malice—Sufficiency of Evidence.

In this action for malicious prosecution there is evidence tending to show malice.

7. Malicious Prosecution—Malice—Probable Cause.

In an action for malicious prosecution, malice may be inferred from the want of probable cause.

8. Instructions—Exceptions and Objections.

Where an instruction given at the request of a party contains in substance an instruction objected to, an exception thereto will not be sustained.

9. Malicious Prosecution—Damages—Exemplary Damages.

Exemplary damages may be awarded in an action for malicious prosecution.

10. False Imprisonment—Damages—Punitive Damages.

In an action for false arrest the plaintiff may recover punitive damages if the arrest is accompanied with gross negligence, malice, insult, oppression, or other circumstances of legal aggravation.

ACTION by R. A. Kelly against the Durham Traction Company, heard by *W. R. Allen, J.,* and a jury, at January Term, 1903, of DURHAM.

This is an action brought to recover damages for false imprisonment and malicious prosecution. The plaintiff was a passenger on one of the street cars owned and operated by the defendant and had paid his fare to the conductor, Eubanks. There seems to have been two conductors upon the car, Eubanks and Brock, and also the general manager, Butler. The conductor Eubanks again demanded the fare from the plaintiff, who refused to pay on the ground that he had already paid. Eubanks then went to the front of the platform and asked some one whether he should stop. He was answered "No." When the car reached Five Points the plaintiff was arrested by a policeman and taken to the police headquarters, where he was released on bail after a short detention. Before being taken from the car the plaintiff demanded the cause of his arrest, and upon being informed that it was because he had not paid his fare, stated that he had paid it, but offered to pay it again to prevent any trouble. The conductor Brock said, "Too late," and the plaintiff was taken off the car. The witness McGuirk testifies that "Eubanks told the policeman, 'There they are,' pointing to Kelly (the plaintiff), Ray and Griffith, saying, 'Take them,' and the police-
(370) man arrested them."

The defendant does not appear to have introduced any evidence, and offered no objection to the plaintiff's testimony. It is admitted that the plaintiff was tried before the mayor of the city of Durham for violation of section 3, chapter 16, of the ordinances of the said city, which reads as follows: "Any person who shall get upon a street car for the purpose of defrauding the owners thereof of the fare shall upon conviction be fined $10."

It is also admitted that the plaintiff was acquitted and discharged.

The issues and answers thereto are as follows:

"1. Was the plaintiff illegally arrested, as alleged in complaint?" Answer: "Yes."

"2. If so, did the defendant procure the same?" Answer: "Yes."

"3. Was the plaintiff prosecuted by the defendant for the violation of the town ordinance before the mayor of the city of Durham, as alleged in the complaint?" Answer: "Yes."

"4. If so, was the prosecution on the part of the defendant without probable cause?" Answer: "Yes."

"5. If so, was the prosecution with malice?" Answer: "Yes."

"6. What damage, if any, has the plaintiff sustained?" Answer: "$500."

From a judgment for the plaintiff, the defendant appealed.

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

DOUGLAS, J., after stating the facts: Among the numerous exceptions by the defendant, there are none to the admission of testimony, and but two to its exclusion. The defendant proposed to ask the plaintiff: "Did not Griffith admit before the mayor that he did not pay his street car fare? That he was so tight that he did not know much (371) about it? Also did not Griffith say that he and others were in the same fix?" Again, the defendant proposed to show by the same witness on cross-examination that "at the trial before the mayor, Ray pleaded guilty for being drunk and disorderly at Five Points on this occasion, and Griffith stated before the mayor that he had not paid his fare." Upon objection the proposed evidence was excluded. We can see no ground upon which it could have been admitted. What Ray and Griffith may have said about themselves did not concern the plaintiff, who was not charged with conspiracy, and who was neither arrested nor tried on any charge of drunkenness or disorder. A. & E. Enc. (2 Ed.), 753.

There are twenty-two exceptions, but as exception 17 is directed to each and every refusal to give each and every of the twelve special

instructions, it practically amounts to eleven additional exceptions. It is needless as well as impracticable for us to discuss all the exceptions, especially those relating to the refusal of the court to give special instructions. Five were directed to the refusal of the court to direct a verdict in favor of the defendant upon five different issues. As there was evidence tending to sustain the contentions of the plaintiff, the issues were properly submitted to the jury. As to the remaining exceptions, we will confine ourselves to those apparently relied on by the defendant. It contends that, "There was no evidence as to the following material facts:

"1. Who caused the arrest of the plaintiff. 2. The warrant was not offered. 3. Who swore out the warrant. 4. That the defendant caused, procured or promoted the prosecution."

The witness McGuirk testifies that the conductor Eubanks pointed out Ray, Griffith, and the plaintiff, and directed the policeman to take them, whereupon they were immediately arrested. It therefore (372) appears that their arrest was caused by the defendant, through its servant acting within the general scope of his authority. Moreover, the plaintiff testified that Eubanks went to the front of the car, asked some one if he must stop. This person said "No." . . . "Butler was on the front of the car." Such is the plaintiff's evidence, which upon all motions by the defendant for nonsuit or direction of the verdict must be construed most strongly in favor of the plaintiff. From this the jury might have inferred that the general manager of the company was also a party to the arrest.

Under the circumstances of this case the arrest without a warrant was illegal, and proof that the defendant acted without malice would be no defense. *Neal v. Joyner,* 89 N. C., 287; *S. v. McAfee,* 107 N. C., 812, 10 L. R. A., 607; Newell on Malicious Prosecution, 100.

It is true, the warrant was not offered in evidence, but we do not see how it was material, as its regularity was not questioned.

It is not necessary to show who actually swore out the warrant, provided it was at the instigation or procurement of the defendant. *Kline v. Shuler,* 30 N. C., 484, 49 Am. Dec., 402; 19 A. and E. Enc. Law (2 Ed.), 692.

There was evidence tending to prove that the defendant instigated the prosecution. It is true, it is merely circumstantial; but if circumstantial evidence is competent on an issue of life or death, we see no reason why it is not equally competent in civil cases. His Honor thus correctly stated the contentions of the plaintiff: "The plaintiff relies upon the circumstances that the charge against the plaintiff was for violating an ordinance passed for the protection of the traction company, and that no other person had any interest to prosecute. Second.

That the plaintiff was arrested under the direction of the conductor of the defendant company upon a charge of not having paid his fare, and that the warrant was for the same offense. Third. (373) That the plaintiff was arrested and immediately carried to the guardhouse, and the prosecution followed immediately.

"The plaintiff contends that the circumstances are sufficient to satisfy you that the plaintiff was prosecuted by the agent of the traction company and that such agent was acting within the scope of his authority."

The defendant excepted to the statement of each of these contentions, but the exceptions cannot be sustained. The court was equally fair and explicit in stating the contentions of the defendant. The ordinance appears upon its face to have been passed for the protection of the defendant, and this would be none the less so had it appeared that there were other street railways in the city of Durham.

The defendant contends that there was no evidence of malice. That the conductor Eubanks, after an altercation with the plaintiff, in which he had repeatedly demanded the fare, refused to accept the fare when tendered, and ordered the arrest of the plaintiff, tends to show malice. Without this, the jury were at liberty to infer malice from the want of probable cause, and this they seem to have done. This Court said in *Johnson v. Chambers,* 32 N. C., 287: "The dismissal of the State's warrant raised a presumption of the want of probable cause, but it did not also raise a presumption of malice; for the question of malice was not inquired of by the justice of the peace. . . . Malice may in some cases be inferred from want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make; and it should have been left to them, in addition to the question of damages." This Court has also said in *Brooks v. Jones,* 33 N. C., 260: "When there is a total want of probable cause the jury will infer malice almost of necessity, as a prosecution wholly groundless cannot be accounted for in any other way." Both these cases (374) have been quoted with approval in *McGowan v. McGowan,* 122 N. C., 145. In the case at bar, his Honor properly charged the jury that, "Malice may be inferred by the jury on account of the want of probable cause. They are not, however, obliged to infer malice from the want of probable cause."

On the question of damages the court charged: "Now, as to the sixth issue, the issue of damages, first for the illegal arrest, you can give plaintiff such actual damages as will compensate him for injury to his feelings, mental suffering, loss of time, and any other actual damage which the plaintiff may have sustained." The defendant excepted to each and every part of this charge. We think it is substantially correct;

but even if the latter part were too indefinite, we do not think that the defendant is in a condition to complain of it, as the court gave the following instructions at the request of the defendant: "If the jury answers the first, second, third, fourth, and the fifth issues Yes, then in ascertaining the damages sustained by the plaintiff they will allow compensation for loss of time, hire, injured credit, decrease of earnings, mental suffering, and all approximate consequences of the wrong." This instruction is much broader than the charge complained of, and contains every element of the exception. This Court, in *Buie v. Buie,* 24 N. C., 87, speaking by *Gaston, J.,* says: "A party cannot except for errors to an instruction which he hath himself prayed." The same principle is reiterated in *McLennan v. Chisholm,* 66 N. C., 100, and *Moore v. Parker,* 91 N. C., 275.

His Honor properly charged that exemplary damages could be given for malicious prosecution, as in all cases where malice is an essential element in the cause of action. 19 A. & E. Enc. (2 Ed.), 704; *Ellis v. Hampton,* 123 N. C., 194; *Sowers v. Sowers,* 87 N. C., 303, and *Chappell v. Ellis,* 123 N. C., 259, 68 Am. St., 822, and cases therein cited. (375) It is equally well settled that in cases of false arrest or imprisonment the plaintiff is entitled to all actual damages, but cannot recover punitive damages unless the arrest or detention is accompanied with gross negligence, malice, insult, oppression, or other circumstances of legal aggravation. *Lewis v. Clegg,* 120 N. C., 292; *Lovick v. R. R.,* 129 N. C., 427. The defendant excepted to the charge defining what was meant by a servant acting within the scope of his employment; but these exceptions were not pressed in the brief of the learned counsel. In any view of the evidence (if believed) the servants of the defendant were acting within the general scope of their authority in procuring the arrest and prosecution of the plaintiff.

The defendant in its brief thus alludes to the character of the plaintiff: "The police station and guardhouse of the city were familiar to plaintiff, as he had twice before this occasion been locked up on the admittedly just charge of drunkenness, and once subsequent to this occasion he had been locked up therein for using a street of the city as a place to sleep off a drunken debauch."

This is a sad record, especially in one so young; but he does not appear ever to have been charged with crime, and he may yet reform. In any event, he is entitled to the protection of the law, and belongs to a class who need it most. In some cases extremes meet. There are some degraded wretches whose characters are too low to be injured by the tongue of slander, while there are others whose established reputations are beyond its reach. General Houston's stern answer in refusing to accept a challenge from one who threatened to post him as a coward was no

empty boast when he said in plain Texan phrase: "When you post me as a coward, you will post yourself as a liar." It is those who are hanging on the ragged edge of respectability whose reputations are most deeply affected by the false accusation of crime; and when they (376) prove their innocence they are entitled to such damages as the law will allow under existing circumstances.

As we see no error in the conduct of the trial, the judgment of the court below is

Affirmed.

Cited: Merrell v. Dudley, 139 N. C., 60; *Stanford v. Grocery Co.,* 143 N. C., 427; *Stewart v. Lumber Co.,* 146 N. C., 110; *Powell v. Fibre Co.,* 150 N. C. 17; *Warren v. Lumber Co.,* 150 N. C., 38; *Wilkinson v. Wilkinson,* 159 N. C., 270; *Humphries v. Edwards,* 164 N. C., 156; *Motsinger v. Sink,* 168 N. C., 551; *Beam v. Fuller,* 171 N. C., 771; *Gray v. Cartwright,* 174 N. C., 51; *Exchange Co. v. Bonner,* 180 N. C., 21.

JOHNSON v. ANDREWS.

(Filed 21 April, 1903.)

1. Appeal—Docketing—Justices of the Peace—Superior Court—Laws 1901, Ch. 28, Sec. 2—The Code, Secs. 878-880.

Under Laws 1901, ch. 28, an appeal from a justice of the peace in a civil action should be docketed at the next term of the Superior Court, though it be a criminal term.

2. Appeal—Docketing—Laches—Justices of the Peace—Clerks of Superior Court—Superior Court—The Code, Secs. 878-880.

Where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dismissed for the failure of the clerk of the Superior Court to docket the same under The Code, secs. 878-880.

ACTION by Sarah Johnson and another against W. B. Andrews, heard by *W. R. Allen, J.,* at January Term, 1903, of DURHAM.

This action was heard in the Superior Court upon the following facts found by the court:

"1. This was an action begun by the plaintiff against the defendant before D. C. Gunter, justice of the peace, by issuing a summons 24 March, 1902, returnable 29 March, 1902. On the return day thereof, to wit, 29 March, 1902, the justice heard said action, both plaintiff and defendant being represented by counsel, and rendered a judgment against the defendant for the full amount of his claim, to wit, $151.

"2. From the judgment the defendant gave notice of appeal
(377) to the Superior Court, said notice of appeal being given in open court in the presence of the plaintiff and his counsel.

"3. On 5 April, 1902, the defendant paid the justice his fee of 50 cents for the transcript on appeal, and thereupon the justice on 5 April, 1902, made out his return to the notice of appeal and delivered the same to C. B. Green, clerk of the Superior Court, and the defendant at the same time paid to C. B. Green 50 cents, being his fee for docketing the appeal.

"4. The next term of the Superior Court of Durham, after the appeal from the justice, began on 12 May, 1902, as provided in Laws 1901, ch. 28, sec. 2, and another term on 25 August, 1902, as provided in said act; that during the month of September, beginning 29 September, there was a term of the Superior Court for Durham for the trial of civil cases only.

"5. At the May Criminal Term the defendant through his counsel, J. S. Manning, asked the clerk of the Superior Court if his appeal was docketed, and the clerk informed him that he had docketed said appeal.

"6. After the calendar was arranged for September Term, to wit, about 15 September, 1902, but the same day, appellant's counsel examined the civil-issue docket and found that said appeal did not appear on said docket, and thereupon he requested the clerk to enter and the clerk did enter the case on said civil-issue docket for September Term, and the case was put on the printed calendar for trial by the clerk for said term, and the appeal had not before that time been entered upon the docket.

"7. The clerk did not make out any civil-issue docket for May Term or August Term of the Superior Court, but did make out an appear-
(378) ance docket for each of said terms, entering thereon such actions as had been brought to said respective terms, and said clerk stated in open court that such had been his custom prior to said September Term, 1902.

"8. At the said September Term, 1902, plaintiff entered a special appearance and moved to dismiss the defendant's appeal for the reason that said appeal had not been docketed according to law, and defendant moved for permission to docket same, if the court should be of the opinion that the clerk failed to docket the same; this motion was continued without prejudice, and heard at January Term, 1903.

"9. Upon the foregoing facts, the court was of the opinion that said appeal was not docketed according to law, and that he had no discretion in the matter, and allowed the motion of plaintiff and dismissed the appeal. The motion to dismiss was allowed and motion to docket refused as matters of law and not in the exercise of discretion. From a judgment dismissing the appeal, the defendant appealed."

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

WALKER, J. The May and August terms of the Superior Court of Durham were held under the provisions of chapter 28, Laws 1901. Section 2 of said act reads as follows: "Civil process shall be returnable to and pleadings filed at all of the courts herein designated as exclusively criminal; motions in trials in civil actions, which do not require a jury, may be heard at such criminal terms by consent."

It is provided by The Code, secs. 878-880, that "The justice shall within ten days after the service of the notice of appeal on him make a return to the appellate court. When the return is made the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of the said court."

The plaintiff contends that the defendant's appeal should have (379) been docketed on the trial docket for hearing at the May Term, as civil matters could have been heard and determined at that term under the provisions of section 2 of the act. In support of this contention his counsel relied upon *Pants Co. v. Smith,* 125 N. C., 588, and we think the case fully sustains the contention. We have examined carefully the act which was under consideration in that case, and we are unable to see any substantial difference between the two acts. They must, therefore, receive the same construction, so far as they relate to the particular question under discussion.

While we are of opinion that the defendant's appeal should have been docketed at the May Term, we think there was error in dismissing the appeal upon the facts found by the court.

It appears that the counsel for the defendant did everything that the law requires of him or his client. He caused the return to the notice of appeal to be made by the justice and paid the fee therefor within the time fixed by law. The return was immediately filed with the clerk, his fee for docketing the appeal was promptly paid and he was requested to docket the appeal. What more could counsel have done, or was he required to do, in order to protect the interest of his client and save his right to have the case heard *de novo* in the Superior Court? When he caused the return to be filed with the clerk and paid the fee for docketing, it became the duty of the clerk under the law to docket the appeal, and surely the law will not permit the defendant to be prejudiced or deprived of his right to have a trial in the Superior Court by any fault or neglect of the clerk when his counsel, acting in his behalf, has been vigilant at every stage of the case and up to the very point where his duty ended and that of the clerk began.

The two cases cited by the plaintiff's counsel are not applicable. (380)

In both instances there was neglect on the part of the appellant or his counsel to file the return to the appeal and pay the fee for docketing. In one of the cases the Court says: "The case on appeal was not sent up or docketed at the next term of the Superior Court, nor did appellant take any steps at said term to have his case docketed." *Pants Co. v. Smith,* 125 N. C., 588. In the other case it appears from the record that "no return to the notice of appeal from the justice was delivered to the clerk until after the expiration of the term. Consequently, the case was not docketed at said term." Counsel for appellant also admitted, in that case, that no return had been filed at the term "ensuing" the trial before the justice. *Davenport v. Grissom,* 113 N. C., 38. It is manifest that these cases are not authorities in favor of plaintiff's present contention. The case must be decided upon the principle announced by this Court in *Winborn v. Byrd,* 92 N. C., 7. In that case there was an application for a writ of *certiorari,* as a substitute for an appeal, which had not been perfected according to law. It was there said by the Court that where the appeal is not perfected "by reason of some error or improper act of the court, or some neglect or omission of the clerk of the court," the court will grant the writ of *certiorari* to bring up the case for review. If this will be done where there is no *laches* of the appellant, but merely neglect of the clerk, why should a court dismiss an appeal when the return has been filed and the case docketed? Why dismiss, if the party, under the principle laid down in the case just cited, could have the case docketed and heard by resort to a writ of *recordari? McConnell v. Caldwell,* 51 N. C., 469; *Elliott v. Holliday,* 14 N. C., 377.

In *Fain v. R. R.,* 130 N. C., 29, which was also cited by the plaintiff, it appeared that the clerk had applied to the local counsel of defendant to know if he desired the transcript to be sent to this Court, and (381) could get no satisfactory answer, and the appellant took no steps to have the transcript sent up and did not pay or tender the fees to the clerk for his services in preparing and forwarding the transcript. The Court held that the appellant was the actor in taking and prosecuting the appeal, and that he had failed to do anything that was required of him. Our case is quite different. Here the appellant has performed his whole duty. If in *Fain v. R. R., supra,* the transcript had been sent to this Court and the clerk here had failed to docket the appeal, the same question we have in this case would have been presented.

In this case the counsel for the appellant not only did all that was required of him, but at the May Term it seems that he asked the clerk if the appeal had been docketed, and was informed by him that it had been. It further appears that the clerk did not make up any civil-issue dockets for the May and August terms of the court, but made up

only appearance dockets for those terms and a civil-issue docket for the September Term, and this had been his custom prior to said time

Under the facts and circumstances of the case, we do not think that the appeal should have been dismissed, and the court committed an error, therefore, in granting the plaintiff's motion.

PER CURIAM. Error.

Cited: Blair v. Coakley, 136 N. C., 408; *McClintock v. Ins. Co.,* 149 N. C., 36; *McKenzie v. Development Co.,* 151 N. C., 278; *Love v. Huffines, ib.,* 380; *Peltz v. Bailey,* 157 N. C., 168; *Abell v. Power Co.,* 159 N. C., 349, 352; *Barnes v. Saleeby,* 177 N. C., 259.

(382)

LEWIS v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 21 April, 1903.)

1. Evidence—Pleadings—Admissions.

Where a paragraph of an answer admits a specific fact and in another part of the same paragraph denies the allegations of the corresponding paragraph of the complaint, the plaintiff is entitled to introduce the admission without introducing the part denying the allegations of the complaint.

2. Instructions—Evidence—Weight of Evidence—Trial.

It is not error for the trial judge in commenting upon the testimony of witnesses to use the phrases, "the evidence tends to show" and "evidence tending to show."

3. Negligence—Trespasser—Ordinary Care.

The evidence in this case warrants an instruction that in dealing with a trespasser a railroad company is not held to the highest degree of care, but is required to use only ordinary care, that is, to do him no intentional or wilful injury.

4. Instructions—Negligence—Contributory Negligence—Burden of Proof—New Trial.

The time and order in which the trial court instructs relative to the negligence, contributory negligence, and burden of proof, in an action for personal injuries, is not sufficient ground for a new trial.

ACTION by Fletcher Lewis, by his next friend, against the Norfolk and Western Railway Company, heard by *McNeill, J.,* and a jury, at November Term, 1902, of PERSON. From a judgment for the plaintiff, the defendant appealed.

Boone, Bryant & Biggs and W. D. Merritt for plaintiff.
Guthrie & Guthrie for defendant.

MONTGOMERY, J. Plaintiff brought this action to recover damages on account of personal injuries alleged to have been sustained by the wanton

and wilful conduct of the defendant through one of its employees.

The plaintiff in his complaint alleges that he was induced by the
(383) defendant's agent to leave his home in Person County in North Carolina and go to Radford in Virginia to work for the defendant on its railroad, near that place; that after a few days work for the defendant he was discharged without cause and without pay for his labor; that, without free transportation or without having purchased a ticket, he boarded a freight train of the defendant going in the direction of his home, and while the train was moving at a high rate of speed, near Radford, a brakeman on the train came along and ordered the plaintiff to get off the car, and upon his declining to do so he was knocked off the car by the brakeman and greatly injured.

In the answer the defendant denied that the plaintiff was ever in its employment or that he was hurt on its cars or by any of its employees; and for a further defense the defendant averred "that the defendant is informed and believes that the plaintiff while a trespasser, and without the knowledge and permission and consent of the defendant, in the nighttime, when the defendant could not by the exercise of ordinary care and watchfulness on the part of its employees have seen him or have known of his presence, intending to steal a ride on defendant's freight train, accordingly got aboard of said freight train on the night of 19 August, 1900, and while upon said freight train, or in attempting to get off said freight train while it was in motion, either from fright or some other cause not attributable to any negligence of defendant or misconduct on the part of its employees, the plaintiff fell or jumped off said moving freight train and was thereby injured by his own contributory negligence as aforesaid."

The sixth allegation of the complaint was in the following words: "That while the plaintiff was on the end of said car and while the train was running at a high rate of speed, at a point on said road not
(384) far beyond Radford, a brakeman on said train, whose name is unknown to plaintiff, came along and told the plaintiff to get off said car, and the plaintiff told the brakeman that he would do so if he would stop the train, but that he would not do so while the train was running so fast, and when the plaintiff told the brakeman this the brakeman negligently, wrongfully, wilfully, wantonly, cruelly, and without due regard for the safety and life of the plaintiff, knocked the plaintiff off the car with a stick, thereby causing said car wheel to run over and cut off the plaintiff's right arm at or near the elbow, and broke his skull in such a manner that a piece of the bone larger than a silver dollar had to be taken from his head, leaving the brain exposed, with no protection but the skin of his head, thus causing the plaintiff great damage and injury, and also great agony, pain, and suffering, and almost

wholly incapacitating him for future usefulness to himself and family."

The plaintiff for the purpose of showing that it was the defendant's road upon which he was injured introduced a part of section six of the defendant's answer to allegation six of the plaintiff's complaint, as follows: "The defendant admits that on the night of 19 August, 1900, about 3 o'clock a. m., the engineer and fireman in charge of the defendant's engine No. 282, while looking ahead of the engine and going from East Radford, Va., to Radford Tower, discovered a colored boy who was afterwards ascertained to be the plaintiff, lying in a wounded condition between the tracks of defendant's railroad at or near the west end of Arch Bridge on Connolley's Creek, but when or how he got there and by what means he became wounded the defendant has no knowledge or information sufficient to form a belief."

The remaining part of the sixth section of the answer is in these words: "And except as herein admitted, the allegations of article 6 of the complaint are not true, as the defendant is informed and believes, and the same are therefore denied." (385)

The defendant objected to the introduction of a part of the sixth section of the answer, insisting that the whole should go in. We can see no error in the admission of the evidence as it was received. It embraced all of the matter which bore upon the allegations made in the sixth article of the complaint as to the place where the plaintiff was injured, viz., near Radford on the defendant's railroad. That part of section 6 of the answer which was not offered in evidence had no reference to the place where the plaintiff was injured, but was only a denial of the plaintiff's injury by the defendant or its employees. It was not fragmentary. *Gossler v. Wood*, 120 N. C., 69. The plaintiff did not offer to put in the whole of allegation 6 of the complaint, nor would he have been allowed to do so by the court, and therefore the introduction of the latter part of section 6 of the answer would have been meaningless.

It was insisted here by the counsel of the defendant that although the plaintiff introduced the evidence "for the purpose of showing that it was the defendant's road upon which the plaintiff was injured," it was clear that the real purpose of the plaintiff in offering the evidence was to try to raise a presumption that the plaintiff was injured on the defendant's train and that his injury, therefore, was attributable to the defendant. In looking through the case, we find not the remotest intimation of any contention on the part of the plaintiff that the finding of the plaintiff in his injured condition, near the defendant's railroad track, afforded a presumption that he was hurt by the defendant's train or its employees, nor was there any allusion to such a presumption in his Honor's charge.

It seems clear that the evidence was competent to sustain the
(386) plaintiff's allegation that he was injured upon the defendant's road. The plaintiff had already testified that a brakeman of the defendant had knocked him off the car a short time before the time when the defendant admitted he was found between its track.

Second exception. His Honor in his charge, in reciting the substance of the testimony of certain of the witnesses, used the expressions, "The evidence tends to show," "evidence tending to show." The defendant objected to these expressions on the part of the judge on the ground that they intimated his opinion as to the facts and as to the weight of the evidence. We see no valid objection to the expressions complained of. They do not imply an opinion on the part of the judge that any fact was fully or sufficiently proved. And, besides, if evidence when offered does not tend to prove or show a fact material to the issue, it ought not to be received (*Short v. Yelverton,* 121 N. C., 95); and when evidence is admitted, that is in effect a ruling by the court that it tends to prove or show some material fact. In *Savage v. Davis,* 131 N. C., 159, the judge below in his instructions to the jury on the question of malice (in a case for damages for malicious prosecution) said: "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." That charge was not disapproved by this Court. It was not, however, excepted to by the defendant.

Fourth exception. His Honor instructed the jury that "in dealing with a trespasser, the defendant is not held to the highest degree of care, but is required to use ordinary care, that is, to do him no intentional or wilful injury." The defendant's first ground of exception to the instruction is that in no aspect of the evidence on either side and under no contention of either party did the doctrine of "ordinary care" or of "due care" or of "reasonable care" (admitted by the defend-
(387) ant to be interchangeable and synonymous terms) arise in the case. There was evidence going to show that the plaintiff was ordered by the defendant's brakeman to get off the car while it was in rapid motion; that the plaintiff said if he, the brakeman, would stop the car he would get off; that immediately the brakeman struck him with a stick and knocked him off. It was decided by this Court in the cases of *Pierce v. R. R.,* 124 N. C., 88, 44 L. R. A., 316, and *Cook v. R. R.,* 128 N. C., 333, that a railroad company is responsible for an injury caused by the wrongful act of its employee while acting in the general scope of his employment, whether such act is wilful, wanton, and malicious, or merely negligent. Under the plaintiff's evidence the

charge of his Honor on the degree of care the defendant owed the plaintiff was not out of place. In removing the plaintiff, who was a trespasser, from the car the brakeman was not required to use the highest degree of care, but would not be allowed to intentionally or wilfully hurt him. *Pierce v. R. R.* and *Cook v. R. R., supra.*

The second ground of objection to the instruction is that his Honor's definition of ordinary care, that it is not intentional or wilful injury, was not correct as a legal definition of "ordinary care," and was calculated to mislead and confuse the jury. If it be true that it was not an accurate definition of ordinary care, it is not prejudicial to the defendant. The clear and unmistakable meaning of his Honor's instruction was that the first issue could not be answered in the affirmative unless the defendant's employee intentionally and wilfully injured the plaintiff in removing him from the car. His Honor submitted to the jury in connection with that matter an instruction covering the defense of the defendant, in these words: If the jury should find from the evidence that the plaintiff on the night of the alleged injury voluntarily, and in order to get a ride on the defendant's train without paying for it, got on the end of a coal car composing a part of the defend-
ant's freight train, without the knowledge or consent of the engi- (388)
neer or fireman or other employee of the defendant, and was on
said coal car while the train was running over defendant's track, and if thereby the plaintiff voluntarily placed himself in a dangerous position on the train, and on account thereof fell off the train and was thereby injured, then the jury should answer the first issue 'No.'"

Tenth exception. After his Honor had given his general charge and the defendant's special prayers for instruction, he added in conclusion the following: "The burden of proof is on the plaintiff on the first issue. I have advised you now that the burden of proof is on the plaintiff on the first issue to show you by the greater weight of evidence that he was injured by the wrongful act of the defendant, and, on the third issue, to show you what damage, if any, he has sustained; and, upon the second issue, the burden of proof is upon the defendant to show you by the greater weight of evidence that the plaintiff contributed to his own injury. Now, with these instructions and on the evidence, retire and say how this matter is."

The defendant objected to the conclusion of the charge on the grounds, first, that it was a repetition of what the judge had said in his main charge, and, second, that it was prejudicial to the defendant in that it emphasized and gave special prominence to the view that the burden of proof was on the defendant as to the issue on contributory negligence and was directly calculated to break the force of the defendant's special

instruction and to mislead the jury. The instruction was perfectly fair to both sides, and the only fault found by the defendant was as to the time and order in which it was given. If it could be complained of at all on the latter score, the error is certainly not such as would (389) justify us in sending the case back for a new trial. But we think it of not sufficient consequence to be the subject of an exception.

The defendant in this Court abandoned its third, fifth, sixth, seventh, eighth, and ninth exceptions.

Affirmed.

Cited: McNeill v. R. R., 135 N. C., 721; *Hedrick v. R. R.,* 136 N. C., 513; *Hayes v. R. R.,* 141 N. C., 198; *Sawyer v. R. R.,* 145 N. C., 30; *Stewart v. Lumber Co.,* 146 N. C., 65; *Hockfield v. R. R.,* 150 N. C., 421; *Modlin v. Ins. Co.,* 151 N. C., 39; *Jones v. R. R.,* 176 N. C., 268; *Hipps v. R. R.,* 177 N. C., 475.

DAVISON v. GREGORY.

(Filed 21 April, 1903.)

1. Pleadings—Demurrer.

A demurrer will lie only for defects which appear on the face of the pleading to which it is opposed.

2. Subrogation—Mortgages—Assignments for the Benefit of Creditors—Payments.

Where creditors furnish money to take up a mortgage on the land of the debtor and have the same assigned to the assignees in a deed of assignment for the benefit of creditors, the creditors are entitled to be subrogated to all rights of the mortgagee, and it is not a payment of the mortgage.

3. Parties—Assignments for the Benefit of Creditors—Trustees—Trust Deeds.

Where trustees, for the purpose of settling their trust, bring suit and make all interested persons parties, a court of equity will entertain the action.

ACTION by G. W. Davison and C. E. Baker, trustees, against N. A. Gregory, Mrs. Pattie McCrary, and others, heard by *McNeill, J.,* and a jury, at April Term, 1902, of GRANVILLE. From the judgment, Mrs. Pattie McCrary appealed.

T. T. Hicks and A. A. Hicks for plaintiff.

John W. Graham and A. W. Graham for defendant Mrs. Pattie McCrary.

CONNOR, J. This was an action brought by the plaintiffs, George W. Davison and Charles E. Baker, trustees, against N. A. Gregory, Laura N. Gregory, his wife, and Pattie M. McCrary.

The plaintiffs allege that on 30 January, 1885, Nathaniel A. (390) Gregory borrowed of John Y. Gholson $1,000, for which he gave his bond to be due 30 January, 1886, with interest at 8 per cent, and to secure its payment he and his wife, Laura N. Gregory, executed a deed of trust to Robert T. Winston of the same date, conveying the tract of land containing 100 acres, situate in Granville County, and fully described therein. Said deed was duly recorded.

On 7 December, 1886, said Gregory and wife executed to Mrs. Pattie McCrary his bond for the sum of $1,500 and executed to John A. Williams, trustee, a deed in trust to secure said note, conveying the equity of redemption of said Gregory in the said 100 acres of land and also another tract of 260½ acres, which deeds were duly recorded.

On 15 September, 1887, W. A. Davis and N. A. Gregory, being partners, became embarrassed, and they and their wives conveyed certain of their property, including any remaining interest of N. A. Gregory in that above referred to, to plaintiffs, G. W. Davison and Charles E. Baker, trustees, to secure the payment of certain debts therein set out, payable to twenty different persons. Said conveyance was duly recorded.

Thereafter the assignee of the said Gholson demanded payment of the note executed to him as aforesaid, and threatened to collect the same by foreclosure of the first trust deed and the sale of the 100 acres therein conveyed. That said Davis & Gregory stated to the plaintiffs Davison and Baker that a sale of the said 100 acres at that time would greatly prejudice their creditors; the land would not bring a fair price, and that it was worth far more than the amount of the said encumbrances.

That thereupon the plaintiffs solicited the creditors of said Davis (391) & Gregory, secured in the deed of trust to them, to raise the money to take up and purchase said Gholson note, and these plaintiffs did take up said Gholson note on 17 March, 1890, as trustees for themselves and said other last-named creditors, who furnished the money for said purpose. That ten of said creditors agreed to furnish the money for the purpose stated, and they signed an agreement in the following words:

"We, the undersigned creditors of Davis & Gregory, of Oxford, N. C., hereby agree to pay George W. Davison and Charles E. Baker 10 per cent of our claims due us by said firm of Davis & Gregory, and which claims are secured by deed in trust dated 15 September, 1887, for the purpose of protecting 100 acres of land which is about to be sold under mortgage, and the said G. W. Davison and Charles E. Baker are

authorized to purchase said mortgage note or to do whatever is considered best in their judgment for all parties concerned."

And they at once paid into the hands of plaintiff C. E. Baker the said sum, and the same was at once applied by these plaintiffs to the purchase of said note and its security.

That said note was at that time held by the Bank of Oxford by assignment from Gholson. That the president of said bank inadvertently endorsed said note to G. W. Davison and C. E. Baker, trustees of Davis & Gregory, whereas he should have endorsed same to the plaintiffs as trustees or agents of the parties who furnished the money to buy the same. Plaintiffs promptly informed said President Herndon of the error in the assignment of said note and its security and requested a correction of the endorsement, and said Herndon at once authorized its correction. The plaintiffs allege that they still have the same, and offer to produce them in court when necessary in the progress of this cause.

(392) Shortly after the purchase of the said Gholson note, during 1891, plaintiffs took possession of said tract of 100 acres of land and held the same continuously thereafter until about the year 1900, when the defendant Pattie McCrary, by her agents, unlawfully and wrongfully entered and took possession of the same to the exclusion of plaintiffs and their agents.

That the said Gholson note had divers small credits on it at the time it was taken up by the plaintiffs, aggregating $461.67, and the plaintiffs received from the rents of said land amounts aggregating $618.56, leaving a balance due on said note, 13 February, 1902, of $1,150. That said John A. Williams, trustee, on 18 September, 1895, sold under the trust deed executed to him the tract of 266½ acres for the sum of $1,740, which nearly if not quite extinguished the debt due to the defendant Mrs. McCrary. That thereafter the said John A. Williams attempted to advertise and sell the 100 acres under his said second deed of trust some time during 1897, and that it was bid off by some one for the defendant Mrs. McCrary. That they had no knowledge or notice of said sale or the amount bid. That no deed was ever made by said Williams to Mrs. McCrary for said land. That there is no such person known to the plaintiffs as Robert T. Winston. There was at the time of this execution residing in Oxford the Hon. Robert W. Winston, who now resides in the county of Durham. That the said Gholson is dead. That the said 100 acres is not now worth the amount due on the Gholson note. That the said N. H. Gregory is insolvent and has left the State, and that W. A. Davis is dead. That John A. Williams, trustee, is dead, leaving a large number of heirs at law. They demand judgment that the said 100 acres be sold by a commissioner to be appointed by

the court, the proceeds to be applied to the payment of the Gholson note for the benefit of the parties furnishing the money for the purchase thereof, and that Mrs. McCrary account for rents and (393) profits on said land, and for other relief.

Thereafter, in accordance with the order of the court made herein, Walton & Whann Company, and others, being the creditors of Gregory & Davis secured in the trust deed to the plaintiffs, who furnished the money with which to take up the Gholson note, came in and made themselves plaintiffs and jointly and severally adopted and made their own the complaint, and united in asking the relief as therein prayed.

The defendant Pattie McCrary demurred to the complaint for defect of parties. Said demurrer in that respect was sustained. The necessary parties were thereafter made, pursuant to the order of the court.

The third and fourth causes of demurrer were as follows:

"3. That it will appear, from an inspection of the note which plaintiffs offer to produce in court, that the said note was assigned to Davison and Baker, trustees for Davis & Gregory, and defendant McCrary insists that said assignment was an extinguishment of said note, and the plaintiffs have no cause of action thereon, as by said assignment the note of 30 January, 1885, was paid and the mortgage then executed satisfied, and should be canceled, and the mortgage executed 7 December, 1886, to John A. Williams, for the benefit of Mrs. Pattie McCrary, became the first lien on said land.

"4. That if said mortgage of 30 January, 1885, is still operative, then the title to the tract of land is still in Robert W. Winston, and until a sale under said mortgage is had by the said Robert W. Winston, trustee, and a purchase made thereunder, no action can be maintained, certainly not by the plaintiffs, who have only an equity of redemption in said land subject to the two mortgages recited in the complaint."

His Honor overruled the third and fourth causes of demurrer, and rendered judgment, upon which the defendant Pattie McCrary excepted and appealed. (394)

In this Court the defendant Pattie McCrary asked for a writ of *certiorari* directing the plaintiffs to produce and file the copy of the note executed by Gregory to Gholson, with the entries and endorsements thereon. Upon the return of the writ, counsel for plaintiffs stating that he had said note in his possession, pursuant to a suggestion from the court, filed copies thereof. The following endorsements appear thereon: "Without recourse, I assign this note, and mortgage attached, to George W. Davison and Charles E. Baker, trustees for Davis & Gregory, 17 March, 1890," signed "H. C. Herndon, president Bank of Oxford, Oxford, N. C."

We treat this record as if the note had been in fact attached to and made a part of the complaint.

The plaintiff's counsel contend that the demurrer is defective in that it is based upon the assumption of a fact which does not appear upon the face of the complaint. The demurrer states: "That it will appear from an inspection of the note, which plaintiffs offer to produce in court, that the said note was assigned to Davison and Baker, trustees for Davis & Gregory," etc. We think the objection well taken. "It is a fundamental rule of pleading that a demurrer will lie only for defects which appear on the face of the pleading to which it is opposed and it must be decided without evidence *aliunde,* unless by consent of the parties." 6 Enc. Pl. and Pr., 297.

Pearson, C. J., in *VonGlahn v. DeRossett,* 76 N. C., 292, referring to a demurrer of this character, says: "It is a 'speaking demurrer,' as styled by the books: that is, in order to sustain itself, the aid of a fact not appearing upon the complaint is invoked."

The learned counsel for the defendant, Mrs. McCrary, fully appreciating this objection to the pleading, filed a petition in this Court for
(395) a writ of *certiorari* directing the plaintiffs to file a copy of the note with endorsements thereon. Upon return of the writ, plaintiffs' counsel reserving all of his clients' rights and not conceding that the defendant was entitled to the writ for the purpose indicated, frankly stated to the Court that he had the note in his possession and had no objection to filing a copy of it. This having been done, we proceed to dispose of the appeal as upon demurrer to the complaint, treating the note with endorsements thereon as exhibits attached to and forming a part of the complaint. The demurrer, in this view of the pleadings, admits that ten of the creditors secured in the deed in trust to the plaintiffs, conveying the property conveyed to Winston, trustee, in the first trust deed, pursuant to the agreement set out in the complaint and for the purpose of preventing the sale of the 100 acres of land covered by the Winston trust deed at a time and under circumstances threatening a sacrifice of the property, advanced the amount of the note and placed it in the hands of the plaintiff Baker, with direction to the plaintiffs to take up and have transferred to them, as trustees for said creditors, the note and security therefor.

It is well settled that if the debtor of several creditors, having security, pays off with his own money the first encumbrance, the debt secured thereby is extinguished, and such payment and extinguishment will inure to the benefit of the encumbrance next in order of priority. *Bank v. Moore,* 94 N. C., 734. It is equally clear that in a court of law if the surety pays off the debt for which he is bound and upon which

a judgment has been obtained against his principal and himself, he must, if he would preserve the judgment with the liens and other rights thereby acquired against the principal, procure its assignment to a third person. *Hodges v. Armstrong,* 14 N. C., 253; *Liles v. Rogers,* 113 N. C., 200, 37 Am. St., 627; *Peebles v. Gay,* 115 N. C., 41, 44 Am. St., 429; *Johnson v. Gooch,* 116 N. C., 64. *Ruffin, J.,* in *Sherwood v. Collier,* 14 N. C., 380, 24 Am. Dec., 624, says: "It is true that (396) if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger or by using the name of a stranger to whom an assignment can be made, when there is but a single security, and that one upon which all of the defendants are liable. This is upon the score of intention and because the plea of payment by a stranger is bad upon demurrer. If the assignment be taken by the surety himself, that is an extinguishment, notwithstanding the intention, because the assignment to one of his own debts is an absurdity."

In equity, however, when the surety, or, upon the same principle, a subsequent encumbrancer or any other person having an interest in the property affected by the liens, pays off the debt of his principal, or of the common debtor, as the case may be, for the protection of the property liable for the debt, he is subrogated to the rights of the creditor whose debt he has paid and to all securities held by him, without a formal assignment. *York v. Landis,* 65 N. C., 535; *Holden v. Strickland,* 116 N. C., 185; *Carter v. Jones,* 40 N. C., 196, 49 Am. Dec., 425.

"A second mortgagee who is in danger of losing his security by the foreclosure of the first mortgage may redeem from the first mortgagee or pay the debt secured by the first mortgage, and may thereupon look to the mortgaged property for his reimbursement even against intervening encumbrancers." Sheldon on Sub., 20.

Mr. Justice Parker, in *Robinson v. Levitt,* 7 N. H., 99, thus states the doctrine: "There are cases in which a party who has paid money due upon a mortgage is entitled for the purpose of affecting the substantial justice of the case to be substituted in the place of the encumbrancer and treated as assignee of the mortgage and is enabled to hold the land as if assignee, notwithstanding the mortgage (397) itself has been canceled and the debt discharged. The true principle, I apprehend, is that when money due upon a mortgage is paid it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties. Many cases state the rule in equity to be that the encumbrance shall be kept on foot or considered extinguished or merged according to the intent or interest *of the parties paying the money.*"

"One who has paid the money due upon a mortgage of lands to which

he had a title, that might have been defeated thereby, has the right to hold the land as if the mortgage subsisted and had been assigned to him, until he has received the amount due upon it from some one who has the right to redeem, whether he took a discharge or assignment of the mortgage." Sheldon on Sub., 14. "The intent of the parties will govern, and the mortgage will not be extinguished by the payment if the intention is still to keep it alive." Beach Mod. Eq., 457.

Gray, J., in *Haroeck v. Vanderbilt,* 20 N. Y., 395, says: "Every judgment purchased and paid for is, so far as the plaintiff is concerned, paid; but if, at the time of the payment, an assignment is made by the plaintiffs to a third party for the benefit of one with whose money or credit the payment is made, the judgment, although in one sense paid, is not satisfied, but remains subsisting and valid until it has answered the purpose for which it was assigned. . . . The fact of payment connected with the assignment to a third party to indemnify another with whose money or credit it is paid, instead of establishing a satisfaction of the judgment, establishes the reverse, and proves the judgment to be outstanding."

We are of the opinion that upon the admission by the demurrer that the creditors or a portion of them secured in the trust deeds to the plaintiffs furnished the money with which to pay off or take up the
(398) Gholson note, and placed same in the hands of one of the plaintiffs for that purpose, they are entitled to be substituted to the rights, securities, and status of Gholson, without regard to the form of the endorsement on the note. If we were to treat the assignment as made to the plaintiffs as trustees of Davis & Gregory, it being admitted that Davis & Gregory did not furnish the money, the transaction could not in equity be treated as a payment and discharge of the debt. Mrs. McCrary has no right to complain of the act of the creditors of Davis & Gregory in taking up the Gholson note. It inured to her benefit by preventing a sale of the lands at a sacrifice, and thereby strengthened her security. Equity will always disregard forms and look to the substance, protecting the rights of all parties and preserving liens and priorities for that purpose. The demurrer admits every essential fact upon which the right of the plaintiffs and creditors advancing the money to take up the Gholson note is based, and his Honor properly overruled the third ground of the demurrer.

The fourth ground of the demurrer brings into question the right of the plaintiffs to maintain this action until a sale is made by the trustee, R. W. Winston. It is true that the legal title is outstanding in the trustee. His Honor properly directed that he be made a party defendant. We think that, in view of the complications arising out of the

execution of the several deeds in trust and the necessity for having the rights of all of the parties interested, adjusted, the course pursued by the plaintiffs in bringing all parties in interest before the court and having a sale of the land made under the direction and control thereof, wise and proper. The mistake in the name of the trustee, together with the contention of the defendant Mrs. McCrary, that the trust deed to him and his power to sell had been canceled and destroyed, would very seriously affect the price for which the land would have sold. Courts of equity will always entertain suits brought by trustees for the (399) purpose of having advice in the discharge of their duties and the administration of their trusts. This is one of the most useful and fruitful sources of their jurisdiction. His Honor properly overruled the fourth ground of demurrer. The judgment of his Honor provides for bringing all persons who may possibly have any interest in the property, into court, and unless the defendant, as she may do, desires to file an answer, we can see no good reason why the court below may not proceed to make a decree in accordance with the principles announced in this opinion. The judgment is

Affirmed.

Cited: Moring v. Privott, 146 N. C., 564; *Bargain House v. Watson,* 148 N. C., 299; *Liverman v. Cahoon,* 156 N. C., 207; *Bank v. Bank,* 158 N. C., 248; *Kendall v. Highway Com.,* 165 N. C., 602.

COBLE v. HUFFINES.

(Filed 21 April, 1903.)

1. Malicious Prosecution—Evidence.

In an action against a prosecutor for malicious prosecution the plaintiff having been tried and acquitted on two separate indictments for the same offense, both bills of indictment are competent evidence.

2. Malicious Prosecution—Malice—Probable Cause—Evidence—Judgments.

In an action for malicious prosecution, the order and judgment in the criminal action, finding the prosecution frivolous, malicious, and not required for the public interests, while not conclusive of malice or want of probable cause, is competent as tending to show malice and want of probable cause.

ACTION by Wesley Coble against D. R. Huffines, heard by *Neal, J.,* and a jury, at February Term, 1902, of GUILFORD. From a judgment of nonsuit the plaintiff appealed.

Scales, Taylor & Scales for plaintiff. (400)

John A. Barringer and A. L. Brooks for defendant.

DOUGLAS, J. This is an action for malicious prosecution. The plaintiff and defendant had a horse trade, perhaps the most fruitful source of strife and litigation known to the law. As its result, the defendant procured a warrant for the plaintiff, charging him with trading to the defendant a horse with the assurance that he had never known him to balk, when in fact he was an accomplished balker. The plaintiff was bound to court, where he was tried and acquitted upon two separate indictments based upon the same transaction, to wit, the horse trade. He now brings action for damages, alleging that the prosecution was malicious and without probable cause. He submitted to a nonsuit in the court below upon an intimation of his Honor that he could not recover.

It is needless for us to repeat the evidence. It is sufficient to say that, in connection with the rejected evidence which should have been submitted, it contained more than a scintilla tending to prove the contentions of the plaintiff. This being so, it should have been submitted to the jury.

The warrant upon which the plaintiff was arrested and the first indictment, marked No. 88, upon which he was tried, were admitted in evidence, but the second indictment, marked No. 103, upon which the plaintiff herein was also tried and acquitted, was excluded upon objection by the defendant. In such exclusion we think there was substantial error. It is apparent to us from an inspection of the indictments that they were both based on the same transaction—the horse trade—and were practically parts of the same general prosecution. There is no evidence whatever to the contrary.

The plaintiff offered to show from the records of the Superior Court that he was tried and acquitted on said second indictment, and that in said action the following order and judgment were rendered: "In (401) the above case the court finds as a fact that the prosecution is frivolous, malicious, and not required for the public interest; and the prosecutor, D. R. Huffines, being present in court, he is hereby marked as prosecutor, and it is adjudged that he be and he is hereby taxed with the costs of the action, and is committed to the custody of the sheriff of Guilford County until the said costs of action are paid." This evidence should have been admitted. The clerk of the Superior Court testified that these papers were among the records of his office; that he knew in whose handwriting the warrant and bill of indictment No. 88 and also bill of indictment No. 103 were; that all of them were in the handwriting of J. A. Barringer, who was the attorney of the defendant Huffines in this case, and it was admitted that Mr. Barringer was employed by Huffines and prosecuted Coble in the above criminal cases. We do not mean to say that the adjudication by the court that the

prosecution on the second indictment was frivolous and malicious is conclusive evidence of malice or want of probable cause in the present action, but that it is competent evidence to be considered by the jury in arriving at their verdict. Taken in connection with the second indictment for the same transaction, it strongly *tends* to prove malice, if nothing more. In *Hinson v. Powell,* 109 N. C., 534, this Court held, quoting the syllabus: "Although the defendant had probable cause for the first prosecution, yet if he instituted the second for the same offense and without additional evidence to that produced on the first, there was an absence of probable cause, which prima facie established malice as to that charge, unless rebutted." It may be that the facts in the case at bar are not sufficiently identical with those in *Hinson v. Powell* to bring it within the full force of that opinion, but this can be better determined upon the evidence adduced upon the new trial. For the exclusion of evidence and erroneous intimation of his Honor as above set forth (402) there must be a

New trial.

Cited: *S. c.,* 133 N. C., 422.

WILLEFORD v. BAILEY.

(Filed 21 April, 1903.)

1. Depositions—Irregularities—Exceptions and Objections.

Objections to irregularities in the taking of a deposition must be made in writing and passed on before trial.

2. Depositions—Irregularity—Waiver—Appearance.

An appearance before a commissioner to take a deposition waives any irregularity of the commission.

3. Depositions—Witnesses—The Code, Sec. 1358, Subsec. 4.

The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence.

4. Seduction—Damages—Instructions—Infants.

In an action by a father for the seduction of his minor daughter, an instruction that damages could be allowed the father only for a wrong to himself was properly refused.

5. Damages—Exemplary Damages—Seduction—Instructions.

The instruction of the trial judge as to exemplary damages in this case by a father for the seduction of his minor daughter is not erroneous.

6. Jury—Trial—Judge—Practice.

It is not error, though an unusual practice, for the trial judge, in the absence of counsel, to go to the jury-room and inquire whether the jury were likely to agree.

ACTION by T. F. Willeford against P. S. Bailey, heard by *Robinson, J.*, and a jury, at October Term, 1902, of UNION. From a judgment for the plaintiff, the defendant appealed.

(403) *Redwine & Stack for plaintiff.*
Armfield & Williams and Adams & Jerome for defendant.

CLARK, C. J. This is an action for seduction of plaintiff's 17-year-old daughter by the defendant. The defendant noted thirty-four exceptions on the trial, which he reduced to twenty-eight in making out case on appeal. In the brief, upon further reflection, his counsel very properly abandoned fourteen of these. Of the remaining fourteen it is only necessary to consider assignments of error Nos. 12, 21, 24, 26, and 28, for the others are without merit and need no discussion.

No. 12 was to the admission of a deposition on the ground that the witness was a resident of the county, that no commissioner was named in the notice and no notice was given before the appointment of the commissioner. If there be any merit in these objections, the objection should have been made in writing and should have been passed upon before the trial began. *Davenport v. McKee,* 98 N. C., 500; *Brittain v. Hitchcock,* 127 N. C., 400. Besides, the objections were cured by the defendant appearing before the commissioner and cross-examining the witnesses, without taking any exception to the regularity of the commission. *Barnhardt v. Smith,* 86 N. C., 473; *Davison v. Land Co.,* 118 N. C., 368. The witness being adjudged unable to talk and physically unable to remain in court, the deposition was admissible. The Code, sec. 1358(4). The defendant himself introduced the testimony of same witness, taken at another time, which was substantially to the same purport.

Assignment of error No. 21 was to the refusal of the following prayer for instruction upon the measure of damages: "You can allow the plaintiff none for wrong to his daughter, but only for wrong to himself."

The wrong done to the daughter is the wrong done to the plaintiff. It is the very essence and basis of the plaintiff's cause of action. In
(404) *McClure v. Miller,* 11 N. C., 136, it is said (quoting almost *verbatim* from *Lord Eldon* in *Bedford v. McKowl,* 3 Esp., 119): "We cannot shut our eyes to the fact that this is an action brought by a parent for an injury to the child." In those cases, as in this, the action was brought by the father. The allegation of loss of services and personal injury is simply an outworn fiction. The action is really for the humiliation, the mental suffering and anguish inflicted by the seducer, and for punishment to the seducer, which is brought by the father still if the girl is an infant. *Scarlett v. Norwood,* 115 N. C., 285; *Abbott v. Hancock,* 123 N. C., 99. In those cases it was held that the jury can

allow the father "punitive damages for the wrong done him in his affections and the destruction of his household," and this is necessarily based upon the wrong done him through her by the deceit and fraud in accomplishing the seduction of the daughter. In *Hood v. Sudderth,* 111 N. C., 215, the Court held that if the female was of age she could maintain the action in her own name (a ruling since followed in the decisions in Missouri, Arkansas, and other States), for there is in this last case no foundation whatever for the flimsy fiction of the loss of service. The court certainly could not have given the last part of the prayer, "only for wrong to himself," and part of the prayer being improper, the whole may be rejected. *S. v. Neal,* 120 N. C., 613, 58 Am. St., 810. The purport of the prayer was that the father could recover only for "loss of services by him," which was clearly a misconception of the purpose of the action.

Assignment of error No. 24. The court was merely stating it as a contention of plaintiff's counsel, when he said that if the girl was not with the defendant in Union, S. C., as she testified, the defendant could have introduced evidence to show that it was false. There was no error in this.

Assignment of error No. 26. The court charged the jury that (405) if they "should answer the first four issues 'Yes,' should find from the evidence and the greater weight thereof that the defendant enticed and persuaded plaintiff's daughter, against the wishes of her father, to leave her home and go to South Carolina for the purpose of seducing her, and that he harbored and detained her in South Carolina, and while so harboring her, that he seduced and debauched plaintiff's daughter; and if they should further find from the evidence that plaintiff's daughter was an innocent and virtuous woman, of good character, before she left home, and that the defendant is a man of considerable wealth, then they might give plaintiff punitive damages, and in law no verdict they would render would be excessive, for the loss of virtue and the destruction of character are matters that cannot be measured in dollars and cents, and the amount of 'smart money' which they might give was entirely with them and within their discretion. That if they should allow exemplary damages, the amount should be regulated by all the evidence and circumstances in the case and should be based on the character and conduct of the parties to the action, the character of the wrong done—if they should find from the evidence that defendant did entice away and seduce plaintiff's daughter; on the conduct and standing of plaintiff and his family, the financial circumstances of the defendant, and on all the facts and circumstances connected with the whole transaction. That the law left the whole question of the amount of damages to their discretion, but that they should exercise that discretion intel-

ligently and not arbitrarily, nor should they act from prejudice or other improper motive, but that they should render such verdict as should be warranted by the evidence in the case." In this connection the court also charged that, "As to smart money, the amount the jury
(406) might give was entirely within their discretion, after carefully considering all the circumstances of the case."

The charge upon this point must be considered with reference to the context (*Crenshaw v. Johnson,* 120 N. C., at p. 275; *Everett v. Spencer,* 122 N. C., at p. 1011; *Max v. Harris,* 125 N. C., bottom of p. 351; *Marcom v. R. R.,* 126 N. C., 200), and so considered, it is unobjectionable. The defendant cut a paragraph in two at a comma, and made it read thus: "If they should further find from the evidence that plaintiff's daughter was an innocent and virtuous woman, of good character, before she left home, and that the defendant is a man of considerable wealth, then they might give plaintiff punitive damages, and in law no verdict they would render would be excessive." Thus substituting a period for a comma and cutting off the balance of that sentence which qualified the excerpt and the immediately succeeding paragraphs which fully explained it. This proceeding is fairly paralleled by the man who proved to his own satisfaction) that the scriptures declared "There is no God" by striking out the preceding words of the sentence, "The fool hath said in his heart."—

But, standing alone, the part sentence "and in law no verdict they would render would be excessive," might be misleading, though "the jury act without control on the subject of damages, because there is no legal rule by which they can be measured." Sedg. Dam. (5 Ed.), 458, 464; *McRea v. Lilly,* 23 N. C., at p. 119; *Gilreath v. Allen,* 32 N. C., at p. 69. The corrective power is the discretion of the trial judge to set aside the verdict if excessive. And taking the context, as we must, the charge is carefully guarded. There is nothing to indicate that the jury were in fact misled. There was evidence that the defendant was worth $125,000; that he had said he would not have his conduct with the girl known for $15,000; that he was president of an oil and fertilizer mill, had an interest in a bank, owned a furniture store, a clothing store, and
(407) other business; had several farms, besides houses in town rented out. The defendant on the stand did not negative the above estimate of his pecuniary worth, which is always proper matter for consideration in assessing punitive damages. The defendant stated on cross-examination that he was a married man with a family, and was a deacon in the church; that the girl's eldest sister (Ida) was at the time living in one of his houses in South Carolina; that he supplied her with a house and all she needed and kept her as his mistress, and had done so

for three or four years, and that he had pleaded guilty in the trial court at that term to an indictment for fornication and adultery with said sister. There was evidence, if believed, fully substantiating the charge that the defendant conspired with the girl's said elder sister, and through that means enticed plaintiff's younger daughter (Willie) to South Carolina, and that there he seduced and debauched her. The verdict of $5,000 is not one that, in view of this evidence, tends to indicate that the jury was misled by the extract from the charge which was excerpted from its context and set out in the appellant's exception.

The last assignment of error to be considered is this: "About 11 o'clock at night his Honor, upon being informed that the jury had not agreed, went to the jury-room and stated that he had been so informed; that the term of the court had been continued for the trial of this case; and that the term at Anson should have opened that morning; that if there was any likelihood of the jury reaching a verdict that night the court would not retire; but if the jury thought it would not reach a verdict, the court would retire and continue the term for the purpose of seeing if the jury would agree; the court did not urge a verdict but (said) he would be glad to get an expression from the jury as to whether it would be likely to agree soon. This was in the absence of the counsel of the plaintiff and defendant." In short, if the jury was likely to agree, the (408) judge would sit up to take their verdict, and would then leave on that night's train for Wadesboro to open Anson court next morning; and if they were not likely to agree, he would go to bed. It was entirely proper to have sent an officer to make the inquiry, and it could be no prejudice to the defendant (though unusual) for the judge to make the inquiry at the door of the jury-room himself. The appellant has printed a sub-head in italics, *"Judge goes into the Jury-room,"* but nothing in the statement of the case justifies that insertion. Even if the judge had gone into the jury-room it would not have been error, though it is not advisable practice. *Priest v. State,* (Tex. Cr. App.) 34 S. W., 611.

There was no urging the jury to agree, no discussion of the case, no intimation that the judge said anything improper to the jury or influenced them in their verdict. It must affirmatively appear that undue or improper influence has affected the verdict. *S. v. Tilghman,* 33 N. C., 513; *S. v. Brittain,* 89 N. C., 481. The judgment is

Affirmed.

Cited: Snider v. Newell, post, 616, 624; *Womack v. Gross,* 135 N. C., 279, *S. v. McKenzie,* 166 N. C., 481; *Tillotson v. Currin,* 176 N. C., 781; *McMahan v. Spruce Co.,* 180 N. C., 642.

(409)

BARRINGER v. VIRGINIA TRUST COMPANY.

(Filed 21 April, 1903.)

1. Easements—Merger—Estates.

Where the owner of a part of the servient estate becomes the owner of an easement thereon there was a merger only to the extent of his interest.

2. Easements—Assignments—Covenants—Damages.

The assignor of an easement to maintain a canal across certain land is not liable for failure to maintain a dam, which the original owner had agreed to do as a consideration of the grant of the easement.

3. Easements—Covenants—Estoppel—Res Judicata.

An action by the assignor of the owner of an easement, who held the easement on the condition that he would keep up a dam, for the purpose of restraining a servient landowner from using more water than he was entitled to, does not establish the liability of the assignor of party owning the easement to keep up the dam.

ACTION by Mary A. E. Barringer against the Virginia Trust Company, heard by *Robinson, J.,* at November Term, 1902, of CHATHAM. From a judgment of nonsuit, the plaintiff appealed.

H. A. London and F. H. Busbee & Son for plaintiff.
Womack & Hayes and Manning & Foushee for defendant.

CLARK, C. J. In 1851 the Cape Fear and Deep River Navigation Company, being desirous of digging a canal through the lands of Alston Jones, riparian owner, made a contract with him under seal by which the company agreed "to erect, maintain, keep, and preserve in good order a permanent and substantial dam across Deep River, upon the site of said Jones' present milldam, and the new dam shall be erected, maintained, kept, and preserved so as to effectually feed and supply
(410) hereafter the said Jones' mill canal, and so as not to injure said Jones or his heirs and assigns in the use and enjoyment of the mills already erected or those hereafter to be erected, and so as to give said Jones and his heirs and assigns now and hereafter the exclusive use and enjoyment of such quantity of water as may suffice to propel a sawmill with Hotchkiss wheels and a thresher and cotton gin, and four pairs of wheat stones and two pairs of corn stones, and bolting works, screen and smut machines, whether that quantity of water shall be used on machinery now or hereafter to be erected by said Jones or assigns. . . . The meaning and intent of this agreement being to observe and secure to said Jones or his heirs or assigns that amount of water-power

from the new canal which would be requisite for propelling at all times the machinery aforesaid, and leave it discretionary with him or them to use it or apply it as they see fit to machinery now in use or hereafter to be discovered."

In accordance with this contract, the navigation company dug the canal, constructed the dam, and furnished the stipulated water-power to Jones. After his death, his property and rights were sold and conveyed to Clegg and Bryan, who in 1863 conveyed to Silas Burns by deed in fee "one acre near the said mill" and "water-power to the amount of 15-horse power, the water-power granted upon the same conditions as agreed upon between the Cape Fear and Deep River Navigation Company and Alston Jones." In April, 1894, the plaintiff's testator became the owner of whatever rights had passed to Silas Burns under the above conveyance.

After their said conveyances to Burns, Clegg and Bryan conveyed all the remainder of the Jones property and rights to other parties, and by successive deeds the defendant became the owner of the same. As it has also acquired all the property, rights and franchises of the navigation company aforesaid, the defendant has all the property and rights of both parties to the contract of 1851, save only such as are out- (411) standing in the plaintiff. There has therefore been a merger, but to that extent only. Jones on Easements, sec. 835; Gould on Waters, sec. 313; *McAllister v. Devane*, 76 N. C., 57.

The defendant and those under whom it claims furnished to the plaintiff's testator the 15-horse power claimed by him till May, 1901, when the dam across the Deep River (referred to in the aforesaid contract) was broken, since which time no water whatever has been furnished, and this action is for the damages sustained thereby.

In an action determined by judgment in 1880, wherein the defendant's assignor was plaintiff and the assignors of the plaintiff's testator were defendants, the complaint alleged that the Burns heirs (assignors of the plaintiff's testator) were using more than 15-horse power, and the jury found that they were not. The plaintiff herein relies upon the demurrer filed in that cause and other pleadings as an estoppel.

The foundation of the plaintiff's action is that the contract of 1851 created, as to the navigation company, a covenant real running with the land, and that the defendant having broken the contract and the plaintiff having acquired Jones' title, can recover for the breach of covenant. But Jones conveyed no land to the navigation company, and there can be no breach of the covenant running with the land unless there is a grant of an estate in the land to which the covenant is annexed. Jones granted an easement to dig and use a canal through his land in consideration of the other party maintaining a dam and allowing him the use of a certain

quantity of the water. It was Jones' covenant which ran with his land and in favor of, not against, the navigation company. This easement has passed to the defendant, but not the obligation to keep up the dam.

When the dam is not kept up for a sufficient space of time to
(412) establish an abandonment of the easement, it is lost. But that question is not before us. It is clear that there is no obligation upon the defendant to keep up the dam. It did not bind itself to do so, and is not the assignee of any land which was conveyed originally charged with such duty. If this were an action by the defendant seeking to enforce its right to an easement, then the defense of abandonment, and perhaps a counterclaim for damages during nonuser, would be properly before us.

The action determined in 1880 was by the defendant's assignor to prohibit the plaintiff's assignor using more than its 15-horse power. It could not be established in that action, brought to regulate and restrict the quantity of water which the present defendant's assignor should pay for its easement, that defendant's assignor was liable for a covenant to keep up the dam. It was not within the scope of that action. *Tyler v. Capehart,* 125 N. C., 64, in which the doctrine of estoppel is fully discussed and determined.

The defendant herein contends further that the one acre conveyed to the plaintiff's original assignor (Burns), though a part of the Jones land, does not embrace any of the land upon which the canal is located (the boundary being the embankment of the canal), but lies between the canal and the river; hence, that the grant is void, being of an easement in gross, severed from the land to which it was appurtenant. But we need not consider this contention, for the reason that the defendant here is not controverting the easement, which is in its favor, nor what payment for its use it must make to the plaintiff, if it were using the same; but the plaintiff is endeavoring to establish the defendant's liability for not performing the duty of keeping up the dam, which the defendant must do before it can claim an easement. The defendant has never contracted to keep up the dam. That was an
(413) obligation of the defunct navigation company. The defendant has simply acquired the easement, which it cannot use unless it complies with the terms upon which it is held. This easement may be abandoned by nonuser or released by deed. *Merrimon v. Russell,* 55 N. C., 470.

In granting judgment of nonsuit there was

No error.

Cited: Patrick v. Ins. Co., 176 N. C., 670.

KINSTON AND CAROLINA RAILROAD COMPANY v. STROUD.

(Filed 21 April, 1903.)

1. Railroads—Charter—Corporations — Eminent Domain — Evidence — The Code, Secs. 1932, 1933.

Where the articles of incorporation of a railroad company are upon their face void, the trial court will so declare in a proceeding to condemn land by right of eminent domain claimed thereunder.

2. Railroads—Charter—Corporations—Recordation—The Code, Secs. 1932, 1933.

The filing and recording by the Secretary of State of articles of association of a proposed railroad company, if not such as required by law, is a nullity.

3. Railroads—Eminent Domain—Recordation—Filing—Map—The Code, Sec. 1952—Laws 1893, Ch. 396.

In an action to condemn land for railroad purposes, the profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned.

4. Appeal—Clerks of Court—Superior Court—Exceptions and Objections—The Code, Sec. 255—Laws 1887, Ch. 276.

On the removal of a proceeding before the clerk of the Superior Court to the Superior Court, objections may be raised on trial in the Superior Court that were not raised before the clerk.

ACTION by the Kinston and Carolina Railroad Company against I. and S. Stroud, heard by *Jones, J.*, at January (Special) Term, 1903, of LENOIR. From a judgment for the defendants, plaintiff appealed.

Loftin & Varser for plaintiff. (414)
Rouse & Ormond and W. D. Pollock for defendants.

CLARK, C. J. The plaintiff claiming to be a railroad company organized under chapter 49 of The Code, began this proceeding before the clerk to condemn a right of way over defendant's land. On appeal from his order to the judge, the plaintiff offered in evidence: (1) A copy of the agreement and articles of association with certificate of the Secretary of State that they had been filed in his office; (2) the profile. These articles of association set forth that the proposed railroad was to be sixty miles long, that $32,000 had been subscribed and 5 per cent thereof had been paid in, to wit, $1,600. The Code, sec. 1932, requires that the articles of association, filed for the purpose of forming a railroad company, shall state "the length of such road as near as may be." Section 1933 provides that such articles shall not be filed and recorded in the office of the Secretary of State until a least $1,000 of stock for every mile of

proposed railroad is subscribed and 5 per cent thereon paid in good faith, with accompanying affidavit of three directors, etc. This was not done here, as only $32,000 is reported as subscribed, with $1,600 cash paid in, instead of $60,000 subscribed and $3,000 certified to be paid in as required by the statute.

Of course, the charter of a corporation cannot be collaterally attacked, and a direct proceeding must be brought to annul it. But if the charter were on its face inoperative and void, a court would so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. By virtue of these proceedings under chapter 49 of The Code, the duties of the Secretary of State are only to "file and record" when the proposed articles are in form in compliance with the statute. He adjudicates nothing, though he can refuse to file and record articles of association not complying with the statute, but
(415) he issues no charter or letters patent. It is true, the persons are not a corporation until the articles are filed, but if they are not in compliance with the requirements of the statute the corporation acquires no life or rights, however much it or the alleged corporators may be estopped to deny liability for acts under color of such registration by them in the office of the Secretary of State. Upon the presentation of the certified copy of the articles of association, his Honor, seeing that upon the face thereof the law had not been complied with, properly adjudged that the alleged corporation had not been legally incorporated and could not procure an order to condemn a right of way through defendant's premises. The "filing and recording" by the Secretary of State of articles of association, if not such as required by law, has no more effect than a registration of a deed not duly authorized (*Todd v. Outlaw,* 79 N. C., 235), or than the docketing a judgment confessed without legal requirements (*Uzzle v. Vinson,* 111 N. C., 138), or recording a laborer's lien without complying with the requirements of a statute (*Cook v. Cobb,* 101 N. C., 68). This is not a collateral attack, but holding that the articles of association, like the above papers, are invalid and of no effect, upon their face.

The profile not being such as required by the statute, the court also properly held that this was a condition precedent before an order of condemnation could be granted. It is true, it does not affirmatively appear that there would be any "cuts" or "fills" on defendant's land. But the very object of requiring the profile is that it may appear whether or not there will be such "cuts" or "fills" before granting the order of condemnation, and that the jury may have the benefit thereof in assessing damages. It is enough that the statute requires the profile to be filed, and that the plaintiff has failed to do what was required in this respect. It is immaterial that this last point was not made before

the clerk. The case on appeal is as fully before the judge as (416) if it had been originally returned before him. Chapter 276, Laws 1887, amending The Code, sec. 255. See Clark's Code, 3 Ed., pp. 266, 267; *Faison v. Williams,* 121 N. C., 152, and cases there cited; *Roseman v. Roseman,* 127 N. C., at p. 497.

No error.

Cited: R. R. v. Newton, 133 N. C., 135; *Ewbank v. Turner,* 134 N. C., 80; *R. R. v. R. R.,* 148 N. C., 64; *Abernathy v. R. R.,* 150 N. C., 103; *In re Herring,* 152 N. C., 259; *Unitype v. Ashcraft,* 155 N. C., 71; *R. R. v. Oates,* 164 N. C., 174; *McLaurin v. McIntyre,* 167 N. C., 356; *Holmes v. Bullock,* 178 N. C., 379 *Hargrove v. Cox,* 180 N. C., 365.

BARDEN v. STICKNEY.

(Filed 21 April, 1903.)

1. Limitations of Actions—Accrual of Cause of Action—Vendor and Purchaser.

In an action to recover money paid for the purchase price of land, the statute of limitations begins to run at the time the payment is made, the vendor having had no title.

2. Limitations of Actions—Married Women—Trusts—Trustees—Agency.

Where the statute of limitations begins to run against a trustee or an undisclosed agent acting as principal, it is not suspended by the subsequent appearance of a married woman as *cestui que trust* or as the undisclosed principal.

3. Limitations of Actions—Fraud—Mistake—The Code, Sec. 155, Subsec. 9.

That the title of land attempted to be conveyed by a mortgagor is a failure is not such a mistake as to prevent the running of the statute of limitations.

PETITION to rehear this case, reported in 130 N. C., 62. Petition dismissed.

A. O. Gaylord and Shepherd & Shepherd for petitioner.
H. S. Ward and Battle & Mordecai in opposition.

CLARK, C. J. This is a petition of the plaintiff to rehear this case, decided 130 N. C., 62, where the facts are stated. Without further reconsidering the former opinion, it is sufficient to say that (417) the statute of limitations is a complete bar to the petitioner.

Ayers bought in his own name and without disclosing any agency, and if he was in fact the undisclosed agent of Mrs. Barden, the statute began to run against him, and against her as well, whenever he had a right to recover back the money paid. If he ever possessed such right, he had it immediately upon payment by him of the money. The alleged cause of action is the sale by Stickney of land to which he had no title. Ayers claims that having paid the money without consideration, the law raises an implied promise to repay it. That payment was made 30 January, 1888, and this action was not begun till 13 February, 1901.

If Ayers was trustee, instead of being the agent of an undisclosed principal, the same rule would apply, for the statute of limitations having begun to run against a trustee or an undisclosed agent who is acting as principal, it is not suspended by the subsequent coming forward of a married woman as *cestui que trust* or as the undisclosed principal. Among many cases it is sufficient to cite *Miller v. Leigh,* 35 Md., 396, 6 Am. Dec. 417; *Huntingdon v. Knox,* 7 Cush., 371; *Traube v. Milliken,* 57 Me., 63, 2 Am. Rep., 14; Clark on Cont., 742; Pollock on Cont., 228, notes, and cases cited; *Sims v. Bond,* 5 B. and Ad., 393. An action for money had and received accrues immediately upon receipt of the money. *Sweat v. Arrington,* 3 N. C., 129; Wood Lim., 328; *Bishop v. Little,* 3 Me., 405; *Furloy v. Stone,* 12 R. I., 437.

This is an action to recover money, and not land, hence the statute runs from the payment of the money. The Code, sec. 155(9), has no application, for there is no evidence or allegation of fraud or mistake. Stickney sold the piece of land he intended to sell, and under a bona fide belief that he had a legal right to do so. That he did not
(418) make a good title is not a "mistake" within the meaning of this section.

Petition dismissed.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

Cited: Hayden v. Hayden, 178 N. C., 264.

PHARR v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 28 April, 1903.)

1. Negligence—Contributory Negligence—Issues—Questions for Jury.

In an action for personal injuries, evidence being offered by he defendant to show contributory negligence, and no evidence being offered by the plaintiff on that issue, such question is for the jury.

2. Contributory Negligence—Negligence—Evidence—Sufficiency of Evidence.

In this action for personal injuries the evidence is sufficient to justify the finding by the jury that the defendant is guilty of negligence and the plaintiff not guilty of contributory negligence.

3. New Trial—Verdict—Setting Aside Verdict—Jury—Presumptions—Findings of Court.

A refusal of a trial judge to set aside a verdict for the reason that a juror was alleged to have been asleep during the trial, will not be reviewed where the trial judge does not find the facts, and it will be presumed that the refusal was warranted by the facts.

ACTION by H. N. Pharr, administrator, against the Atlanta and Charlotte Air Line Railway Company, heard by *Shaw, J.*, and a jury, at January Term, 1903, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Jones & Tillett for plaintiff.
George F. Bason for defendant.

WALKER, J. The plaintiff's intestate was a brakeman in the employment of the defendant's lessee, the Southern Railway Company, at the time he is alleged to have been killed by the negligence of (419) the latter. A freight train on its way from Spencer to Charlotte had reached a point on the line of the lessee's railway, called "The Junction," and it was the duty of the intestate at that place to uncouple the train between cars 20 and 21 for the purpose of having the cars of the rear section transferred to another track. In order to do so, it was necessary for the engineer to move the train back and slack on the pin so that it could be removed, and the intestate gave a signal to the engineer to come back, which he did, and the pin was removed with the lever. The intestate signaled the engineer to go forward, and then stepped between the cars "to put the air" on the rear section, which had started down the grade, and just as he "reached over the drawbar" for this purpose, he was caught between the cars and thrown under the wheels of car 20 and killed.

The principal exception in the case relates to the charge of the court upon the second issue, there being no exception to the charge upon the first issue. The disputed question arising between the parties on the second issue was whether, at the time the intestate went between the cars to apply the brakes to the rear section the rear car of the first section was standing still or moving, it being conceded that if it was not moving at the time, the intestate was not guilty of negligence in going between the cars to apply the brakes and stop the rear section which was then moving down the grade in a northerly direction.

In the consideration of this question it must be remembered that contributory negligence is an affirmative defense, expressly made so by statute, and consequently the burden is always on the defendant to establish it. It follows that if there is any evidence introduced by the defendant to sustain the plea, the jury must pass upon the credibility of the witnesses and the weight of the testimony, and this is true even
(420) though the defendant introduced proof tending to show contributory negligence and the plaintiff offered no proof at all upon the issue. The law does not presume the existence of negligence or contributory negligence, and requires the party with whom is the affirmative of the issue to prove it by the greater weight of the evidence. In this case, therefore, if the defendant's evidence tended to show that the first section of the train was moving when the intestate went between the cars to apply the brakes, it was for the jury to pass upon this evidence and to accept or reject it. The jury were not bound to believe the witnesses of the defendant or required to find that there was contributory negligence until the defendant by the proof in the case had satisfied them that it did exist, and the plaintiff was not called upon to prove the negative of that issue. The laboring oar was with the defendant.

The witness Russell was asked whether the front section of the train stopped, and replied that he did not know and could not say whether it did or not. In *Edwards v. R. R.*, 129 N. C., 78, this Court ruled that the testimony of a witness that he did not hear the bell or whistle of an engine as it approached a crossing, he being in hearing distance, was proper evidence to be submitted to the jury upon the question whether the bell was rung or the whistle sounded, and was sufficient to establish a verdict in favor of the plaintiff, as it tended to establish the fact in issue in his favor. The testimony of the witness in that case was not essentially different from that of the witness Russell in this case. The latter was standing within a few feet of the train assisting the intestate and in full view of the cars, and testified that the rear section had moved back and down the grade, but that he did not know whether the front section moved or not. He had as good opportunity to know whether the front section was moving or not, when the intestate was between the cars, as he had with regard to the rear section, and the jury
could well infer from this evidence either that the front section
(421) was not moving at the time or that the motion was so imperceptible as not to be observed by Russell and the intestate.

Without commenting upon the evidence in detail, we think that the separation of the cars at that part of the train where they were uncoupled and the distance between the cars 20 and 21, when the intestate stepped between them "to put the air on," and the testimony of

the engineer that the brakes were stuck ten or twelve cars from the engine, there being thirty or forty cars in the train, and that he had to go forward to take up the slack in order to come back again and move the cars so as to loosen the pin, was at least some evidence upon which it might reasonably be argued and from which the jury might fairly conclude that the rear car of the front section was standing still at the time the intestate went between the cars.

The question whether the front section of the train had stopped was submitted to the jury in the charge upon the first issue, to which no exception was taken, and the jury by answering the first issue "Yes" necessarily found that the front section was not moving at the time the intestate stepped between the cars. An affirmative answer to the first issue would, therefore, necessarily call for a negative answer to the second.

The engineer knew that he as required to stop at the switch for the purpose of cutting off the rear section of his train so that it could be transferred to the sidetrack, for the intestate, he says, had told him so at Newell's and there was evidence tending to show that, after the pin had been drawn and the cars uncoupled, the intestate signaled him to go forward, and instead of doing so, he moved the front section of the train backward. Two inferences might have been made by the jury from this evidence: first, that the engineer, knowing full well what was to be done, did not move back any further than was necessary to loosen the pin or "ease up on it," and then stopped, as he should have done; (422) and, second, that the intestate, who had given him the signal to go forward, had the right to suppose that he would do so, and was not required to anticipate his negligence in disregarding the signal, if he saw it, or to presume that he did not see it; and this being so, the intestate might well have thought, as a prudent man, that he could go between the cars with perfect safety.

The question upon the second issue was not whether there was any evidence that the rear car of the front section had stopped, but whether there was any evidence that it was moving at the time the intestate attempted to set the brakes on the rear section, and unless the evidence was sufficient to satisfy the jury that the car was moving, the defendant failed, of course to sustain its contention and was not entitled to a favorable finding upon that issue, without reference to the question whether the plaintiff offered any evidence to show that it had stopped. This is clear upon reason and authority.

Upon a careful review of the case, we are of the opinion that the state of the evidence was such as to fully justify the charge of the court and the finding of the jury upon the second issue. The objection of the defendant cannot be sustained, even if it had been made before ver-

dict. *Sutton v. Walters,* 118 N. C., 495; *Holden v. Strickland,* 116 N. C., 185.

We see no merit in the defendant's motion to set aside the verdict because the juror Brown was asleep during the trial. The evidence whether the juror was asleep was conflicting, and when the court denied the motion it must be presumed that the facts were found in accordance with the affidavit of the juror that he was not asleep, or, at least, that the facts were so found as to warrant the decision of the court. *S. v. Taylor,* 118 N. C., 1262; *Albertson v. Terry,* 108 N. C., 75. This Court cannot pass upon the affidavits, but in order to entitle the (423) moving party to a review here of the ruling below, the facts must be found and spread upon the record, and the court must always find the facts when requested to do so. *Smith v. Whitten,* 117 N. C., 389; *Alberston v. Terry,* 108 N. C., 75. It is well settled that this Court cannot find facts or review them, as a general rule, but can only pass upon "matters of law or legal inference." *Love v. Moody,* 68 N. C., 200; *S. v. Best,* 111 N. C., 643. Motions of this sort must be made in apt time. The knowledge of the alleged fact, upon which the defendant bases its motion, was acquired during the trial and before a verdict was rendered, and the matter should at the earliest opportunity, have been brought to the attention of the court. It has been said by this Court that, after a defendant has taken chances for a favorable verdict, the purposes of justice are not subserved by listening too readily to objections not taken in apt time. *S. v. Perkins,* 66 N. C., 128; *Spicer v. Fulghum,* 67 N. C., 18.

There was a way in which the defendant could have the juror aroused, if he was asleep, without serious, if any, prejudice to its interests, and a proper reminder or warning from the court would probably have been sufficient to keep him awake until the end of the trial. The motion, under the circumstances of this case, was within the sound discretion of the court, and we do not see that it was improperly exercised. *S. v. Miller,* 18 N. C., 500; *S. v. Fuller,* 114 N. C., 885.

We have been unable to discover any error in the ruling of the court below.

PER CURIAM. Judgment affirmed.

Cited: S. v. Watkins, 159 N. C., 487; *Lumber Co. v. Buhmann,* 160 N. C., 387; *Lewis v. Fountain,* 168 N. C., 279; *Gardiner v. May,* 172 N. C., 194; *Sanford v. Junior Order,* 176 N. C., 446; *Mfg. Co. v. Lumber Co.,* 177 N. C., 406.

(424)

FIRE EXTINGUISHER COMPANY v. MOORESVILLE COTTON MILLS

(Filed 28 April, 1903.)

1. Contracts—Construction—Written Contracts.

Where a writing is attached to a contract and is referred to in the contract, it thereby becomes a part of the contract.

2. Contracts—Evidence.

Where a party has a copy of a contract, with a written agreement thereto, and allows certain work to be performed under the attached agreement, he thereby recognizes the attached writing as a part of the contract.

ACTION by the General Fire Extinguisher Company against the Mooresville Cotton Mills, heard by *Shaw, J.*, and a jury, at January Term, 1903, of MECKLENBURG. From a judgment of nonsuit, the plaintiff appealed.

Burwell & Cansler for plaintiff.
Jones & Tillett for defendant.

MONTGOMERY, J. The plaintiff and the defendant entered into a contract in writing in which the plaintiff was to make certain improvements or additions to the mill plant of the defendant. In the body of the contract the proposal to do the work consisted in the furnishing and erecting by the plaintiff of "a system of improved Grinnell automatic sprinklers, as described and enumerated in the within specifications." There was also a clause in the contract printed in large capital letters in these words: "It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party." It was also agreed that the plaintiff's "price for the work herein specified will be $1,056." It was also further agreed in the last clause of the contract that "Any additional work or apparatus which may be required, not included in our specifications" (the last five words being in large (425) capital letters) should be supplied by the defendant, or, if by the plaintiff, at prices to be agreed upon. The contract was in the shape of a general form used by the plaintiff, with blanks for price, names of parties, etc. Following the signatures of the parties to the contract, the following writing was appended: "We propose to furnish and install a complete wet system of improved Grinnell sprinklers in main mill, picker-room, dust-room, engine and boiler-room, to be according to the factory or Mutual Insurance Company, for the sum of $1,056; additional for tank riser, $75. We commence on the inside of

the building, at the foot of each riser and at the bottom of the tank to be furnished by you. Additional for outside work to connect sprinkler work and leave plugs for extension, Post indicator valves to control risers, for the sum of $175." The $1,056 has been paid for the automatic sprinklers.

This action was brought by the plaintiff to recover $250 for the building and erecting by the plaintiff of the tank riser and for outside work to connect sprinkler work, etc. It was admitted by the defendant that the plaintiff had erected the improved Grinnell automatic sprinklers, according to the contract, and also that the plaintiff had constructed the tank riser and had performed the outside work to connect the sprinkler work and leave plugs for extension, Post indicator valves to control risers "according to the terms and conditions set out in the contract and specifications attached," and that all the work had been duly accepted by the defendant. His Honor intimated that he would instruct the jury that, if they believed the evidence, to answer the issue, Is the defendant indebted to the plaintiff, if so, in what amount? "No." The plaintiff took a nonsuit and appealed.

We think there was error in the ruling, and that the plaintiff was entitled to recover under the contract. The contract was in
(426) writing, and its construction was a matter of law. The writing following the signatures, called in the contract and in the defendant's argument "specifications" and in the plaintiff's brief "addendum," was a part of the contract. It was both a specificaton, as they concerned the automatic sprinklers, and a part of the contract also, when taken in connection with the additional work referred to in the contract. There was no conflict between any part of the "specifications" or "addendum" and the body of the contract itself. The writing attached to the contract was referred to in the contract, and was therefore a part of it, just as fully as if it had been incorporated therein. Beach on Contracts, sec. 739. That being so, it follows that our view must be that the erection of the tank and the performance of the outside work are provided for in the contract itself by the very words which the defendant contends exclude them. The words, "It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party," embrace the tank riser and the outside work, for they are included in the contract as additional work and apparatus. The last clause in the body of the contract, which we have quoted too, embraces the tank riser and the additional work. The work done by the plaintiff other than the erection of the automatic sprinklers did not fall under the specifications as to the sprinklers which required that work to be

done "according to the factory or Mutual Insurance Company," but under the sections of the contract which refer to additional work or apparatus.

If any evidnece *dehors* the contract were necessary or permissible to aid in its interpretation, it is abundantly furnished by the intention of the parties as manifested by that contract. The plaintiff and the defendant each had in possession the contract in duplicate, with the paper-writing attached, from the time of is execution, and the (427) defendant knew of and saw the erection of the tank riser and the performance of the outside work as the work was proceeded with, and accepted the whole. That conduct on the part of the defendant is clear evidence that the defendant recognized the whole of the writing following the signatures as a part of the contract. The defendant knew what constituted the automatic sprinkler under the contract and he knew that the tank riser and the outside work were separate and distinct matters from the sprinklers. The managers of the defendant company, as we have said, saw these distinct pieces of work being performed by the plaintiff and they made no objection to the building of the tank riser or to the performance of the outside work, and they received the whole of it when it was finished. "The intention of the parties to any particular transaction may be gathered from their acts and deeds in connection with the surrounding circumstances as well as from their words, and the law, therefore, implies from the silent language of man's conduct and action, contracts and promises as forcible and binding as those that are made by express words or through the medium of written memorial." 1 Addison on Contracts, 23.

There was error, for which there must be a
New trial.

WALKER J., having been of counsel, did not sit on the hearing of this case.

DOUGLAS, J., concurring in result: I think the paper pasted on to the contract was an *addendum* thereto in the nature of a collateral contract. It was not a part of the original contract, and was not included in the price therein specified. Had it been included, the plaintiff would be bound by the stipulated price. It was attached to both copies of the contract retained respectively by the plaintiff and the de- (428) fendant, and by its very terms related to additional work, for which additional compensation was provided.

ALEXANDER v. CANNON MANUFACTURING COMPANY.

(Filed 28 April, 1903.)

Negligence—Accident—Master and Servant.

In an action for personal injuries, the plaintiff cannot recover where it appears that there was no omission or breach of duty on the part of the defendant and that the injury was an accident.

ACTION by I. A. Alexander against the Cannon Manufacturing Company, heard by *Shaw, J.*, at January Term, 1903, of CABARRUS.

The following evidence is taken from the judge's notes:

Ira A. Alexander, the plaintiff, testified as follows: "In May of last year I worked at defendant's bleachery; was employed by Mr. Hawthorne, the superintendent. I was first employed to work in bleach-house in daytime; afterwards, I was employed to run the cans and see to the finishing of towels on a calender, and worked from 6 p. m. to 6 a. m. I went on this night work and worked two weeks and two nights, and on Tuesday evening, 6 May, something got the matter with the calendar, and Mr. Holdbrooks had not got it fixed. Mr. Hawthorne told me to see if I could see what was the matter with it, and to get it started before morning if I could. I went to work downstairs and run the dry cans until 3 o'clock. I then went to calender to find out what was the matter; I found it would not turn; I went on back, as I did not know how to fix it, and if I had I knew I could not have fixed it by myself.

(429) I run the cans on till 6 a. m. and fifteen minutes before changing time, when the hands came in, Mr. Hawthorne came and I told him what was the matter with the calender. I stopped the dry cans and got my coat to come home and Mr. Hawthorne said: "You stay and help Sam (Holdbrooks) to fix the calender," and knowing that if I disobeyed the order I would get turned off, I stayed and helped Sam till I got hurt. When Mr. Hawthorne gave the order he left and went downstairs. I went to Sam Holdbrooks to know what to do, and he said he did not know. The thing was a double-geared cog-wheel. He got John Cochran and Dick Caldwell to come and help us, and they came over; we went to take it down and got it slipped out; as we went to take it down, somehow, I don't know how, it came down all of a sudden and dropped and struck my left foot. The wheel was 18 inches across and 4 inches in diameter and weighed 500 pounds. They took off my shoe, my foot swelling so fast I could not walk home; they sent me home in a wagon; I can't express how much suffering it caused. For four weeks I was not out of the house. Dr. Archey was my physician. It was about six or seven months before I was able to go to work.

I was receiving 85 cents a night or $5 a week when hurt; my foot still gives me pain; the pain went all over my whole body all the time except when under the influence of opium. I am not a machinist or mechanic and never had any experience as such, nor did I hold myself out as such when I hired to them. Holdbrooks' business was to run calender. Cochran run the dry cans in daytime. Dick Caldwell was a calender waiting boy to bring up towels to second floor and then to third floor. Dick had been there about a week; he was a 'bus porter before that. None of the men were mechanics. The defendant had several experienced machinists in its shops and others under orders of the superintendent.

"I knew nothing about fixing this machinery, but I knew I (430) would be turned off if I didn't help. I had never before that time fixed any machinery in the mill; I didn't know it was dangerous to handle that machinery in this way. We began work some few minutes after the order to do so, and I was hurt fifteen minutes after the order was given. Hawthorne did not come back till after I was hurt. Mr. Hawthorne did not give me any warning that it was dangerous to do this work. All he said was : 'Stay and help Sam, and I'll see you get pay for your extra time.' "

Cross-examination: "Had been in this room two weeks and two nights. I had run this calender half the night about one week. A calender is a machine for finishing up towels. This wheel was 18 inches diameter and 4 inches across cogs. The axle about 2½ or 3 inches in diameter; the cogwheel and shaft weighed 500 pounds; the wheel had spokes in it. Had charge of calender two weeks, but had run it only one week. I had not run any machinery like this before at defendant's mill. I did run a calender one day when Will Stuart was superintendent; no skill was required to run cloth through it. Have taken wheel off buggy. It required somebody to take it out that knew something about it; all you had to do was to take off tap, and then it was a question of how to get it down. Sam Holdbrooks had charge of it in daytime and his business was to take charge of it in daytime. Sam said he did not know how to take it down; we were helping Sam to take it down. Sam was directing how to take it down, if any one was. The cogwheel was gummed up; it stuck to shaft and would not turn. Don't know whether it was dry or cutting on shaft. Don't know what had to be done when taken off. I did not do the work because I thought I could do it. I didn't think we could do it. I did it because I was ordered to do it. I expected extra pay. I never had any thought about get- (431) ting hurt. I did not know whether we four men could do it or not. I knew nothing about it. I thought we could take it down after we got off tap. Mr. Holdbrooks said: 'If you hold your end, we will hold ours.'

I can get along pretty well now, but my foot is stiff and still hurts. I went back to work in November; was not able to stand on my foot, and after I began work I had to lay out two days on account of giving out. I worked four days between May and November at Forest Hill to try whether I was able to work. The center of the cogwheel above the floor was about breast-high." Here witness explained how wheel was taken down, saying that you took off the tap and pulled the wheel out and let it down. "I could see how it was to be taken down."

Redirect: "No tackle was used. Have never been able to pay Dr. Archey's bill. I never saw one (cogwheel of calender) taken down before. I could not have had my foot any other place, lifting as I was."

Dr. Archie testifies as follows: "I was physician for plaintiff. I found his foot badly bruised and mashed across the top; skin slightly stripped; not cut, but badly bruised. I kept him under the influence of opiates for a month. Such a wound caused great physical pain; I saw him after June. I examined his foot last Saturday; his foot is stiff yet, about solid mass of bones; his foot is such I don't think he could stand on it for twelve hours. In my opinion, he could not have stood to work from May to November. Foot will gradually grow better, but will probably give him trouble all his life. If compelled to use it by standing up, it will retard his improvement. He owes me about (432) $30 or $40 for services."

Cross-examination: "I could not make out that bones were broken. The injury is more or less permanent; it will always give him trouble; something like rheumatism, and weather will affect it, of course."

From a judgment of nonsuit, the plaintiff appealed.

M. H. Caldwell and L. T. Hartsell for plaintiff.
Jones & Tillett for defendant.

PER CURIAM. The facts in this case show a painful and unfortunate accident, but do not show any omission or breach of duty on the part of the defendant's agents or servants. His Honor properly sustained the motion for a judgment of nonsuit.

Affirmed.

Cited: Lassiter v. R. R., 150 N. C., 486; *Horton v. R. R.*, 145 N. C., 137; *Simpson v. R. R.*, 154 N. C., 53.

MALLOY v. LINCOLN COTTON MILLS.

(Filed 28 April, 1903.)

1. References—Findings of Court—Appeal.

The findings of fact by a referee, supported by evidence and sustained by the trial court, are not reviewable.

2. Contracts—References—Conclusions of Law—Damages.

The findings of fact by the referee in this case sustain the conclusions of law, that the time for the completion of the work was impliedly and necessarily enlarged, that plaintiffs are guilty of no unnecessary delay, that defendant cannot recover damages for failure to complete the work at the time specified, and that the defendant is indebted to plaintiffs in the sum found due by the referee, for work and labor in excavating and lowering the bed of a tail-race.

ACTION by Malloy & Boggs against the Lincoln Cotton Mills, heard by *Coble, J.*, and a jury, at September Term, 1902, of LINCOLN. From a judgment for the plaintiffs, the defendant appealed.

(433)

D. W. Robinson for plaintiffs.
Burwell & Cansler and C. E. Childs for defendant.

CLARK, C. J. This was an action to recover for work and labor in excavating and lowering the bed of the tail-race for the defendant. The defendant set up a counterclaim for damages caused by delay in completing the work. The appeal was practically narrowed in the argument to the counterclaim.

The briefs and the oral argument on both sides were able, full, and exhaustive, and after fullest consideration we think the referee found upon competent evidence that the defendant was to keep the water pumped out of said race and to keep the same dry and in proper condition for the work during the progress thereof; that the excavation of the tail-race (except as to the wall at the head thereof) was to be from the point where the branch emptied into the race, about 180 feet from the mill, to the point where the race emptied into the river; that the plaintiffs were to build a stone bulkhead at the east end of the dam; the work aforesaid to be done at the rate of $1 per cubic yard for excavating and $6.50 per cubic yard for work on walls; that the defendant (through its general manager) represented that it was only necessary for plaintiffs to excavate the tail-race from the point where the branch empties into the race to the mouth of the river, and that a great part of the bed of the race had been blasted and loosened up and the material could be easily removed, which proved to be incorrect; that plaintiff in making the contract relied upon said representations and inducements, as the water at that time covered

and concealed the bed of the race; that the agreement was that the defendant was to pump the water from the race at its own expense; that the paper-writing "Exhibit 'A'" contained only a part of the contract between the parties, the rest thereof being in parol and not re-
(434) duced to writing; that the work on the upper part of the race from the branch to the wheel pit was much more difficult, required more time in proportion, and was not contemplated in the original contract; the defendant accepted and used all of aforesaid work and is still using the same to its great advantage; there is no evidence that the dedendant lost any orders on account of mill not beginning work at date first mentioned, and while there was no express stipulation for extension of time by reason of the above circumstances, it was an implied extension and the plaintiffs were not liable for damages for delay which was caused as aforesaid; that while no agreement was proved as to the price of excavation done from the branch to the wheel pit, the referee allowed $1 per cubic yard, on a *quantum meruit,* being the price agreed on for the other excavations.

The findings of fact by the referee are very full, the above being the most salient and most debated points. There was evidence to sustain each and every finding, and the same having been sustained in the trial court, are not reviewable here. See cases collected Clark's Code (3 Ed.), p. 564.

Upon said findings we must affirm his Honor's judgment sustaining the referee's conclusions of law, that the time for the completion of the work was impliedly and necessarily enlarged, that plaintiffs were guilty of no unnecessary delay, that the defendant cannot recover any damages for work not being completed at the date first specified, and is indebted to the plaintiffs in the sum found to be due by the referee.

Affirmed.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

Cited: Brown v. R. R., 154 N. C., 302; *In re Fowler,* 156 N. C., 346; *Caldwell v. Robinson,* 179 N. C., 521.

(435)

DAVIS v. MORRIS.

(Filed 28 April, 1903.)

1. Dedication—Streets—Estoppel.

Where lots are sold with reference to a street, it amounts to a dedication, and the grantees have a right to have the street kept open, although the town had never accepted the street for public use.

2. Ejectment—Streets—Easements—Possession.

A person cannot bring ejectment against an abutting landowner for the possession of a street, the landowner having only an easement thereon and not being in possession.

3. Trespass—Easement—Streets.

An action for trespass cannot be brought against an abutting landowner for placing his woodpile and pig-pen in the street.

ACTION by I. N. Davis against Emma Morris and her husband, heard by *Coble, J.*, and a jury, at September Term, 1902, of GASTON. From a judgment for the defendants, the plaintiff appealed.

A. G. Mangum for plaintiff.
Burwell & Cansler for defendants.

CLARK, C. J. The plaintiff laid off a strip of land 20 feet wide in the town of Gastonia and styled it "Davis Street," in the deeds of lots which he conveyed to sundry parties abutting on both sides of said street, the *feme* defendant being purchaser and grantee of one of said lots. The evidence is uncontradicted that the defendants were induced to purchase their lot by the representations of the plaintiff that said 20 feet was a street, and that he intended to extend said street 500 feet north, and also south across the railroad. Before the bond for title to the defendants was executed, the plaintiff caused said street to be laid off in their presence, instructing the surveyor to lay off said 20 feet for a street, making a plat thereof and located the boundaries and corners of (436) said lot and street, which last he named "Davis" in honor of himself. Under the bond for title, the defendants went into possession of said lot in 1889 and put up a residence, stable, and other outhouses, and the plaintiff has executed to the *feme* defendant a deed for said lot, in which he calls for "Davis Street" for the west boundary of said lot, which he has also done in the bond for title. The street has been used continuously as such since 1889 without objection by the plaintiff. Such conduct is an estoppel on the plaintiff, and as "between the parties the dedication is irrevocable, though the street has never been accepted by

the town for public use." *S. v. Fisher,* 117 N. C., at p. 740, citing *Moose v. Carson,* 104 N. C., 431, 7 L. R. A., 548, 17 Am. St., 681; *Grogan v. Haywood,* 4 Fed., 164, all of which has since been cited with approval by *Douglas, J.,* in *Smith v. Goldsbro,* 121 N. C., at p. 354. The same principle has been reiterated in *Conrad v. Land Co.,* 126 N. C., 776; *Collins v. Land Co.,* 128 N. C., 563, 83 Am. St., 720.

For the above reasons the plaintiff could not sustain his first cause of action to recover possession of said street, and for the further reason that the defendants are not in possession of the street, but have only an easement therein as abutting proprietors.

The second cause of action is for trespass, in that the defendant placed his woodpile in the street (as has been not unusual in our smaller towns) and put his pig-pen 12 inches over the line. The defendants corrected both these grounds of complaint when called to their attention, and besides it was not a matter for which the plaintiff could sustain an action for trespass. The other exceptions require no discussion. It was not material that there was no plat when the bond for title was executed
(437) to the defendants. The line of the street was marked off on the ground and the boundary of the street was called for in the bond for title and in the subsequent deed. The boundary was sufficiently described. *Id certum est quod certum reddi potest.*

No error.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

Cited: Green v. Miller, 161 N. C., 30; *Sexton v. Elizabeth City,* 169 N. C., 390.

FRAZIER v. WILKES.

(Filed 28 April, 1903.)

Negligence—Damages—Accidents—Railroads—Personal Injuries.

No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care, under all the circumstances, have foreseen that it might result in damage to some one.

ACTION by A. H. Frazier against Jane R. Wilkes, heard by *Shaw, J.,* at March Term, 1903, of MECKLENBURG. From a judgment of nonsuit, the plaintiff appealed.

Burwell & Cansler and Jones & Tillett for plaintiff.
Maxwell & Keerans for defendant.

PER CURIAM. The facts in the case come clearly within the language of *Justice Montgomery*, speaking for the Court in *Raiford v. R. R.*, 130 N. C., 597: "No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care, under all the circumstanes, have (438) foreseen that it might result in damage to some one." This is one of those misfortunes against which no reasonable human foresight could have made provision.

Affirmed.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

Cited: Fuller v. R. R., 140 N. C., 484; *Lassiter v. R. R.*, 150 N. C., 486.

BUMGARDNER v. SOUTHERN RAILWAY COMPANY.

(Filed 28 April, 1903.)

1. Instruction—Negligence—Personal Injuries—Trial.

In an action against a railroad company for personal injuries, a state- error for the trial court to give an instruction which assumes that the freight train became separated and that a collision occurred, these being the facts in issue.

2. Evidence—Res Gestæ—Heresay Evidence.

In an action against a railroad company for personal injuries, a statement of a person to the party injured, a very short time after the accident, relative to the condition of the train just prior to the accident, not being a part of the *res gestæ*, is not competent.

ACTION by C. B. Bumgardner against the Southern Railway Company, head by *Neal, J.*, and jury, at August Term, 1902, of IREDELL. From a judgment for the plaintiff, the defendant appealed.

G. B. Nicholson for plaintiff.
L. C. Caldwell for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages for personal injuries alleged to have been received by him

(439) through the negligence of the defendant. In his complaint the plaintiff alleges that while he was engaged in his duties as brakeman on a very long freight train of the defendant the train became uncoupled, and upon the sections coming together again with great violence he was thrown to the ground upon the track, and received dangerous and painful injuries. The allegations of negligence were a lack of sufficient number of employees to manage the train, and that the conductor of the train was not at his post of duty—in the caboose or cupola—where he was required to be by the rules of the company that he might keep a proper lookout; and because of such failure to furnish a sufficient force to man the train, and because of the failure of the conductor to be at his post to give proper signals of the separation of the train and of the subsequent collision, the plaintiff received his injury.

The question, then, whether a separation of the cars took place and whether there was a subsequent collision of the section were the material points in the case. Upon these matters his Honor gave, at the request of the plaintiff, the following instruction:

"If the jury find by the greater weight of the evidence that the conductor on the train was required under the rules of the company to be in the caboose, and that at the time of the plaintiff's injury he was without necessity on the second engine about forty-five cars in front of the caboose, while the train was in motion, and you further find that if he had been in the caboose, according to Rule No. 465, and on the lookout, that he could have given signals to the plaintiff and could have assisted the plaintiff in stopping the second section and prevented the collision and injury, and that this failure on his part was the proximate cause of the injury to the plaintiff, and that the defendant failed to use ordinary care, you are instructed to find the first issue (as to the injury of the plaintiff by the defendant's negligence) 'Yes.'" There is clear error in that instruction, for it included the assumption that the train (440) had become separated and that a collision afterwards occurred—the very matters which were in contention between the parties.

Although there must be a new trial for the error pointed out, we think it better for all concerned to call attention to another error upon a question of evidence, because of its importance and because it is almost certain that it will arise again on the next trial: The plaintiff as a witness for himself testified that when he fell from the car the wheels ran over and crushed his left leg; that upon hitting the ground he made an outcry for help, cried out very loudly; that he took off his suspenders and was cording his leg to prevent further bleeding when a Mr. Spurgeon (who was dead at the time of the trial) came up to where he was lying, having heard the outcries; that Spurgeon came up a minute and a half or two minutes after the plaintiff was hurt. At the morning session

of the court the witness said that when Spurgeon came up the train had already pulled by, not more than 300 yards, that it was not out of sight. When the court convened after a recess, continuing his testimony, he said that when Spurgeon came up the train had gone but a short distance away, the rear of the caboose being about 100 feet or more; then he added, "Probably a little further than a hundred feet." Under those circumstances the plaintiff was allowed over the objection of the defendant to testify that when Spurgeon came up he said to the witness: "That train was parted when it passed me about two car lengths, and I thought it was going to hit." We think the evidence should not have been admitted. It was not a part of the *res gestæ*. The law proscribes *hearsay* evidence; but there are certain necessary exceptions to that general rule. Amongst those exceptions are certain declarations made at the time of the main transaction—the principal fact under investigation—if they are connected with the transaction and explain it as to its character and purpose. Such declarations are often called "*verbal acts* (441) indicating a present purpose and intention," and are admissible as original evidence like any other material facts. It is said in Greenleaf on Evidence, sec. 108: "The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." The same author in the same book, section 110, further says: "It is to be observed that where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act, and so connected with it as to be regarded as a mere result and consequence of the coexisting motives in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct." There are decided cases in some of the courts, notably that of *Ins. Co. v. Moseley,* 75 U. S., 407, in which the original doctrine concerning this subject has been extended. In those cases, the question of time when the declarations are made is treated as of minor importance, if they are made at a time recent after the transaction, so recent as to preclude the idea of design. Immediateness, as was said in *Ward v. White,* 86 Va., 212, 19 Am. St. 887, being tested by closeness, not of time, but by causal relation. In *Ins. Co. v. Mosely,* 75 U. S., 407, the Court said: "It is impossible to tie down to time the rule as to declarations." There the declarations of Moseley were made after his return to his bedroom from downstairs between 12 and 1 o'clock at night, and they were that "he had fallen down the back stair and almost killed himself." The plaintiff's counsel in his brief learnedly and ingeniously argued this case from the

(442) standpoint of those referred to. But however inclined we might be to adopt those views, if the question was new, we think the numerous decisions of our Court on the subject would prevent us.

Upon a careful reading of our own decisions, we are satisfied that the time at which declarations are made is most material, and that they are not admissible as evidence in our courts unless they are made during the happening of the main transaction or immediately and instantly after the transaction and in direct connection with it. They must be forced out, as it were, as the utterance of truth; they must be declarations as to something being done, and not as to what has been done.

In *S. v. Dula,* 61 N. C., 211, *Chief Justice Pearson* for the Court, discussing *res gestæ,* said: "Acts frequently consist not only of an action or a thing being done, but of words showing the nature and quality of the thing. In such cases when the action or thing being done is offered in evidence, as a matter of course the words which form part of it must also be received in evidence: as if one seizes another by the arm saying, 'I arrest you under a State's warrant,' these words are just as much a part of the act done as the act of taking him by the arm."

In *Harper v. Dail,* 92 N. C., 394, the Court said, *Judge Ashe* delivering the opinion: "Declarations, to become part of *res gestæ,* must be made at the time of the act done and must be such as are calculated to unfold the nature and qaulity of the facts they are intended to explain, and so to harmonize with them as to obviously constitute one transaction. In other words, they must be contemporaneous with the act and must be consistent with the obvious character of the act."

In *Simon v. Manning,* 99 N. C., 327, the Court recites section 108 on Greenleaf on Evidence with approval.

In *S. v. McCourry,* 128 N. C., 594, the prisoner was indicted for murder. Melvin Ray, one of the witnesses, said at the time of the homicide, in answer to a question by a person who was present, "What was
(443) that?" referring to a "lick," "Elijah McCourry hit Bob Ray (the deceased) with a rock." This Court said the evidence was competent because it was spoken at the instant the fatal blow was given. The Court also quoted with approval from Underhill's Criminal Evidence, sec. 1, the following: "The exclamations of persons who were present at a fracas in which a homicide occurred, showing the means and mode of killing, are admissible for or against the accused because of their unpremeditated character and their connection with the event by which the attention of the speaker was engrossed."

In *Summerow v. Baruch,* 128 N. C., 202, the Court said: "The question, then, is, Were they (words spoken) a part of the *res gestæ? Res gestæ* is generally defined to be what is said or done contempora-

neously with the fact sought to be established, or at least so nearly contemporaneous in point of time as to constitute a part of the fact to be proved, or to form a part of it or to explain it."

Under these decisions the declarations of Spurgeon introduced in evidence in the case before us was not admissible as a part of the *res gestæ*.

They were clearly a narrative of a past occurrence, and they ought not to have been heard as evidence of that occurrence. To illustrate: if Spurgeon had been standing by at the time of the collision (if there was a collision) and had said just before the cars came together, "The cars are apart and there must be a collision"; or, "There will be a collision and that man will be hurt"; or if he had said instantly upon the plaintiff falling to the ground and being hurt, "Those cars were two lengths apart; I saw it and knew there would be a collision," in either of these instances the declaration would have been a part of the *res gestæ*.

In *S. v. Walker,* 78 Mo., 380, the moment after the fatal shot was fired a bystander exclaimed, "Don't strike him, for you have shot him now"; and the evidence was admitted as a part of the *res* (444) *gestæ*.

In *S. v. Duncan,* 116 Mo., 288, it appeared that a bystander remarked immediately after the homicide to an officer, "There is the man who did it," and the evidence was held competent as a part of the *res gestæ* on the trial of the person so designated for murder. Those cases were cited with approval by this Court in *S. v. McCourry,* 128 N. C., 594.

New trial.

DOUGLAS, J., *dubitante.*

Cited: Sewell v. R. R., 133 N. C., 519, 522; *Hill v. Ins. Co.,* 150 N. C., 2; *S. v. Spivey,* 151 N. C., 681; *S. v. Peebles,* 170 N. C., 764; *Goodrich v. Matthews,* 177 N. C., 200.

(445)

SEABOARD AIR LINE RAILWAY COMPANY v. MAIN.

(Filed 28 April, 1903.)

1. Pleadings—Complaint—Demurrer—Mistake.

A demurrer to a complaint, because it alleges a release to have been given prior to the injury, is untenable, the record showing that an amendment had been allowed changing the date of the release.

2. Pleadings—Complaint—Demurrer—The Code, Sec. 260.

Where the allegations of a complaint are sufficiently intelligible to enable the defendant to know what he is required to answer, it is not demurrable, but the remedy is by motion to make it more definite if it is not sufficiently certain.

3. Carriers—Indemnity Contracts—Negligence—Contracts.

Where a carrier contracts to transport a circus and is indemnified by the circus company against any loss sustained by injury to the employees of the circus, the carrier is not thereby relieved of its liability for negligent injuries to such employees.

4. Indemnity Contracts—Carriers.

Where a circus company indemnifies a carrier for any amount which the carrier may be compelled to pay for any injuries to the employees of the circus during transportation, and the carrier pays without suit an employee for injuries sustained, and in an action on the indemnity bond alleges that the amount thus paid was less than the actual damages the employee sustained and less than he would have received by a jury, a demurrer to the complaint on the ground that there should have been an adjudication of the amount of damages by a court of competent jurisdiction will not be sustained.

5. Pleadings—Complaint—Demurrer—Costs—Attachment—The Code, Sec. 466—Appeal.

Where a claim paid by plaintiff to the sheriff for taking care of attached goods would be taxed in the costs, the defendant is not prejudiced by the overruling of his demurrer to the complaint in which it is set out.

ACTION by the Seaboard Air Line Railway Company against Walter L. Main and another, heard by *W. R. Allen, J.*, at January Term, 1903, of DURHAM.

The plaintiff brought this action for the recovery of $750 al-
(446) leged to be due under the provisions of a contract for the transportation of defendant's circus outfit and equipment by the plaintiff. By the contract the defendant undertook and agreed, among other things, to indemnify the plaintiff and save it harmless from loss and damage incurred by reason of any injuries to defendant's employees. The case was heard in the court below upon demurrer to the complaint, and is before us upon an appeal from a judgment overruling the same. It will be necessary for a clear understanding of the case and the questions presented to give an outline of the pleadings. The plaintiff alleges that, being a corporation and a common carrier of freight and passengers, it entered into a contract with the defendant as follows:

This indenture made at Atlanta, Georgia, on 7 October, A. D. 1902, between the Seaboard Air Line Railway Company, party of the first part, hereinafter styled the Railway Company, and the Walter L. Main's

Shows, party of the second part, hereinafter styled the Circus Company.

Witnesseth: That for and in consideration of the stipulations and agreements hereinafter set forth, the Railway Company agrees:

First. To furnish the necessary motive power, conductors, enginemen, and other trainmen to haul four passenger cars, seven stock cars, and nine platform cars (to be furnished by the said Circus Company), to receive the said cars loaded from Central of Georgia Railway at Athens, Georgia, and to transport said cars and their contents, provided their combined actual gross weight does not exceed..... tons of 2,000 pounds, from Atlanta, Georgia, to Wadesboro, N. C., as follows: To leave Athens, Georgia, on 17 October about 2 a. m., for Elberton, Georgia, etc.

Second. That should it become necessary to change the above routes or dates, the Circus Company shall have the privilege of making such change by giving the Railway Company ten (10) days notice (447) in writing.

Third. To furnish sidetracks necessary for the unloading and reloading at each point of destination named therein, to the extent of its existing track room, less such space as may be necessary for the proper conduct of their freight and passenger business, and the space necessary for the free and safe passage of their trains at such points of destination, and also to furnish an engine for the proper placing of cars during the unloading and reloading of said Circus Company's cars.

Fourth. That so far as convenient and practicable to do so, it will limit the speed of trains carrying any or all of the Circus Company's cars to fifteen (15) miles per hour.

Fifth. To furnish car orders for free transportation in its local passenger or accommodation train and by the route named herein, two advertising cars, and to furnish passes for the free transportation on all passenger trains for the Circus Company's bill posters (in actual service), baggagemen, and advertising agents with baggage and advertising material.

Sixth. To arrive, so far as practicable, at each destination before 7 o'clock a. m. on the day of exhibition.

In consideration whereof, the Circus Company binds itself by these presents—

First. To pay to the said Railway Company the sum of seventeen hundred dollars ($1,700), in advance, as follows:

At Athens, Ga., $283.34; at Elberton Ga., $283.34, etc.

Second. To release the said Railway Company from all liability for loss or damage to its property, and to hold the said Railway Company harmless for any damages to the person of its officers, agents, or employees which is not the direct result of gross negligence on the part of the officers, agents, or employees of the said Railway Company.

(448) Third. To release the said Railway Company from all liability for the loss or damage resulting from the said Railway Company's failure to make any or all of the runs provided for herein, or from the failure to make any or all of said runs within the prescribed time, when said failure is due to any accident which is not the result of gross negligence on the part of said Railway Company.

Fourth. To release said Railway Company from all liability for loss or damage by delays due to insufficient sidetrack room at any point of destination.

Fifth. That the said Railway Company shall have the right to haul any or all of the cars of said Circus Company in trains with other freight.

Sixth. That the Railway Company shall not be required to run more than seventy-five (75) miles from one point of exhibition within the usual time of eight hours, or betwen the hours of 11 p. m. and 7 a. m., although there may be no accident or unusual delay.

Seventh. That the said Railway Company shall have the right to make any repairs to the equipment of the Circus Company for which it may be legally liable at such place and time within ninety (90) days, as the said Railway Company may elect, the said Railway Company agreeing that all such repairs shall be made with as reasonable dispatch as possible.

Eighth. That the said Railway Company shall have the right to rigidly inspect the cars of said Circus Company, and to reject any or all of said cars until said Circus Company has made such repairs, alterations, or additions as may be in the opinion of the said Railway Company necessary for the prompt and safe tansportation of such cars over its line.

Ninth. That all necessary repairs to the cars of said Circus Company and the renewal of trucks or other parts, when the result of ordi-
(449) nary wear, shall be at the expense of the said Circus Company.

Tenth. That if the said Railway Company should, because of its own negligence, he held responsible for the loss or destruction of any animals transported by it under this contract, said animals shall be charged for at their actual value, not to exceed the following maximum values, to wit:

[Animals and values here omitted.]

Eleventh. That the said Railway Company shall not be held liable for any injury, fatal or otherwise, to any proprietor, agent, or employee for an amount greater than fifty dollars ($50), for any one person, and that if the said Railway Company should be held liable for a greater amount to any employee, or to his personal representative, the said Circus Company then binds itself to pay such excess to said Railway Company.

Twelfth. That if it (the Circus Company) should fail to fulfill the terms of this contract, or to make the number of runs stipulated, the said Railway Company may, at its option, charge for and collect the full amount of compensation provided for under the first section of the second portion hereof.

In testimony whereof, the said parties have hereunto set their hands the day and year above written.

SEABOARD AIR LINE RAILWAY COMPANY,
By R. I. CHEATHAM.
THE WALTER L. MAIN SHOWS,
By ED. C. KNUFF.

Witness: C. S. ALLEN, JR.

The rate charged the defendant was much lower than the usual rates for like service, and was given in consideration of the stipulation for indemnity in said contract, and that said stipulations were customary in such cases.

While the contract was in force and the cars containing the (450) circus outfit and equipment were on a sidetrack at Elberton, Ga., 17 October, 1902, H. Allen, an agent and employee of the defendant, and one of the parties referred in section 11 of the contract, was in a "regular passenger car on the siding," and was injured by a collision which was caused by the plaintiff's negligence, and that by reason of said injury he has "lost in dollars and cents more than $750"; that Allen demanded of the plaintiff compensation for his said injuries and threatened to sue it for the same, and the plaintiff thereupon notified the defendant, who repudiated the contract and refused to pay anything. The plaintiff thereafter compromised and settled with Allen for the sum of $750, which it paid to him and for which it took a receipt, and a release, dated 10 October, 1902, from any and all other liability on account of said injuries, and said sum of $750 the plaintiff alleges is "less than the injury which Allen sustained and less than he could or would have recovered before a jury." The plaintiff demands judgment for $700, and the costs. The defendant demurred upon the following grounds:

1. Because the release from Allen is dated 10 October, 1902, and the injuries are alleged to have occurred on 18 October, 1902.

2. Because, while it is alleged that Allen was on a "regular passenger car on the siding," it does not appear that this was one of the four passenger cars furnished by the defendant.

3. It appears from the contract that the plaintiff did not stand, towards the defendant and its agents and employees, as a common carrier with the responsibilities and liabilities incident to that relation, but that it stood in the relation of a private carrier under a special contract for

hire and subject only to the liabilities incident thereto, and Allen therefore had no cause of action against the plaintiff, as his right to be on the train arose out of the special contract, he being one of the em-
(451) ployees and servants of the defendant. It follows that, as Allen had no cause of action, the payment to him by the plaintiff was voluntary and imposed no duty on the defendant to reimburse the plaintiff.

4. If the defendant is liable to the plaintiff at all, there can be no recovery under section 11 of the contract before there has been an actual adjudication by a court of competent jurisdiction that the plaintiff is liable to Allen, the person injured.

5. That the plaintiff's cause of action was for money paid to the sheriff for the keep of horses seized under the attachment, is dependent upon its recovery of the principal cause of action, and was improperly joined therewith, and also that it accrued since this action commenced.

From a judgment overruling a demurrer to the complaint, the defend ant appealed.

Winston & Fuller and W. H. Day for plaintiff.
Guthrie & Guthrie for defendant.

WALKER, J., after stating the case: The first ground of demurrer is untenable, as it appears from the record that the court permitted an amendment of the complaint by which the date of the release was changed from 10 October, 1902, to 10 November, 1902. This is quite sufficient to dispose of this ground of demurrer. But we do not think that an amendment was necessary for the purpose, as it clearly appears from the context of the complaint that the date affixed to the release was intended for 10 November, 1902. It is expressly alleged in section 8 that a release was given on 10 November, 1902, and it is so impliedly stated in section 9. But the amendment cures the defect, if there was one.

The second ground of demurrer cannot be sustained. It is true, as stated, that the plaintiff was not as explicit in making the allega-
(452) tion in question as it might have been, but the allegation is sufficiently intelligible to enable the defendant to know what he is required to answer. "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." The Code, sec. 260. But there is another conclusive answer to this objection. The plaintiff alleges in section 5 that Allen is "one of the parties referred to in section 11 of the contract," and we find that section 11 provides that the railroad company shall not be held liable for the injury to any agent or employee of the defendant to an amount greater than $50, and that if the railroad

railroad company. It follows from this allegation that Allen was either in one of the four coaches of the defendant at the time of the injury or on one of the plaintiff's coaches, where he had the right to be by virtue of the provisions of section 5 of the contract. By section 11 the plaintiff is indemnified against all liability in excess of $50 for any injury to any agent or employee of the defendant, and it necessarily follows from these allegations of the complaint, when considered together, that Allen was rightfully in the car at the time the injury was received. We are further inclined to think that the complaint sufficiently shows that he was in one of the passenger coaches of the defendant, if the particular allegation, which has fallen under the condemnation of the defendant in his demurrer, is construed in connection with the other averments of the complaint. If the pleading was not sufficiently definite or certain to enable the defendant to understand the precise nature of the allegation, it could by motion have obtained an order from the court requiring the plaintiff to make it definite and certain by amendment; but this cannot be done by demurrer, as it is not the statement of a defective cause of action or the defective statement of a good cause of action, but, (453) at most, only an uncertain and indefinite statement of one of the facts constituting a cause of action. *Allen v. R. R.*, 120 N. C., 548.

This brings us to the principal contention of the defendant, that the plaintiff did not sustain the relation of a common carrier towards Allen, but was a private carrier, and as Allen was in the car only by virtue of the contract between the plaintiff and defendant, the former was not liable to him in damages for the injury, and consequently the defendant cannot be liable to the plaintiff under the indemnity contract, as the payment of the money to Allen was voluntary and not in discharge of any liability of the plaintiff to him. It is contended by the defendant's counsel that while a carrier can stipulate for release from liability for negligence in regard to property to be transported, it cannot do so in regard to passengers, "because public policy forbids such a waiver or release, and our courts follow the general common-law doctrine that a carrier cannot by contract secure exemption from liability for its own negligence." It is argued that if the contract for indemnity amounts to the release of the plaintiff from liability for negligence, as such release is against public policy, the contract must be void, as it contains a stipulation indemnifying the plaintiff against the consequences of a breach of duty and releasing the plaintiff from its common-law liability. In the demurrer the defendant seems to assert that the plaintiff under the terms of the contract was not a common carrier, but a private carrier and subject only to the responsibilities and liabilities of that relation, which are quite different from those of a public carrier.

It seems to us that if the plaintiff was a common carrier with respect to Allen when he was injured, it has not, in any way by the contract, stipulated for exemption for negligence as between itself and Allen, and, as it has not done so, the contract must be valid. If Allen had sued
(454) the plaintiff for his damages, it could not have successfully pleaded that it had been released, even if the law permitted such a release between carrier and passneger, and for the simple reason that there is no provision in the contract for any such release. The very nature and terms of the contract presuppose that the plaintiff will remain liable to any agent or employee of the defendant who is injured by its negligence; otherwise there could be no indemnity, as that always implies a liability on the part of the person or corporation indemnified.

But whether we regard the plaintiff as a common or private carrier in its relation to Allen, we think that under the terms of the contract and upon the admitted facts of the case it was liable to Allen for the injuries he received. It must be borne in mind that the demurrer admits the material facts alleged in the complaint. In all respects, except loading, unloading and reloading, it appears from the complaint that the plaintiff had the control and management of the cars of the defendant. It had the right to inspect and repair them and to haul them in any of its trains, and was required to provide necessary motive power, conductors, enginemen, and other trainmen, and exercise a general supervision over the train. If the defendant had the right to release the plaintiff as a public carrier from liability for injuries to its employees resulting from the plaintiff's negligence, it has not chosen to do so, but on the contrary, the very terms of the contract exclude any such idea and strongly implied, if by them it is not expressly provided, that the plaintiff shall be and remain liable for all such negligence.

If the plaintiff at the time Allen was injured did not occupy the position of a public or common carrier towards him by reason by the special terms of the contract of carriage between the plaintiff and defendant, and the plaintiff was but a private carrier, under a special contract,
(455) it was liable, in our opinion, by the terms of that contract, for any injury to Allen which was caused by its own negligence. By the contract the parties did not profess to release the railroad company from liability from acts of negligence, but the agreement is predicated upon the assumption that there may be negligence of the railroad company resulting in injury to the defendant's employees, for which they should have their action. It would be vain indeed to indemnify the plaintiff against a liability that could never arise. It must be remembered that the contract provides, not only for a *release* from liability so far as the defendant itself may be concerned, but for *indemnity* against liability to its agents and servants.

The cases cited by the defendant's counsel have no application here. In *Robertson v. R. R.*, 156 Mass., 525, 32 Am. St., 482, the injury was caused, not by the negligence of the railroad company, but by that of the proprietors of the circus, the particular negligence being the defective condition of the trucks of its cars. There are other differences between the two cases. The case of *Coup v. R. R.*, 56 Mich., 111, 56 Am. Rep., 374, was one in which the plaintiff was the proprietor of a circus and sued for injury to his property, alleged to have been caused by the negligence of the railroad company, and not for injury to one of its servants. In *R. R. v. Keefer*, 146 Ind., 21, 58 Am. St., 348, 38 L. R. A., 93, it appeared that the plaintiff, who was an express messenger, had himself authorized the making of a contract releasing the railroad company from liability for negligence. Several cases of a like tenor were cited to us, but they all rested upon the reason that a railroad company as a common carrier may become a private carrier or bailee for hire, when, as a matter of accommodation or special agreement, it undertakes to carry something which it is not its busi- (456) ness to carry, and that as such it can make its own terms of carriage not involving any stipulation contrary to law or public policy. Lawson Cont. of Carriers, sec. 110. This is a well-recognized principle, but it cannot affect the decision of this case, as the plaintiff did not stipulate for exemption from the consequences of its negligence as to the defendant's employees and with their consent. It has expressly agreed to remain liable for such negligence to the employees of the defendant, and the engagement of the latter was to indemnify against this very liability.

It is not necessary for us to decide in this case whether, under its facts and circumstances, the plaintiff could divest itself of the character of a common carrier by contract. *R. R. v. Lockwood*, 17 Wall., 376. Our case resembles that of *Kenny v. R. R.*, 125 N. Y., 422, which was a suit by an express messenger. It is there said that general words will not be construed to limit the responsibility of the carrier for negligence, and that the clause in question, which is similar to the one in this case, should be read so as not to necessarily release the railroad company or prevent an action by the employee of the express company against the former for damages for injuries received while on the road in the discharge of his duties, and the agreement should be considered as one to indemnify the railroad companies in the event of such action. "This," says the Court, "is a salutary and reasonable rule and the agreement a perfectly proper one for the parties to make," and further, that an entire exemption from liability for negligence, which caused the injury to the employee of the company indemnified, will not be presumed, but must be clearly expressed, and immunity from the consequences of such negli-

gence will not be held to exist unless "it is read into the argument *in ipsissimis verbis.*" This must needs be the correct doctrine, and, when tested by the rule thus laid down, the contract in this case can receive but one construction, namely, that the railroad company remained liable to the employees of the defendant for the consequences of the neg-
(457) ligent acts of itself or its servants. The language of the contract is, that the railroad company shall be saved harmless from any damages to the persons of the defendant's employees or agents which is not the direct result of gross negligence; and, again, that it shall not be held liable for a greater amount than $50, and if it should be held liable for a greater amount, the defendant binds himself to pay such excess to the plaintiff. This language is too plain to be misunderstood and clearly indicates the purpose to have been, not to exempt the railroad company from liability for negligence, but to indemnify it in case it should be liable. This brings the contract within the salutary rule of the law, and does not disappoint the intention of the parties. Besides, this Court would hesitate to hold that Allen had relinquished his right of action against the railroad company by a contract to which he had not consented and of which, so far as the case shows, he was entirely ignorant. He might well say, "*Non hæc in fœdera veni.*" There can be little or no question as to the validity of the contract as one of indemnity, even if we regard the railroad company as a common or public carrier and incapable in that capacity of stipulating against liability for its negligence, as such insurance against liability does not diminish the carrier's own responsibility to the passenger under its care, but increases the means of meeting that responsibility; nor does such insurance tend to relax the carrier's vigilance, as the carrier remains liable to the passenger and no principle of public policy is violated. *Ins. Co. Case,* 82 Md., 535; *Ins. Co. v. Trans. Co.,* 117 U. S., 324; *Ins. Co. v. U. C. Co.,* 133 U. S., 387. But as we have treated this contract as one between the plaintiff, as a private carrier, and the defendant, there can be
(458) no possible doubt as to its validity.

The defendant contends further that there should have been an adjudication of the plaintiff's liability to Allen by a court of competent jurisdiction before the plaintiff could call upon it for reimbursement under the contract. We cannot agree with the defendant in this contention. It is alleged in the complaint that the defendant was notified by the plaintiff that Allen had made his demand for damages for the injuries he had received, and that he would take $750 in full settlement of his claim, and that the defendant "curtly refused to pay Allen one cent," and that the sum paid Allen was less than the actual damages he sustained, and less than he could and would have recovered before a jury. By the demurrer, the defendant fully admits the truth of this allegation,

and for the purpose of ruling upon the demurrer, we think the above statement is a sufficient allegation that the plaintiff has been damnified. The defendant, at the trial of the case, will not be concluded by the settlement with Allen, but will be at liberty to show that the amount paid was excessive, or that Allen was not entitled to recover anything. Why require the plaintiff to sue and recover judgment, when the defendant by demurrer admits the plaintiff's liability to Allen and the amount thereof? *Kerr v. Mitchell,* 18 E. C. L., 447; *Laing v. Hanson,* (Tex. Law App.) 36 S. W. Rep., 117; *Lindsey v. Parker,* 142 Mass., 583; *Connor v. Reeves,* 103 N. Y., 527.

The objection to the claim for $95.08, which amount was paid by the plaintiff to the sheriff for feeding the horses attached in this case, while they were in his possession, must be overruled. While it is not, strictly speaking, a cause of action and should not have been joined as such in this suit, and ought therefore to be disregarded, the defendant was not prejudiced by the failure of the court below to sustain his demurrer in this respect, as the expense of keeping the horses, which can hereafter be allowed by the court, must be taxed in the costs and paid by the losing party (Clark's Code, 3 Ed., sec. 466), and it can make no difference to the defendant how this allegation is considered, whether (459) it is properly a part of the complaint or not, for the plaintiff's recovery of this expense must necssarily depend upon its success at the final trial of the case. If the plaintiff wins in the end, the defendant must pay that expense; and if the plaintiff loses, it can have no reimbursement for the amount paid to the sheriff. It is a mere incident to the suit and not a part of the cause of action, and no issue as to it will be submitted to the jury.

Upon a review of the whole matter, we do not find any error in the judgment of the court overruling the demurrer.

PER CURIAM. No error.

Cited: Jones v. Henderson, 147 N. C., 125; *Hendricks v. Ireland,* 162 N. C., 525.

---

(460)

HINSON v. POSTAL TELEGRAPH-CABLE COMPANY

(Filed 28 April, 1903.)

1. Telegraphs—Negligence—Contributory Negligence.

In an action against a telegraph company for delay in delivering a message, where the court charged that defendant would have discharged its duty "if it tendered the telegram at the mills where plaintiff was

employed and to which the telegram was addressed, to an employee thereof having access to the pay-rolls, and who refused to receive the same, telling defendant that plaintiff was not employed there, and defendant then inquired of a boy in the mill yard, at the postoffice, examined the city directory, and also sent a service message," it was error to add, "and used the diligence that one of ordinary prudence would have exercised under the circumstances."

2. Telegraphs—Negligence.

Where a person in whose care a telegram is addressed refuses to receive the same, the telegraph company must make reasonable efforts to deliver it to the sendee.

3. Telegraphs—Negligence—Contributory Negligence.

The negligence of a person in whose care a telegram is sent will be imputed to the sendee and not to the telegraph company.

ACTION by M. L. Hinson against the Postal Telegraph-Cable Company, heard by *W. R. Allen, J.*, and a jury, at January Term, 1903, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

Boone, Bryant & Biggs for plaintiff.
Winston & Fuller for defendant.

CONNOR, J. On 19 June, 1902, B. W. Hinson, father of the plaintiff, delivered to the defendant's agent at its office in Durham, N. C., for transmission and delivery, a message in the following words and figures:

To M. L. HINSON, *Care of Olympia Mills, Columbia, S. C.:*
Come at once. Your mother is dying. Answer.

B. W. HINSON.

(461) The mother of the plaintiff and wife of the sender was then sick at the home of her husband in the village of East Durham, N. C. The plaintiff alleged that the defendant negligently failed to deliver said message until 23 June, 1902, and that his mother died on the afternoon of 19 June, 1902, and was buried on 20th of said month about 4 o'clock p. m.; that by reason of the failure to deliver said message the plaintiff did not reach East Durham until 24 June, 1902, at about 6 o'clock a. m., and by reason of defendant's failure to deliver said message he suffered much grief, mental pain and anguish, by reason whereof he was damaged in the sum of $3,000.

The defendant admitted the delivery of the message to its agent at Durham at 11:29 o'clock on 19 June, 1902, and payment of the cost for sending the same. It averred that it promptly transmitted the message

to its office in Columbia, S. C., a few minutes after its receipt at the Durham office; that immediately after its receipt in Columbia the message was delivered to the messenger boy of the defendant, who promptly carried it to the general office of the Olympia Cotton Mills, Columbia, S. C., and there inquired of the agents in charge of said mills, and particularly of the agent who was acquainted with the pay-roll and the names of all persons working for said mills, for M. L. Hinson, and informed such parties of such telegram and its urgency, but that the agent of said Olympia Cotton Mills informed the said messenger that no such person at M. L. Hinson was then working for said mills and that no such name as Hinson appeared on their June pay-roll, and that said agent of said mills refused to receipt for the message; that within a short time after the said messenger returned from the Olympia Cotton Mills to the office of the defendant in Columbia, a service message was sent by the defendant from Columbia to Durham, asking for a better address, and imediately upon the receipt of this message a phone message was sent from the Durham office of the defendant to the Durham Manufacturing Company, at East Durham, and that (462) thereupon and without delay inquiry was made as to M. L. Hinson's address of the sender of said message, and the members of his family who resided in the same house with him, and who were then and there informed by the defendant that the address of M. L. Hinson at the Olympia Cotton Mills was not correct, and he could not be found at the Olympia Cotton Mills, and that a better address was wanted and must be given, or the said message could not be delivered; that the sender of the message and the members of his immediate family stated that they did not know of any other address at that time but Olympia Mills; that the residence of said M. L. Hinson on 19, 20 and 21 June, 1902, was not known to the sender of the message or to any member of his family at East Durham, nor had they or any of them at that time information enabling them to promptly reach said M. L. Hinson by wire or letter, nor was his name and address in the city directory of Columbia; that on 23 June, the father of the plaintiff received information which disclosed the residence address of the plaintiff in Columbia, and thereupon sent a second message to his son, the plaintiff in this action, which message was directed to him, giving his residence address and was carefully, promptly, and without delay delivered by the defendant to said M. L. Hinson at his proper address, which was not at the Olympia Mills; that the sender of the message, in not giving a full and accurate address when he delivered the message on 19 June, 1902, to the defendant, was guilty of contributory negligence; that Columbia is the capital of South Carolina and is a city of about 28,000 inhabitants, and that it is well-nigh impossible to find a person in said city unless his

(463) residence address is written, or unless he be a resident and freeholder in said city, or unless he be well known therein.

The court submitted the usual issues. The plaintiff introduced testimony tending to sustain his allegations in respect to the sending of the message, the failure to deliver, the sickness, death and burial of his mother. He testified in his own behalf as follows: "I worked in Columbia at the Olympia Mills and was there on 19 June, 1902. I received mail there, care of Olympia Mills. I received a letter from my sister, postmarked 18 June, which I answered on 20 June. I left the Olympia Mills because they would not let me have my money to come home on. I received both messages on Monday. I got my money from the Olympia Mills as soon as I showed the telegram. My name is on the books of the Olympia Mills. I have seen telegrams delivered to employees. I would have come when I received my sister's letter if I had had the money."

The defendant introduced Theodore Rivers, who had been a messenger boy at its office in Columbia, S. C., who testified that the message was given to him by the manager at the defendant's office to be delivered at the Olympia Mills as soon as it was received and copied and entered on the delivery sheet, which was about 12 o'clock, and he carried it at once to the Olympia Mills and offered to deliver it to the bookkeeper (Hammond) in the office of the mills. He received it, but, before signing for it, examined his books and said that Hinson was not working for the company, and gave it back to him and refused to receive it; that he came out of the office and met a boy who said that a Mr. Hinson was living down there, but it was not M. L. Hinson, but to go on the hill and he might find him. The witness inquired for Hinson, but could not find him, and did everything he could to find him; he then went to the telephone and told Mr. White, the manager, that Hinson was not at the mill and the witness could not find him. White said, "Bring (464) the message back," which the witness did. He then went to the postoffice at Columbia and inquired for Hinson, and if the postmaster knew where he could deliver a telegram to him. They did not know him. He then looked in the city directory and found some Hinsons named in the directory and went to see them, but they did not know the plaintiff. He then went back to the office and put his book down and did not bother it any more because that was all he could do.

H. B. Hammond testified that he was shipping clerk and assistant paymaster at the Olympia Mills on 19 June, 1902, and remembered that on that day a messenger boy, Theodore Rivers, came to the office. The witness went to the window to wait on him, and he asked where M. L. Hinson was. The witness examined the pay-roll of the company hurriedly and found that one Luther Hinson had been working there,

but left on 17 June, and he refused to receive the message, as there was no one there by the name of M. L. Hinson, and he was not working for the mill. The pay-roll was made up the night before and showed the names of all those working for the company, and the witness did not inquire of any one else in the office in regard to Hinson. The population of Columbia is about 25,000. There were on the pay-roll of the company about 700 or 800 operatives. The operatives generally lived in the mill village, and he received telegrams sent to the mill.

G. A. White, Jr., testified that he was manager of the defendant company at Columbia and remembered receiving the message, and delivering it to the messenger boy to carry quickly to the Olympia Mills and deliver it at the company's office for Hinson. The boy started at once, and a short while afterwards the witness received a message over the phone that the Olympia Mills would not receipt for the message because no such person was working at the mill. He also stated that he had made an effort to find Hinson outside of the mill in the mill village, and after numerous inquiries to find him, the witness in- (465) structed the boy to bring the message back to the office. The witness had the boy to go to the postoffice and make inquiry there to find out if he received any mail, and if so, where he could deliver a message to him; also instructed the boy to look through the city directory, which he did, and the witness did the same thing, but could not find the name of M. L. Hinson in the directory; found names of two other Hinsons, and had the boy to look them up, hoping to get some information as to M. L. Hinson; the boy was smart and reliable. The witness sent to the Durham office a service message asking for a better address, a copy of which he produced; he did not receive any reply to it; that the second mesasge was delivered to the plaintiff at his adress, 521 Main Street, Columbia, S. C. This message was dated 23 June, 1902. The witness had resided in Columbia four years and had been manager for the defendant about sixteen months; he was not acquainted with the plaintiff; he exhausted every means in his power and did everything he could to deliver the message.

The defendant introduced W. H. Oakley, who testified in regard to the receipt of the service message on 19 June, 1902, at Durham; that he sent out to get better address, but was unable to do so, and that the sender knew no better address.

Several requests were made by the defendant for instructions, some of which were given. His Honor charged the jury in respect to the duty of the defendant to deliver the message, to which there was no exception, that the burden of proof was upon the plaintiff to satisfy the jury that the telegram was not delivered within a reasonable time. The charge was full, and to the larger portion thereof there can be no ob-

jection. His Honor concluded his instruction to the jury as follows:

"It is not contended that there was delay in tendering to the
(466) Olympia Mills, and if you find from the evidence that defendant tendered the telegram at the Olympia Mills to an employee of the Olympia Mills, employed in the main office, having access to the pay-rolls, and such an employee refused to receive the telegram, telling the agent of the defendant that Hinson was not there and that his name was not on the pay-roll, and you find further that the defendant then inquired of a boy on the mill yard, at the postoffice, examined the city directory, and also sent a service message, and used the diligence that one of ordinary prudence would have exercised under the circumstances, then answer the first issue 'No.'" To this charge the defendant excepted.

We think that the exception should be sustained. His Honor should have charged the jury that if they found from the testimony that the defendant tendered the telegram at the Olympia Mills to an employee of the Olympia Mills, employed in the main office, having access to the pay-rolls, and such employee refused to receive the telegram, telling the agent of the defendant that Hinson was not there and his name was not on the pay-roll, and if you find further that the defendant then inquired of a boy on the mill yard, at the postoffice, examined the city directory, and also sent a service message, that it had discharged its full duty in the premises; and to further charge the jury, "and used the diligence that one of ordinary prudence would have exercised under the circumstances," was error in that it left the jury in doubt as to what measure of diligence the defendant must have used other than that laid down by his Honor, in order to discharge itself of liability.

We held at the last term of this Court, in *Lefler v. Tel. Co.*, 131 N. C., 355, that when a telegram to a person is addressed in care of a corporation a delivery to an agent of the corporation is suffi-
(467) cient, and his Honor in accordance therewith charged the jury that a delivery to Hammond would have relieved the defendant of further liability. It has also been held that, upon the refusal of the agent to receive the message, it was the duty of the defendant to make reasonable effort to find the sendee and to deliver the message. The agent of the Olympia Mills having been selected by the sender as the person to whom the message was to be delivered for the sendee, he thereby became the agent of the sendee, and his negligence in stating to the defendant's messenger boy that the sendee was not at the mill and his refusal to receive the same, must be imputed to the sendee and not to the defendant. This being so, the defendant was put in the same position that it would have been if no direction had been given as to the place of residence or address of the sendee. Viewed from this stand-

point, the defendant had in its possession a message addressed to M. L. Hinson, with no direction as to place of residence other than the city of Columbia, S. C.; its duty upon this state of facts was to use every reasonable effort to find and deliver the message to the sendee, and, upon failure to do so, to ask for a better address. No controversy is made in respect to the urgency of the message or the duty of the defendant to use all reasonable efforts to deliver it promptly. We think if the jury had found the facts, in respect to which here was testimony, grouped by his Honor, that such finding would have constituted due diligence, and that his Honor should have told the jury, upon this hypothesis, that the defendant was not guilty of negligence.

This case is distinguished from *Hendricks v. Telegraph* Co., 126 N. C., 304, 78 Am. St., 658. There the defendant sent no service message asking for a better address, and the Court said: "We think that it is the duty of the company in all cases, where it is practicable to do so, to inform the sender of the message that it cannot be delivered. While its failure to do so may be negligence *per se,* it is clearly evidence of negligence. In many instances, by such a course, the damages (468) might be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved of great anxiety. Moreover, it might *tend* to show diligence on the part of the company." This duty was met and discharged by the defendant in this case. There is really no conflict in the testimony, and we think that but one inference can be drawn from the defendant's testimony, if believed by the jury. They, of course, are the sole judges of its credibility, and this was properly submitted. There was no other testimony in the case from which the jury could have properly inferred that the defendant did not use due diligence, and it is error to submit to a jury a phase of a case in respect to which there is no testimony.

We do not deem it necessary to consider the other interesting questions which were discussed before us by counsel.

The defendant is entitled to a

New trial.

Cited: Cogdell v. Tel. Co., 135 N. C., 436; *Hood v. Tel. Co., ib.,* 626; *Helms v. Tel. Co.,* 143 N. C., 395; *Woods v. Tel. Co.,* 148 N. C., 5; *Shaw v. Tel. Co.,* 151 N. C., 642; *Carswell v. Tel. Co.,* 154 N. C., 155; *Edwards v. Chemical Co.,* 167 N. C., 672; *Medlin v. Tel. Co.,* 169 N. C., 505; *Howard v. Tel. Co.,* 170 N. C., 499; *Cohoon v. Davis,* 175 N. C., 148.

SPRINKLE v. WELLBORN.

(Filed 28 April, 1903.)

Appeal—Case on Appeal—New Trial.

Where the Supreme Court is unable to ascertain from the examination of the record and the statement made by the trial judge sufficient facts to enable the Court to determine the case, a new trial will be ordered.

ACTION by Nancy E. Sprinkle against J. M. Wellborn, tried before *Coble, J.*, and a jury, at May (Special) Term, 1902, of WILKES. (469) From a judgment for the defendant, the plaintiff appealed.

T. B. Finley, Womack & Hayes, and Shepherd & Shepherd for plaintiff.

Glenn, Manly & Hendren and W. W. Barber for defendant.

PER CURIAM. The Court is unable to ascertain from the examination of the record in this case and the statement made by his Honor, whether the defendant's counsel agreed that the finding of the first issue "put an end to the case." In this condition of the record, we can do nothing but order a new trial, to the end that if the cause should come to this Court again the record may be in a condition which will enable us to hear and determine it upon exceptions properly presented.

Neither party will recover any costs. The costs of this Court will be divided between the parties.

New trial.

LOCKHART v. COVINGTON

(Filed 28 April, 1903.)

Wills—Construction—Estates—Reversion.

Under the terms of the will set out in the opinion the children of the devisor living at the time of the death of the widow of the devisor take a fee-simple estate.

ACTION by Martha W. Lockhart and others against Lizzie Covington and others, heard by *O. H. Allen, J.*, at February Term, 1903, of UNION. From the judgment both sides appealed, other than Lizzie Covington.

(470) *Armfield & Williams for plaintiffs.*

W. P. Andrews and Redwine & Stack for defendants other than Lizzie Covington.

T. W. Bickett for guardian and infants.

CLARK, C. J. D. A. Covington died in 1870, leaving surviving him his wife and six children. In clause 1 of his will he provides that all his property should "remain undivided and to belong in common to my wife and children and to be under the control, management, and supervision of my dear wife, until such contingency, of which I shall hereinafter speak, may take place." In item 2 he authorizes the wife to sell property to pay debts, and in item 3 to use any of the property to provide for and to educate his children. In item 4 he gives his wife full power and authority to sell the lands, negroes, or any property if she may think it to the interest of herself and children, and that he desires that his wife shall "stand in the same relationship to all my property and estate, and also to my children, that I now do, to buy or sell any and everything that she pleases, *to give off to the children as she chooses,* and to control everything pertaining to my worldly estate . . . and for her to be the judge of what is best." In item 5 he requests his wife to give off to each child on marriage such portion as she may think best. In item 6 he provides that in case of his widow marrying, that the property shall be divided, and specifies the shares for her and the children, and that the division shall be based upon the number of children then living, and that the share devolving on his wife shall at her death "be equally divided among all her children." In the seventh and last item he appoints his wife executrix, and adds a postscript that should his wife not marry again, at her death all the property "to be equally divided among our children and their lawful heirs; and should one of my children die to whom a portion of my property or estate has been advanced, leaving no lawful issue, then in that event *the property so advanced* to revert to those of my children or the heirs of my chil- (471) dren that are alive—I mean of my living children and the children of those who are dead."

In the facts agreed it appears that the widow died in 1897 without having remarried, and had given off to the children all of the property left by her husband except some personalty disposed of by her will; that in 1892 and 1893 she conveyed to her son J. G. Covington the lands here in controversy; that she died in 1897; that J. G. Covington married in 1898 and died in 1902 without issue, having devised said lands to his wife. This action is by the heirs at law of D. A. Covington to recover said lands upon the ground that they had *reverted* to them at the death of J. G. Covington.

The evident purport of the will is to give the entire estate to his wife in trust for herself and children with power of advancement, but providing for a final division, allotting to the children their shares in severalty either at her marriage or death, and, if at her marriage, then her share to be for life and that to be divided at her death among the

children. The provision in the postscript restricts the advancements made so that if any child advanced shall be dead, without issue, at the time specified for the final division (i. e., at the death of the wife), not its share, but its advancement, shall revert and be brought into hotchpotch and divided. The "reverter" takes effect at the final division at the death of the wife. It is in the clause providing for such division, which has no reference to any later time.

The Code, 1327, has no application. There is no limitation in this will to the children at all, but a provision for the final division at the death of the wife (both in the event of her remarriage or not remarrying), and that she may make advancements, but if the child ad-
(472) vanced by her shall die without leaving issue, "the property *so advanced* to revert to those of my children, or the heirs of my children, *that are alive*"—meaning those alive at the time of the division. By the final division the property was vested in each of the children, in *fee simple,* and J. G. Covington had full power to devise it. *Sain v. Baker,* 128 N. C., 256, in nowise conflicts with this. There a defeasible estate was given to the son. Here, nothing was given to the son except a right to share in the final division of the estate at the death of his mother, equally with his brothers and sisters (or their issue) then alive, subject to the mother's power to make advancements, which power was clogged with the requirement that if the child so advanced should die without issue, such advancement should revert and be divided among the children *that are alive, i. e.,* alive at the time of this final division.

It must be noted that no property except the *advanced* property would revert—thus showing conclusively that the reverter must have taken place at the time of the final division.

No error.

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

---

(473)

McLEOD v. GRAHAM.

(Filed 28 April, 1903.)

1. Judgments—Irregular—Complaint—The Code, Sec. 206.

Acquiescence in a judgment waives the failure to file a complaint.

2. Executors and Administrators—Arbitration and Award—References—The Code, Sec. 1426.

The Code, sec. 1426, authorizes the submission to arbitration of a claim against an administrator.

3. Executors and Administrators—Claims—Filing—Pleadings.

An action brought against an administrator is a sufficient filing of a claim against the estate.

4. Executors and Administrators—Judgments—Distributees.

On a motion by an administrator to set aside a judgment by a creditor of the estate upon an alleged irregularity of the judgment, the distributees cannot intervene.

5. Arbitration and Award—Judgments—References—The Code, Secs. 274, 1426—Appeal.

After an award has passed into final judgment, it is too late to contest the same for alleged mistake in calculation of arbitrator, or that the arbitration had not been made a rule of court, or that the amount was agreed upon by the parties, or that the reference to arbitration was invalid. For an erroneous judgment the only remedy is by appeal.

ACTION by N. A. McLeod against G. W. Graham, administrator, heard by *Cooke, J.*, at February Term, 1903, of CUMBERLAND. From a judgment setting aside a judgment for the plaintiff, he appealed.

Rose & Rose for plaintiff.

H. L. Cook for defendant.

CLARK, C. J. This is an action brought against the defendant administrator for an alleged indebtedness by his intestate to the plaintiff. After suit brought, and without pleading, having (474) been filed, the parties agreed in writing to submit the matter in dispute to arbitration. The Code, sec. 1426. The arbitrators made an award and reported the same to court, and judgment was duly entered thereon. At the next term a distributee of the estate filed a petition to set aside the judgment, and subsequently thereto the arbitrators filed a statement that they had detected an error in the addition of the figures to the amount of $168 and "authorized and instructed the clerk to change their report in making the award $146.44 instead of $314.44." Notice was issued to the parties of the motion to modify and reduce the judgment; and at February Term, 1903, the defendant administrator asked that the judgment be set aside, which the court did upon the ground that it was an irregular judgment. The motion having been made after the trial term and not upon any of the grounds set out in The Code, sec. 274, could only be sustained upon the ground of irregularity. *Turner v. Davis, ante,* 187. No fraud is alleged, and if there had been it would have been ground for an action and not for a motion in the cause, this being a final judgment. *Carter v. Rountree,* 109 N. C., 29.

But we cannot discover any irregularity in the judgment. The action was pending and the judgment was regularly entered and in due course.

The failure to file a complaint was ground to dismiss the action, if objection had been taken in apt time (The Code, sec. 206), but its absence was cured by acquiescence in the judgment. *Vick v. Pope,* 81 N. C., 22; *Leach v. R. R.,* 65 N. C., 485; *Stancill v. Gay,* 92 N. C., 455; *Peoples v. Norwood,* 94 N. C., 167; *Little v. McCarter,* 89 N. C., 233; *Robeson v. Hodges,* 105 N. C. 49; *McNeill v. Hodges,* 105 N. C., 52; *Peebles v. Braswell,* 107 N. C., 68; *McLean v. Breece,* 113 N. C., 390. Besides, the submission (in writing) to arbitration, the written award and the consent to the judgment thereon show that the defend-
(475) ant had as full information as could have been had from a complaint.

The submission to arbitration or reference was authorized by The Code, sec. 1426. *Lassiter v. Upchurch,* 107 N. C., 411. The action brought was sufficient "filing" the claim (*Stonestreet v. Frost,* 123 N. C., 640); but if it were otherwise, that was a matter to have been heard in opposition to the judgment and not as ground to set it aside, for the defendant not only was a party to the arbitration, but it is found as a fact that his counsel knew of the arbitration and knew of the signing the judgment. Whether the judgment will protect the defendant administrator against the distributees in an action charging negligence or want of care in his administration cannot now be raised, for the distributees are not parties to this action. This motion is between the parties and rests upon the alleged irregularity of the judgment. The attempted intervention and affidavit of the distributee cannot be considered. *Walton v. McKesson,* 101 N. C., 428.

If the award itself has been contested for error in calculation therein, judgment thereon could not have been defeated for alleged mistake, when even this was denied; we have proceeded beyond that, for the award has passed into a solemn judgment of a court of competent jurisdiction. For the same reason, it is too late now to contest that the arbitration not having been made a rule of court, judgment should not have been entered upon it. *Metcalf v. Guthrie,* 94 N. C., 451. The parties accepted and agreed upon the award as the amount due, and judgment was by consent. *Moore v. Austin,* 85 N. C., 179. If the judgment was erroneous, the only remedy was by appeal. *Henderson v. Moore,* 125 N. C., 383. The defendant properly concedes in his brief that the court could not modify or amend such consent judgment, citing *Kerchner v. McEachern,* 93 N. C., 455, and rests his case upon the power of the court to set aside an irregular judgment. The reference to arbi-
(476) tration was valid (*Lassiter v. Upchurch,* 107 N. C., 411), but even that matter is not before us after judgment in the cause. If it should be a hardship not to correct an alleged error in an award after

judgment thereon, it is a less hardship than a practice leaving arbitrators to be worked on by the unsuccessful parties to actions. "Hard cases are the quicksands of the law." An error in calculating an award is like an error in the calculation of their verdict by a jury, which cannot be brought forward at a subsequent term upon a statement of the jurors to set aside a judgment regularly entered upon the verdict.

Upon the findings of fact, the judgment setting aside the former judgment must be

Reversed.

Cited: *Rawls v. Mayo,* 163 N. C., 180; *Simmons v. McCullin, ib.,* 414.

---

(477)

BAPTIST FEMALE UNIVERSITY v. BORDEN.

(Filed 28 April, 1903.)

1. Wills—Legacies and Devises—Widow—Dissent of Widow—Acceleration.

Where property is devised to the widow during her life and then to a university, and she dissents thereto, such property vests immediately in the university if the property is not given to the widow in her dower.

2. Rents—Wills—Legacies and Devises—Descent and Distribution.

Rents accruing after the death of the testator pass with the property, and must be paid to those to whom such property belongs.

3. Wills—Construction—Widow—Legacies and Devises.

A will should be so construed that the dissent of the widow affects the devisees and legatees to as small degree as possible and that the general scope and plan of distribution be carried out as far as possible.

4. Legacies and Devises—Wills.

The personalty of a testator must be applied to the payment of debts and exhausted before the realty can be subjected thereto, unless it clearly appears from the will that the testator meant to charge the same upon his real estate.

5. Legacies and Devises—Wills—Conversion.

Where a testator directs that certain real estate be sold and the proceeds be divided between two devisees, such sale constitutes a conversion for the purpose of division only, and does not change the character of the property with respect to its liability for debts and legacies.

6. Legacies and Devises—General Legacies—Demonstrative Legacies—Wills—Abatement of Legacies.

General legacies must abate or be postponed until payment in full is made of demonstrative legacies.

7. Contracts—Subscription—Consideration—Wills.

Mutual promises of several subscribers to contribute to a fund to be raised for a specified object in which all feel an interest are a sufficient consideration to make such subscription a valid contract.

8. Legacies and Devises—Ademption of Legacies—Wills.

A devise to a creditor does not operate as a satisfaction of a debt due from the testator to such creditor.

9. Descent and Distribution—Legacies and Devises—Wills.

The distributive share of a widow consists of one half of the personalty after the debts, expenses of administration, her year's allowance, and specific legacies are deducted from the total value of the personal estate.

10. Legacies and Devises—Executors and Administrators—Wills.

A widow is entitled to receive securities representing advantageous investments as a part of her distributive share of the personalty if there is no necessity of converting such investments into money.

ACTION by the Trustees of the Baptist Female University and others against E. B. Borden, executor of W. T. Faircloth, and others, heard by *Robinson, J.,* at December Term, 1902, of WAYNE. From a judgment determining the rights of the parties, both sides appealed.

W. N. Jones and Battle & Mordecai for the plaintiffs, the Baptist Female University and Thomasville Orphanage.

(478) *W. C. Monroe for Mrs. W. T. Faircloth.*

F. A. Daniels for the executor, E. B. Borden.

John E. Woodard and W. T. Dortch for legatees.

CONNOR, J. This is a controversy submitted without action under The Code, by the plaintiffs, The Baptist Female University and the Trustees of the Thomasville Baptist Orphanage and the Trustees of Wake Forest College, against E. B. Borden, executor of W. T. Faircloth, deceased, and E. E. Faircloth, widow of said deceased, and other devisees and legatees named in the will of the said testator, for the purpose of obtaining a construction of the will of the testator and direction to the executor in regard to the administration of his trust.

The facts necessary to a decision of the case are:

(1) That W. T. Faircloth died in the county of Wayne on 29 December, 1900, leaving no children or issue of such, leaving him surviving his widow, E. E. Faircloth.

(2) That the defendant Frank W. Faircloth, Douglas B. Faircloth, Samuel L. Faircloth, and Callie Faircloth, Clara A. Lane, Susan E. Woodard, Fannie M. Faircloth, are the nephews and nieces of the said W. T. Faircloth, and are also his heirs at law.

(3) That the said W. T. Faircloth left a will which was duly admitted to probate, and the executor therein named, the defendant E. B. Borden, duly qualified.

(4) That since the death of W. T. Faircloth and the probate of said will his widow, E. E. Faircloth, has duly filed her dissent thereto, and claims such share of the estate of her husband as she would have been entitled to if he had died intestate. Her year's support amounting to $2,000 has been duly allotted to her.

(5) In addition to such claims, the estate of said testator is indebted to her in the sum of $10,342.07, with interest thereon (479) from 12 February, 1900, which has been reduced to judgment.

(6) That on or about 1 December, 1900, said testator made a subscription of $1,000 to the Baptist Female University of North Carolina for the purpose of aiding in the payment of certain indebtedness already created, amounting to more than $40,000, of said University. That said University is a school under the control of the Baptist denomination, of which the said testator was a member. That such subscription was made or given to Dr. R. T. Vann, president of said institution, a part of whose duty it is to solicit subscriptions for the payment of said debt. The said testator verbally authorized the said Dr. R. T. Vann to announce the said subscription in a public convention of the Baptists of North Carolina, at one of its sessions where other amounts were subscribed by various parties, and the same was announced in the presence of said testator. That said subscription was published in the public prints; that most of the said subscriptions are paid. That the said University, being indebted as aforesaid, employed agents to solicit subscriptions for the payment of said indebtedness, and in securing said subscriptions it incurred liability to said agents. That after said subscription was made as aforesaid the said testator executed his will, which is hereto attached, and made the devises to the University set out in the same.

(7) That the estate of the said W. T. Faircloth, at the time of his death, was worth about $70,000, of which about $30,000 consisted of real estate, and about $40,000 of personalty.

(8) That of the personal estate, about $3,000 was money in bank subject to check, and the remainder of said personal estate consisted of notes, stocks, and bonds, his library and household furniture, the said library and household furniture not exceeding in value $1,000, and of said stocks and bonds some have market value and others no mar- (480) ket value, and some of which are above and some below par.

(9) That the real estate described in item 7 of said will is worth from $7,000 to $8,000; the real estate described in item 13 of said will is worth

from $13,000 to $17,000, and the real estate described in item 14 of said will is worth from $5,000 to $8,000.

(10) That after the payment of debts, except the debt claimed by Mrs. Faircloth and the expenses of administering the estate, there will be in the hands of the executor for distribution under the said will, or as the law directs, about $34,000 of personal estate.

(11) That there will not be a sufficiency of said personal estate to pay the legacies provided for in item 6 of the will after the payment to Mrs. E. E. Faircloth of her distributive share of the estate and her claim of $10,342.07.

(12) That after the payment of the share of personal estate of which Mrs. Faircloth will be entitled and her claim of $10,342.07, there will not be sufficient to pay the legacies provided for in item 6 of the will if the value of the property in item 7 is added to the remainder of the personal estate.

(13) That after the payment of the share of the personal estate to which Mrs. E. E. Faircloth is entitled and her claim of $10,342.07, there will not be sufficient to pay the legacies given in items 1, 2, 3, 4, 5, 6, 10 and 11 of said will, if the value of the property devised in item 7 is added to the remainder of the personal estate.

(14) That since the death of said W. T. Faircloth, by consent the defendant J. W. Gardner has rented out the real estate and has received rents and profits thereof, and he now has in hand of said rents and profits the sum of $....., to be disposed of as the court may direct.

(15) That the dower of Mrs. Faircloth has been duly allotted to her, and covers the following property devised in said will: The house and lot in which the said W. T. Faircloth lived at the time of his
(481) death, fronting on George Street, being the lot referred to in item 8, section 5 of the will of said testator, and also the two-story brick store on Walnut Street, mentioned in item 8, section 2 of said will.

(16) That the said testator prior to his death leased a part of the property mentioned in item 7 of said will to the United States Government, by deed registered in the county of Wayne. That since his death, in accordance with said contract, liabilities to the amount of $ ..... have been incurred for equipment for free delivery in Goldsboro, $..... for coal, $..... for water and repairs upon property embraced in said lease.

The portions of said will necessary to be set out for the purpose of disposing of this cause are as follows:

In item 1, 2, and 3 general legacies are given to persons therein named of $100 each.

In item 4 the testator gives to Frank W. Faircloth his watch and chain and also certain real estate situate in the State of Virginia.

In item 5 he gives to the trustees of Thomasville Baptist Orphanage $1,000 in money.

In item 6, "I give and bequeath absolutely to my nephews and nieces, Douglas B. Faircloth, Samuel L. Faircloth, Clara A. Lane (wife of B. F. Lane), Susan E. Woodard (wife of Calvin Woodard), Fannie M. Faircloth, Frank W. Faircloth, and Callie Faircloth (wife of said Frank W. Faircloth), each $4,000, to be paid by my personal representative to said legatees by turning over any of my bonds, stocks, notes or other evidences of debt, at their market value; and if these are not sufficient, then the balance of said $4,000 each to be paid in money."

In item 7, "I give and devise to my widow, E. E. Faircloth, and her heirs, my three-story brick building in the northeast intersection of John and Walnut streets in said city and the land on which it stands (called the Law Building), also the single-story brick (482) store and lot on the east side of said Law Building, including ten feet right of way on the east of single-story store, all fronting on Walnut Street. This devise is in lieu of all moneys I received from her properties in Onslow County, North Carolina. I also gave her $500 in cash in lieu of her year's allowance."

In item 8, "I loan and give to my wife, E. E. Faircloth, during her life, the rents, use, profits, and incomes of the following real estate in Wayne County, viz.:

"1. Two residence lots fronting on James Street, lying between Walnut and Chestnut streets.

"2. My two-story brick store, fronting on Walnut Street and lying in the northwest intersection of John and Walnut streets.

"3. My two-story brick stores on the south side of and fronting on Walnut Street, between L. D. Giddens and John Slaughter's stores.

"4. My Buckhorn plantation and farm on the south side of Neuse River in Wayne County, on which Rigdon Kornegay and Ely Cobb now live as tenants.

"5. My house and lot on which I now reside, fronting on George Street in the city of Goldsboro. These rents, incomes, etc., mentioned in this item, I intend to belong to my said wife absolutely and to be at her disposal absolutely."

In item 9 he disposes of his household and kitchen furniture, which has been allotted to the widow.

In item 10, "I give and bequeath to the trustees of Wake Forest College my entire law library, for the use of the Law Department of said college."

In item 11, "I give and bequeath to 'The Trustees of the First Missionary Baptist Church,' at Goldsboro, and their successors,
(483) $1,000 for the use and benefit of said church, as said trustees may deem proper."

In item 12, "After the death of my wife, E. E. Faircloth, I give and devise to my niece, Clara A. Lane (wife of B. F. Lane) and her heirs in *fee* my house and lot on which I now reside, fronting on George Street in said city of Goldsboro."

In item 13, "After the death of my said wife, I give and devise in *fee* to the 'Trustees of the Baptist Female University of North Carolina' and their successors, situated in the city of Raleigh, N. C., the following real estate in the city of Goldsboro, N. C., hereinbefore referred to, viz.: My two residence lots fronting on James Street, between Walnut and Chestnut streets; my two-story brick store in the northwest intersection of John and Walnut streets, and my single-story brick building on the south side of and fronting on Walnut Street, between the stores of L. D. Giddens and John Slaughter, to be used for the benefit of said University in such manner as said board of trustees may think best."

In item 14, "I direct that after the death of my said wife, my Buckhorn plantation on the south side of Neuse River in Wayne County be sold at public auction at the courthouse door in Goldsboro, after due advertisement, to the highest bidder, by my personal representative, and pay the net proceeds equally to the trustees of the Baptist Female University of North Carolina, at Raleigh, N. C., and to the trustees of the Thomasville Baptist Orphanage at Thomasville, N. C., and said moneys in this item to be used as said board of trustees may think best for their respective corporations."

In item 15, "After the above provisions have been served, I devise and bequeath any residue of my estate, real, personal or mixed, to my nephews and nieces hereinbefore named, to be equally divided between them, share and share alike, the children of any one or more of
(484) said nephews and nieces who may have died to take the share that their parents would take if alive."

The first question presented upon the appeal for our consideration is raised by the contention of the plaintiffs, the trustees of the Baptist Female University: That the dissent of Mrs. E. E. Faircloth accelerated the devises provided in item 13 of the will, and that they are now entitled to the possession of the property described in said item not included in the dower, and to the rents and profits theron. Upon this question

his Honor ruled against the contention of the trustees of the Baptist Female University. In this we think there was error. Mrs. Faircloth having dissented from the will and claimed her dower in the realty and her distributive share in the personalty, we are of the opinion that there was an acceleration of the devises, the enjoyment of which under the will was postponed to the time of her death. The will, in so far as provision was therein made for her, operates in the same manner, as to the time of enjoyment by those entitled after her death, as if she had died prior to her husband. In *Adams v. Gillespie,* 55 N. C., 244, the testator gives to his wife the house and lot on which he lived to have during her life and "after her death" to her daughter. The widow dissented. *Battle, J.,* says: "The dissent of the widow has removed her life estate from all of the property given to her by the will and which she does not take independently, and the effect of it is to hasten the enjoyment of the life estate devised to her daughter."

In *Holderby v. Walker,* 56 N. C., 46, the testator gives his entire estate to his wife for and during her natural life, and provided that "After the death of my beloved wife, I desire all of the estate devised to her" to go to certain persons, naming them. The widow dissented. *Battle, J.,* again speaking for the Court, says: "It is further admitted that as the life estate intended for the widow is removed out of the way as to all of the property which has not been assigned to (485) her, such property is or will by the consent of the executor become vested in possession." See, also, *Wilson v. Stafford,* 60 N. C., 647.

We find the same principle announced by other courts. In *Brown v. Hunt,* 59 Tenn. (12 Heisk.), 404, it is held: "That where a particular estate is devised to the widow with limitation over, and the widow dissented to the will, that thereupon the limitation over took effect at once, except so far as affected the widow's right to her dower and distributive share."

The only case to which our attention has been called which would seem to militate against this view is *Beddard v. Harrington,* 124 N. C., 51. In that case land was given to the wife "for and during her natural life or widowhood," with the following provision: "After the death of my said wife" the land was given to the granddaughter of the testator. In an action by the plaintiff against the granddaughter, the Court held that she could not recover, for that upon her marriage her estate determined. The Court says: "The widow having remarried, cannot maintain the action to recover possession. The devise to the granddaughter, the defendant, 'after the death of my said wife,' cannot take effect until that event, but that cannot avail the plaintiff, who must recover upon the strength of her own title, not upon defects in that of

the defendant." The only question before the Court was the right of the plaintiff to recover possession, and, as her title had determined, it was clear that she could not maintain the action. That was the only point decided in this case. It is true that the Court stated that until the death of the wife the devise to the granddaughter could not take effect, and the title to the land until that time vested in the heirs at law. This language, however, was not necessary for the decision of this case,

and in so far as it conflicts with the uniform current of author-
(486) ity, as applied to the facts in the case before us, we do not regard it as binding upon the Court in the disposition of this appeal. 20 Am. and Eng. Ency. (1 Ed.), p. 895, sec. 5. This ruling does not affect the right of the remainderman named in item 12, as the dwelling-house is given to Mrs. Faircloth for her life and at her death to Mrs. Clara A. Lane. It having been allotted to her as a portion of her dower, the status is not changed by the dissent. The two-story brick store fronting on Walnut Street, mentioned in item 8 (2), having been allotted to Mrs. Faircloth as a portion of her dower, the enjoyment of it is thereby postponed until her death. The title to the other real estate given to Mrs. Faircloth in item 8 for life and after her death to the trustees of the Baptist Female University, vests in the trustees at once, and they are entitled to the immediate possession thereof. The Buckhorn plantation given to Mrs. Faircloth for life in item 8 (4) and disposed of in item 14 must be sold at once by the executor and the proceeds paid over to the trustees of the Baptist Female University and the Thomasville Baptist Orphanage, as directed therein.

The result of this ruling in respect to the real estate disposes of contention No. 9 in regard to the rents accruing from this property. The rent which has accrued since the death of Judge Faircloth passes with the property and must be paid to those to whom the real estate belongs. This principle applies also to the rents accruing from the Buckhorn plantation directed to be sold.

His Honor's ruling in regard to the rents of the property referred to in items 13 and 14 is reversed. *Rogers v. McKenzie,* 65 N. C., 218. This disposes of contentions Nos. 1, 2, and 9 (except as to the property described in item 7).

The contentions Nos. 4, 5 and 6 of the legatees named in item 6 of the record may be considered together. They are, first, From an inspection of the whole will, it appears that it was the intention of the
(487) testator that they should have the legacies and that other parts of the will must yield, if necessary to give effect to this intention. Second, That if necessary to pay the legacies, it is the duty

of the executor to sell the real estate devised in other parts of the will. Third, That the bonds, stocks, notes, etc., in the hands of the executor must be applied under the will to the payment of their legacies, and that provision must be made for the payment of debts out of other property of the deceased.

The will contains a plan or scheme for the disposition of the testator's property entirely consistent and harmonious in all its parts. There would be no difficulty in executing the provisions of the will but for the derangement of the plan caused by the dissent of the widow. The result of this action on her part, followed by the establishment of an indebtedness in her favor, materially changes in many respects and prevents the execution of the plan of the testator. We fully recognize the well-settled principle adopted by the courts, that the will shall be so construed that the dissent of the widow shall affect the devisees and legatees to as small degree as possible and that the general scope or plan of distribution be carried out and effectuated so far as possible. "The dissent may defeat some of the arrangements made by the will and accelerate the time of enjoyment of some of the legacies and devises, but it does not affect the construction of the will." Pritchard on Wills, sec. 776.

We are unable to see from an inspection of the whole will that it was the intention or within the contemplation of the testator that any part of his will would fail to be executed, or that upon his death there would be any necessity that one part should yield in favor of another. It is a holograph will, bears date 28 December, 1900. The death of the testator occurring the next day, being the 29th of the same month. The will is drawn with care and is free from ambiguity. The condition of the estate, as shown to us by the case agreed, was such (488) that, but for the dissent of the widow, the executor would have found no difficulty in executing every provision thereof. We cannot, therefore, undertake to say what the testator would have done, or desired to be done, in the condition into which his estate has been placed by the unexpected contingency which has arisen. We must, by an adherence to the rules and precedents laid down by the courts, direct the disposition of the estate, as near as may be, in accordance with the directions of the testator as set forth in his will.

The legacies given his nephews and nieces in item 6 fall within the class known as demonstrative. Mr. Jarman in his work on Wills, ch. 523, in speaking of general and specific legacies, says: "But, besides these two classes of legacies already mentioned, there is a third or intermediate class where there is a separate or independent gift to the legatees and then a particular fund or estate is pointed out as that which is to be primarily liable."

"A demonstrative legacy is a bequest of a certain sum of money, stock, or other like, payable out of a particular fund or security. . . . . A demonstrative partakes of the nature of a general legacy by bequeathing a specific amount, and also of the nature of a specific legacy by pointing out the fund from which payment is to be made, but differs from a specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, recourse will be had to the general assets of the estate." *Crawford v. McCarthy,* 159 N. Y., 515.

"Such a legacy is so far specific that it will not be liable to abate with the general legacies upon a deficiency of assets, except to the extent that it is to be treated as a general legacy after the application of the fund designated for its payment." *Gelbach v. Shivley,* 67 Md., 498.

Of course, all legacies are subject to the payment of debts and, when the widow dissents, of her distributive share of the personal estate. The general legacies must give way or be postponed in favor of spe-
(489) cific and demonstrative legacies.

The contention of the legatees in item 6, that if necessary to pay the legacies it is the duty of the executor to compel the sale of real estate, cannot be sustained. It is well settled that unless it clearly appears from the will that it is the intention of the testator to charge the payment of debts upon his real estate, the law will not do so. The personalty must be applied to the payment of debts and exhausted before the realty can be subjected. *Shaw v. McBride,* 56 N. C., 173. "The personalty in the hands of the executor or administrator, whether it be specifically bequeathed or otherwise is first liable to the payment of debts unless specifically exempted; and the real estate belonging to the deceased, no matter in what condition it is found, whether descended or devised, is not liable until the former is exhausted." *Knight v. Knight,* 59 N. C., 134; *Graham v. Little,* 40 N. C., 407. "It is safe to say that in the absence of any controlling direction of a testator to the contrary, the personal estate is primarily liable for the debts of the deceased." *Pate v. Oliver,* 104 N. C., 458; *Mahoney v. Stewart,* 123 N. C., 106. We fail to find in the will any indication of a purpose to change the order of liability fixed by the law, and we affirm his Honor's ruling in that respect.

The sixth contention of the legatees was overruled by his Honor, and we concur therein. From the facts stated, we are unable to see to what other property of the deceased the legatees in this contention refer. After the payment of the debts and Mrs. Faircloth's distributive share, which, as we have seen, have priority over the legacies, there will be

no other personal property in the hands of the executor. In any phase of the question, we sustain his Honor's ruling.

The seventh contention of the legatees, that the property de- (490) vised in item 7, known as the "Law Building," and an adjoining lot fall into the residuum, was sustained by his Honor and no exception made thereto.

The eighth contention of the legatees, that the property described in item 14 has been converted by the testator into personal state, and that they are entitled to the proceeds thereof in order to satisfy their legacies, was overruled by his Honor, and we concur therein. The direction to sell this property and divide the proceeds between the Thomasville Baptist Orphanage and the Baptist Female University does not change its character in respect to its liability for debts or legacies. Its conversion is for the purpose of division only.

The tenth and eleventh contentions may be considered together. His Honor sustains the tenth and overrules the eleventh, and we concur with him in both rulings. As we have seen, the general legacies given in items 1, 2, 3, 5, and 11 must abate or must be postponed until the demonstrative legacies given in item 6 have been paid in full.

The contention No. 11½, that it was the intention of the testator, as expressed in his will, that all legacies and devises should be paid in full, and that it has become impossible to carry out this intention by reason of changed conditions since the making of the will, and that a court of equity will not permit the loss to fall upon any one legatee, but will apportion the loss ratably, and that it was not the intention of the testator to make mock legacies to them, was overruled by his Honor, and we concur therein. As we have seen, it was the intention and expectation of the testator that all of the legacies and devises given and made by him were to be effectuated. What he might have done in anticipation of the changed conditions, we are not at liberty to conjecture. *Hill v. Toms,* 87 N. C., 492.

The twelfth contention made by the legatees named in items 4 and 10 was sustained by his Honor, and no exception made (491) thereto.

The thirteenth contention, that the executor should pay out of the personal estate all liabilities arising out of the contract with the Government of the United States, set out in paragraph 16, was sustained by his Honor, and the executor excepted. We concur with the ruling of his Honor upon this question. As we have seen, rents follow the reversion and can only be subjected to the payment of debts when there is a failure of personalty and it becomes necessary to subject the land. The

amount paid by the executor for debts accuring under the provisions of said contract are the personal liabilities of the testator, accruing, it is true, since his death, but in consequence of the contract made by him prior thereto.

The third contention by the trustees of the Baptist Female University that the subscription of $1,000 on the indebtedness of said University, set forth in paragraph 6, is a debt against the estate, and the same was not adeemed by the devises in the will of the testator to said University, may be considered in connection with the fourteenth contention of the legatees, in item 6, and the executor, that the subscription of $1,000 is without consideration, and does not create a binding obligation. The facts in regard to these contentions are that the testator made a subscription of $1,000 to the Baptist Female University of North Carolina for the purpose of aiding in the payment of certain indebtedness already created, amounting to more than $40,000; that said University is a school in the control of the Baptist denomination, of which the testator was a member; that such subscription was made or given to R. T. Vann, president of said institution, a part of whose duty it is to solicit subscriptions for the payment of said debt; that said testator verbally authorized said Vann to announce the said subscription in a public convention of the Baptists of North Carolina, where other
(492) amounts were subscribed by various parties, and the same was announced in the presence of said testator; that said subscription was published in the public prints; that most of the said subscriptions are paid; that said University being indebted as aforesaid, employed agents to solicit subscriptions, for the payment of said indebtedness, and in securing said subscriptions it incurred liability to said agents for their compensation and expended the money in payment of said agents; that after said subscription was made, as aforesaid, the said testator executed his will, which is herewith attached, and made the devises to said University as set out in the same.

The decision of this question is dependent upon the solution of the question whether there be any consideration to support the promise to give $1,000 to the Baptist Female University. It is well settled by a long line of authorities that "a simple contract is incapable of becoming the subject of an action unless supported by a consideration." Smith on Contracts, 106. This is elementary and needs no citation.

We find a very satisfactory definition of a valuable consideration in *Curry v. Mislar,* 10 Exc., 153: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or re-

sponsibility given, suffered, or undertaken by the other." See Clark on Contracts, sec. 64.

We find from a careful examination of the numerous cases which have been decided by the courts of the Union a division of opinion. Among the earliest is *Stewart v. Trustees*, 2 Denio, 403. Chancellor Walworth uses the following language: "As a subscription of a single individual agreeing to make a donation to another individual or a corporation for the benefit of the donee merely, I should find great difficulty in finding a valid consideration to sustain a promise to give without any equivalent therefor, and without any binding agreement on the (493) part of the donee to do anything on his part which would be a loss or injury to him. . . . There is no difficulty in my mind in finding a good and sufficient consideration to support a subscription of this kind made by several individuals. Every member of society has an interest in supporting an institution of religion and learning in the community where he resides. And when he consents to become a subscriber with others to raise a fund for that purpose, the real consideration for his promise is the promise which others have already made or which he expects them to make to contribute to the same object. In other words, the mutual promises of the several subscribers to contribute toward the fund to be raised for the specified object in which all feel an interest are the real consideration of the promise of each. For this purpose, also, the various subscriptions to the same paper and for the same object, although in fact made at different times, may in legal contemplation be considered as having been made simultaneously. The consideration of the promise, therefore, is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration of injury which the payee has sustained or is to sustain, or be put to for his benefit. But the consideration of the promise of each subscriber is the corresponding promise which is made by other subscribers. Mutual promises have always been held sufficient as between the parties to sustain the promise of each. And it has also been the settled law from the time of the decision in the case of *Dutton v. Pool,* Freeman Law Report, 471, in 1678, down to the present time, that a party for whose benefit a promise is made may sue in *assumpsit* upon such promise, although the consideration therefor was a consideration between the promisor and (494) a third person."

In *Dartmouth College v. Woodard,* 4 Wheat., 518, Chief Justice *Marshall,* speaking of the contributions to the funds of that institution, says: "These gifts were made, not indeed to make a profit to the donors

or their posterity, but for something in their opinion of inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves."

In *Congregational Society v. Perry,* 6 N. H., 164, 25 Am. Dec., 455, it is held: "Where several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of the others."

In *Norton v. Janvier,* 5 Harrington, 346, *Booth, C. J.,* says: "The law will not enforce a mere gratuitous or voluntary promise made without consideration. But the question is, What is a merely gratuitous promise? If a subscription be made to a common object on condition that such object is accomplished, or sufficient money be raised to effect that object, and that condition is performed, an obligation to pay would be perfect and may be enforced by a suit at law."

In *Coll. Inst. v. Smith,* 36 Barb., 576, the Court uses the following language: "I am by no means satisfied that, in this country, where all our religious, educational, and charitable institutions are founded by voluntary associations and dependent upon private liberality, the personal benefit to be derived from the erection of a church edifice for worship by himself and family, or the erection of an academy or other institution of learning in his immediate neighborhood for the education of his children, are not works involving a sufficiency of private interest to every citizen and of pecuniary benefit to maintain a promise expressly and distinctly made, received and acted upon in the erection of (495) buildings for such purposes." It is conceded by the Court in this case that this view has not been adopted in most of the cases, and we quote it for the purpose of showing the line of thought passing through the judicial mind upon this question many years ago.

In *Williams College v. Danforth,* 12 Pick., 541, *Chief Justice Shaw,* in speaking of a subscription made by several to a common object, says: "In this case there is an express contract between parties capable of contracting upon mutual stipulations, each having an interest in the stipulations of the others, and these stipulations being such as might be enforced by judicial process. The subscription in the first instance was in the nature of a proposal to the college, by its terms not binding till accepted, and before acceptance revocable. But when the college accepted it they bound themselves to the performance of the conditions. The conditions were that they should apply the money, principal and interest, to the general literary, scientific, and religious purposes of the

institution, at Williamston, in which the defendant, with the other subscribers, declared that they had an interest. . . . These were then mutual and independent promises, and according to a well-known rule of law, such promises are mutual considerations for each other." This action was brought upon subscription paper signed by the defendant with others. There were certain conditions upon which the money was to be paid.

In *Doyle v. Glasscock,* 24 Tex., 200, the Court says: "The case thus disclosed, we understand to be this: "The plaintiff was one of a committee to raise money for the purchase of a site for the lunatic asylum: he applied to the defendant and received his subscription, and on the faith of it (or the committee of which he was one) made the purchase, and he advanced the money, and now calls on the defendant in consideration of the premises to pay his subscription." The Court held (496) that the plaintiff could recover.

In *Maine Cent. Inst. v. Haskell,* 73 Me., 140, *Danforth, J.,* says: "But we are not prepared to admit that the subscription paper in this case 'is a bare naked promise' without any consideration whatever. It is true, no consideration was actually received at the time of signing, but one is plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose, 'to make up the building fund for said institution.' The promise was made to a different payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise, and therefore amenable to law for negligence or abuse of the trust. It is not of course binding upon the promisor until accepted by the promisee, and may up to that time be considered as a revocable promise. But when accepted, and much more when the execution of the trust has been entered upon, where money has been expended in carrying out the object contemplated, it becomes a complete contract binding upon both parties, the promise to pay or at least an implied promise to execute, each being a consideration for the other."

In *Amherst Academy v. Cowles,* 6 Pick., 427, 17 Am. Dec., 387, the Court, after reviewing the cases, says: "On this view of the cases which have occurred within this Commonwealth analogous in any degree to the case before us, we do not find that it has ever been decided that when there are proper parties to the contract and the promisee is capable of carrying into effect the purpose for which the promise is made, and in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration."

In *Collegiate Inst. v. French,* 16 Gray, 196, *Chapman, J.,* says: "It is held that by accepting such a subscription, the promisee on his part

(497) agrees with the subscribers that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscribers, and these mutual and independent promises are made and constitute a legal and sufficient consideration for each other. They are held to rest upon a well-settled principle in respect to concurrent promises."

In *Johnson v. Wabash College,* 2 Ind., 555, on a promise to pay a subscription of $50, the Court says: "The only objection made to the recovery of the note is that said note was given without consideration. The accomplishment of the object, in aid of which the money was promised, forms a good and valid consideration for the promise to pay it."

In *Petty v. Trustees,* 95 Ind., 278, the Court says: "The contract in a case such as this is a peculiar one. The consideration in the contract is not a promise on the part of the religious corporation to build a place of worship, for no such promise is averred; but the consideration is the mutual promises of the respective subscribers each with the other."

In *Pierce v. Ruly,* 5 Ind., 69, it is said: "The consideration for his promise is the promise which others have already made or which he expects them to make to contribute to the same object."

In *Irwin v. Webster,* 56 Ohio St., 9, 36 L. R. A., 239, 60 Am. St., 727, the Court said: "That a promise which does not secure a benefit to him who makes it, or loss or detriment to him to whom it is made, or in any manner influence the conduct of others, is not enforcible, is a recognized general rule of law. . . . By the desire of Gilpin, many other persons made donations in money and executed obligations to the University of like character to his, and his promise was an inducement to their donations and promises. . . . Whether the object of (498) the promisors was to secure the opportunity of educating their own children under such influences as they desired, or more generally to contribute to the general welfare by increasing the facilities for higher education, it has been accomplished by the expenditure of money and the incurring of obligations in reliance upon their promises and similar promises from others. Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the University is restricted not only by the law of its being, but as well by the obligation arising from its acceptance of the promise. A promise to give money to one to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution to be used for such designed and public purposes, rests upon consideration. The

general course of decisions is favorable to the binding obligation of such promises. . . . It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations, and together constitute the financial support of the enterprise. The cases must be rare indeed in which such contributions or promises would be made if others had not been made before, and rarer still in which they would be made but for the belief that others will be made afterwards. The requirments of the law are satisfied, the objects of the parties secured and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment, through the University, of the purposes for (499) which it was incorporated, and in whose aid the promise was made." These observations appear to be peculiarly appropriate to the consideration of the question presented in this case.

In *Roche v. Roanoke Seminary,* 56 Ind., 198, the Supreme Court held "that the subscription required no further consideration to support it than the accomplishment of the object in aid of which the money was promised," which in that case as in this was to go to the endowment fund of an institution of learning.

"A bond payable after the maker's death to a college for its endowment accepted by the college, rests upon a sufficient consideration, and may be enforced after the maker's death." Beach on Modern Law of Contracts, sec. 179. That mutual promises constitute sufficient consideration is well settled by numerous decisions in our reports. In the light of the foregoing authorities and the principles upon which they are based, we are of the opinion that the promise made by Judge Faircloth to pay to the trustees of the Baptist Female University $1,000 is supported by a sufficient consideration and constitutes a legal liability upon his estate. We think that this conclusion may be supported upon several views of the testimony.

The University is duly incorporated, with the power to receive such subscriptions. It is under the control of the Baptist Church, of which the testator was a member. Its trustees had appointed agents to solicit subscriptions. It had incurred liabilities for their expenses and payment for their services. The subscription was made to the president of the University and an announcement thereof made in a Baptist convention. The subscription was thereby accepted, and by its acceptance the University assumed the responsibility, duty, and obligation of applying the money to the purposes for which it was given. Other

persons at said time and place made subscription for the same pupose.
Announcements of each were made in the presence of Judge Fair-
(500) cloth. Most of these subscriptions were paid, and it must be understood, as a reasonable conclusion from the facts stated, that these subscriptions were made at the same time and place, and therefore operated as an inducement for other persons to make subscriptions for the same purpose, which were received by the University, and the duty or trust thereby imposed of expending the money for the purposes for which it was given assumed by the officers of the University.

We think that in either of the several points of view and in accordance with the definition of a valuable consideration hereinbefore given, the promise was supported by such consideration.

We are not inadvertent to the fact that there are a number of authorities holding the contrary. We have carefully examined the cases, and in the absence of any controlling authority in this Court, we have come to the foregoing conclusion.

His Honor overruled the third contention of the trustees, and pursuant thereto sustained the fourteenth contention of the legatees. The trustees excepted to both rulings. We think his Honor was in error.

We do not think that the devises made by the testator to the Baptist Female University operate as an ademption of the debt due the University. While we have not been controlled in the consideration of this question by any supposed intention of the testator, we feel assured that we have effectuated the purpose which he had. It will be observed that he made this subscription about one month prior to his death, and that in his will he gives to the trustees for the Thomasville Baptist Orphanage $1,000 in money. We think that we can see a general pur-
pose running through his mind, after providing for his relatives
(501) to divide his estate, after the death of his wife, between the two institutions, one representing the great educational work for girls of his church and the other its fostering care of its orphaned children. We do not think that the devises made to the Baptist Female University are a satisfaction of the debt of $1,000. As no date of payment is fixed, it was due at once; whereas the devise was not to take effect until the death of Mrs. Faircloth. See Iredell on Executors, 222, sec. 7.

The fifteenth contention, that for the purpose of ascertaining the distributive share of Mrs. Faircloth, the expenses of administration and debts shall be deducted from the value of the personal property, and that all stocks, bonds, etc., as are specifically bequeathed to the legatees in item 6, and that for the purpose of providing a fund for the payment of debts the devises of real estate and specific legacies shall contribute pro rata according to their value, is sustained by his Honor, and exception taken thereto by the trustees of the Baptist Female University and

the trustees of the Thomasville Baptist Orphanage and Wake Forest College.

We think that his Honor was in error. As we have been, the realty cannot be subjected or called upon for the payment of debts until the personalty is exhausted. We think that the correct rule for the purpose of ascertaining the distributive share of Mrs. Faircloth is that the debts and expenses of administration shall be deducted from the total value of the personalty, exclusive of the specific legacies, and that after deducting the same one-half of the remainder will be paid to her for her distributive share—the amount paid her for her year's support, of course, first being deducted. Upon the facts stated in the case agreed this would leave an amount smaller than the legacies named in item 6 of the will, and of course these legacies would absorb the balance of the personalty. *Arrington v. Dortch,* 77 N. C., 367.

The sixteenth contention, that the property mentioned in item (502) 7 of the will is primarily liable for the debts, was sustained by his Honor. If by this is meant that it is liable to be subjected before the realty specifically devised, we concur with his Honor; and we so construe his ruling upon this contention.

The eighteenth and nineteenth contentions made by Mrs. Faircloth were sustained by his Honor, to which there was no exception.

The twentieth contention made by Mrs. Faircloth, that the investment in North Carolina and Atlantic and North Carolina Railroad bonds and the shares in the Bank of Wayne is a wise and advantageous investment and should not be disturbed, and she contends that she is entitled to one-half thereof in specie, was sustained by his Honor, and the executor excepts.

We are of the opinion that those securities or investments should not be converted into money, unless the exigencies of the estate demand it, and that Mrs. Faircloth is entitled to have her share thereof in specie, provided the executor does not find it necessary to sell them for the purpose of paying debts. It would seem from the condition of the estate set forth in the case agreed that it would not be necessary so to do, and we can see no good reason why Mrs. Faircloth should not have, as near as may be, one-half of these securities in specie. We feel quite sure that the executor will be able and will be inclined to comply with her wish in regard to this property. We would not be understood as saying that a distributee has a right to demand investments of this character in specie, unless it is manifest that no necessity exists for converting the investments into money. We can appreciate the difficulty which will be presented in dividing the other one-half of these securities between the seven legatees named in item 6, and such course will be pursued in respect thereto as will promote the interests of the legatees. We can-

(503) not perceive how the legatees named in item 6 can be injured by this ruling, because if these bonds and stocks were sold Mrs. Faircloth would receive one-half of the proceeds.

His Honor directed that there being a deficiency of the personal estate after the payment of debts to pay the legacies provided for in item 6 which was caused by the operation of law by reason of the dissent of Mrs. Faircloth, the court being of opinion that the entire loss should not fall upon the specific legacies or specific devises, adjudged that the said deficiency be apportioned ratably between the specific legatees, including the legatees named in item 6 and the specific devisees. He appoints a referee to ascertain the value of the entire personal estate, etc. To this portion of the judgment the trustees of the Baptist Female University and the Thomasville Baptist Orphanage excepted.

For the reasons hereinbefore given, we think that the judgment in this respect is erroneous. Applying the principles which we have announced, the executor will first deliver to the legatees of the specific legacies, namely, F. W. Faircloth, and the trustees of Wake Forest College, the property specifically bequeathed to them. He will then deduct from the total value of the personalty the debts and charges of administration; one-half of the remainder he will pay to Mrs. Faircloth for her distributive share; the other half will be paid to the legatees named in item 6. Schouler on Executors, sec. 490; Iredell on Executors, 238. The executor will, if practicable, deliver to Mrs. Faircloth, as a part of her distributive share, one-half of the securities hereinbefore mentioned, and the other half will be delivered to the legatees in item 6 of the will. The rents accruing from the several pieces of realty will be paid to the devisees to whom the realty is given. The rents on that portion allotted to Mrs. Faircloth as her dower will be paid to (504) her. The executor will take from the legatees refunding bonds to indemnify him against any claims which may accrue by reason of the contract made by his testator with the United States Government in regard to the "Law Building."

This case has presented a number of questions of which a court of equity would not take jurisdiction in the exercise of its duty and power of advising executors and trustees. *Taylor v. Bond,* 45 N. C., 5; *Cozart v. Lyon,* 91 N. C., 282; *Tyson v. Tyson,* 100 N. C., 360.

This being a controversy without action under The Code, we have found no difficulty in taking jurisdiction and deciding the questions affecting the rights of devisees in connection with advising the executor in discharge of his trust.

The costs of the appeal will be paid by the executor out of the funds of the estate. The judgment of his Honor is

Modified and affirmed.

CONNOR, J. This is the appeal of the plaintiffs, the Trustees of the Baptist Female University and the Trustees of the Thomasville Baptist Orphanage. The questions presented upon this appeal have been disposed of in the opinion filed in the appeal of the defendant executor. In accordance with the disposition of that appeal, the judgment rendered by his Honor is

Reversed.

DOUGLAS, J., dissenting in part: The unanimous decision of this Court that the bequests in item 6 of the will are demonstrative legacies leaves but little in this case beyond the naked principles of law, which, however, are too important to be ignored. It is admitted that under the construction of the Court the bequests in items 1, 2, 3, 5, and 11 are utterly valueless. Aside from the bequests of $1,000 each to the Thomasville Baptist Orphanage and the First Missionary Baptist Church of Goldsboro, they are legacies of nominal value, mere (505) tokens of affection, intended perhaps to purchase some memento of the testator. It seems a pity that these little gifts from a dying hand to those he loved and to the church in which he worshiped cannot be paid. They were as much the objects of his bounty as those whose larger gifts have been *increased* by the decision of this Court, by the process of acceleration. No one can more fully appreciate the benefits of education than I, or more deeply appreciate the noble conduct of those who give or labor for the elevation of others; but these feelings have no room in the consideration of this matter. I am now seeking to find the intention of the testator as expressed in his will. It is his purpose and not my own that I am attempting to effectuate. But it is said that the dissent of the widow has defeated the intent of the testator, and that we must now construe his will in accordance with legal principles and judicial decisions. That is true, but judicial decisions are merely the declaration of legal principles, and such principles are, with the single exception of the rule in *Shelley's case,* rules of construction intended to ascertain the *true intent* of the instrument under consideration.

It is clear that the testator intended his widow to take whatever she might get from the property mentioned in items 7 and 8, because he said so in plain words. This seems to be an appropriation of that property to the claims of the widow, and while she may get more than the testator intended, and get it in a different way, I see no reason why the property he himself pointed out should not first be exhausted. He did not intend that the devises to the college and the orphanage should take effect immediately, else he would have said so, and would not have said that they would be postponed to the just claims of his (506) widow for an adequate support during her few remaining years.

The Court cites *Adams v. Gillespie,* 55 N. C., 244; *Holderby v. Walker,* 56 N. C., 46, and *Wilson v. Stafford,* 60 N. C., 647; but they do not support the general principle as enunciated by the Court, because they are based upon the particular facts in each case. All of them seek to carry out the intention of the testator, as far as possible, and in none of them are there conflicting legacies which are destroyed by the acceleration. If a man leaves his property to his widow for her life, with remainder to his only child for her life, with a further remainder in fee to her children, of course the daughter's estate is accelerated when the widow dissents, because there is no one else to take the property. If the daughter did not take as devisee, she would take as heir. It is true that this Court has said in *Adams v. Gillespie* that "The dissent of the widow has removed her life estate from all the property given to her by the will, and which she does not take independently of it, and the effect of it is to hasten the enjoyment of the life estate devised and bequeathed to the testator's daughter." But the Court in the same case further says: "It is unnecessary to decide whether Mrs. Whittington (the daughter) takes the real estate for her life by implication from the will, or by descent, as being undisposed of by the devise. It is certain that she takes it the one way or the other, because the interest of her children in it is expressly postponed until her death." The Court further decides in that case that, "In allotting the widow's share, she must have, as a part of it, half the value of the girl Jane, and for the purposes of a division, the girl must be sold." The only apparent reason for this ruling is that the *will provided* that the widow should have half the value of Jane, and it seemed proper that when the widow dissented from the will she should take, as part of her distributive share,
(507) the identical property bequeathed to her by the will. What the Court really said in *Holderby v. Walker* was that, "It is admitted *by the parties* to this controversy that the dissent of the widow to the will of her husband discharges the share of his estate, which she takes under the law, from the burden of maintaining and educating the infant defendant, Elizabeth Ellington. It is admitted *further* that as the life estate intended by the will for the widow is removed out of the way as to all the property which has not been assigned to her, such property has or will by the assent of the executor become vested in possession"—that is, that upon the facts of that case there was no contention between the parties on that point, and therefore it was not really before the Court.

In *Beddard v. Harrington,* 124 N. C., 51, in an opinion concurred in by *Chief Justice Faircloth* himself, this Court directly decided the question against acceleration. Another interesting case is that of *Lassiter v. Wood,* 63 N. C., 360, in which the testator specifically devised his lands

to his sons, and directed that his daughters be paid $10,000 each *out of his estate.* The war practically destroyed his personal property. This Court held that as the paramount intent of the testator was the equality of benefit between his children, the pecuniary legacies to the daughters were "chargeable upon the lands devised to the sons so far as is necessary to produce equality among all the children of the testator."

These principles may make but little difference in the pecuniary result of this action, but they are of far-reaching importance and may unjustly affect other cases in the future.

I come now to the last point upon which I dissent. It seems that this mere promise, for I see no element of a contract, to donate $1,000, has been amply adeemed by a most generous legacy, and should not now come in as a debt or destroy other legacies of equal merit, such as that to his home church.

Popular education is one of the noblest objects of a Christian (508) age, but a gift should be the deliberate act of the donor. To construe into a contract a merely voluntary promise made upon the spur of the moment and perhaps under the influence of religious fervor, would in my opinion be subversive of the highest principles of jurisprudence as well as of public policy. In this case the promise was clearly within the ability of the testator, who was a man of clear and deliberate judgment, but in other cases it might not be, and its legal enforcement might be oppressive to the promisor and unjust to a dependent family.

My views are so clearly and strongly expressed by the Supreme Court of Massachusetts in an opinion delivered by *Chief Justice Gray,* afterwards on the Supreme Court of the United States, in *Church v. Kendall,* 121 Mass., 528, 23 Am. Rep., 286, that I will close this opinion by the adoption of its language. Its numerous citations are omitted for the sake of brevity. There are numerous other decisions to the same effect, but this is sufficient to express my views. The Court says:

"The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration there must be either a benefit to the maker of the promise, or a loss, trouble, or inconvenience to, or a charge or obligation resting upon the party to whom the promise is made. A promise to pay money, to promote the objects for which a corporation is established, falls within the general rule. In every case in which this Court has sustained an action upon a promise of this description the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or

(509) obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise. . . . Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. . . . The suggestion in 5 Pickering, 508, substantially repeated in 6 Metc., 316, and in 9 Cushing, 539, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant;' was in each case but *obiter dictum,* and appears to us to be consistent with elementary principles. Similar promises of third persons to the plaintiff may be consideration for agreements between those persons and the defendant; but as they confer no benefits upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him. The facts in the present case show no benefit to the defendant and no vote or contract by the plaintiff, and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not, therefore, appear that there was any legal consideration upon which this action is brought."

CLARK, C. J., concurs in dissenting opinion.

Cited: Morisey v. Brown, 144 N. C., 156; *Rousseau v. Call,* 169 N. C., 177; *Boushall v. Stronach,* 172 N. C., 275; *Young v. Harris,* 176 N. C., 635.

---

(510)

McNEILL v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

(Filed 28 April, 1903.)

Negligence—Carriers—Passengers—Passes—Damages—Personal Injuries—Laws 1899, Ch. 164, Secs. 13, 22—Railroads.

The editor of a newspaper riding on a pass issued contrary to the law cannot recover for injuries received through the negligence of the carrier. He can recover only for injuries which are inflicted wilfully and wantonly.

ACTION by W. H. McNeill against the Durham and Charlotte Railroad Company, heard by *O. H. Allen, J.*, and a jury, at January Term, 1903, of MOORE. From a judgment for the plaintiff, the defendant appealed.

U. L. Spence, W. J. Adams, and Douglass & Simms for plaintiff.
Guthrie & Guthrie, Murchison & Johnson, and H. F. Seawell for defendant.

CLARK, C. J. This is an action of tort arising out of contract for personal injuries alleged to have been received by the plaintiff, 6 April, 1900, by negligence of the defendant while traveling on its road. The complaint avers that the plaintiff was a passenger on said railroad under a contract by it to carry the plaintiff for a valuable consideration. The defendant in its answer, among other things, avers that the plaintiff was a "trespasser on its train, having tendered to defendant no ticket, money or compensation whatever for its fare, only a free pass which had expired 1 January previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person or loss or damage to his baggage.

The plaintiff testified that he was "editor of the *Carthage* (511) *Blade*, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I did publish the time-table and the defendant agreed to continue the contract and renew the pass for 1900." It is true, he said he told the conductor he would pay the fare, but upon his making the above statement the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not wilfully and wantonly injure him. *Cook v. R. R.*, 128 N. C., 333. Laws 1891, ch. 320, sec. 4, provides that "If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or *other device*, charge, demand, collect, or receive from any person or persons a *greater or less* compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, or receives from any other person or persons for doing for him or them a like and contemporaneous service

in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter contains the exceptions which permit handling free and at reduced rates property of the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of
(512) orphan asylums or any department thereof, or the issuance of mileage, excursion, or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of National homes or State homes for disabled volunteer soldiers and of soldiers and sailors orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees."

These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine "not less than $1,000 and not exceeding $5,000" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but let it be what it may, it could not amount exactly "neither more nor less," to the value of a free pass to travel *ad libitum,* an unstipulated number of miles over the defendant's road. Besides, it was an illegal dis-
(513) crimination to sell the plaintiff transportation on credit and not payable in money.

This statute was before this Court and the clear meaning of the statute and the duty of the Court to enforce the public policy indicated by its unequivocal terms were stated in an exhaustive and able opinion by

Mr. Justice Montgomery, S. v. R. R., 122 N. C., 1052, 41 L. R. A., 246. In the concurring opinion of *Mr. Justice Douglas,* in that case, it was stated that the number of free passes issued in this State per year was understood to be over 100,000, and after deducting the free passes issued in the cases allowed by the act, over $250,000 of transportation was given away each year, mostly to the classes best able to pay, and that this quarter of a million dollars was perforce added to the fares of those who paid their way. This was to show the public policy which required that such discrimination should be forbidden.

Sections 4 and 25, ch. 320, Laws 1891, above quoted, were copied from the act of Congress forbidding such discriminations, and the rulings of the Interstate Commerce Commission and of the Federal courts thereon have been to the same effect as our own, many of those decisions being cited by *Justice Montgomery* in *S. v. R. R.,* 122 N. C., 1063-1067, 41 L. R. A., 246. At page 1060 it is well said: "The thing which was denounced by the statute and for which the defendant is indicted is not the *act of giving the free pass,* the mere handing to the passenger the piece of paper on which was written the privilege of riding free, but the actual transporting the favored passenger without *charge or the payment of fare.* The law would be violated when no pass was actually issued, if the passenger was carried free. The favored passenger might be known to the conductor, or be known to him by preconcerted signs, or *mileage-books distributed gratis, or sold at reduced rates,* (514) and *in other ways.*"

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than $1,000 nor more than $5,000." While the plaintiff was not himself made indictable (as in some States), he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are *in pari delicto,* and the Court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law.

In *Cook v. R. R.,* 128 N. C., 333, a tramp was stealing a ride. He was on the train unlawfully. In *Pierce v. R. R.,* 124 N. C., 83, 44 L. R. A., 316, a boy had jumped on a switching train and was riding thereon contrary to the town ordinance. The Court held that the company was liable in such cases only for any wilful or wanton injury in-

flicted by the employees of the company. Here, the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy or the stealing of a ride by a tramp. To same purport, *R. R. v. Burnseed,* 70 Miss., 437, 35 Am. St., 656, and notes; *Hardyer v. R. R.,* 45 Kan., 379, and cases cited. The plaintiff is an educated, reputable gentleman, a member of an honorable profession, but being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the
(515) statute, his rights as against the company are the same as those of others who were also riding contrary to law. He neither shows nor avers wilful, wanton, or malicious injury, and cannot recover.

In *S. v. R. R.,* 122 N. C., 1052, 41 L. R. A., 246, the defendant set up the plea of ignorance of the law, but the Court said every one was fixed with knowledge of the law. The plaintiff has had the additional advantage of the notice given by the construction of the statute in that case. In a subsequent case, *S. v. R. R.,* 125 N. C., 666, the Court repeated that free transportation (or reduced rates), except in cases allowed by the statute, "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage-book, not in truth paid for, but donated by the company. It is the fact of *discrimination,* and not the *method* by which it is done, *which constitutes the offense.*" Subsequent to these decisions, the General Assembly reënacted these sections as section 13 and 22, chapter 164, Laws 1899, with no substantial change, though some other sections were repealed.

The constitutions of eleven States—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the Legislature or other officeholder whatever, and some of these constitutions, like the Federal statute and our statute and the statutes of yet other States, as Colorado, Massachusetts, North Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to any one, whether officeholder or not, with exceptions similar to those enumerated in our statute, above set out. Indeed, the constitutions of four States—New York, Missouri, California, and the recently adopted constitution of Virginia—
(516) make the acceptance by any officeholder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy of equality in treatment by *quasi*-public corporations whose infringement our statute punishes with a fine "not exceeding $5,000," and whose observance it is the duty of all courts to enforce. The denunciation of the statute is

directed against discrimination in the exercise of a *quasi*-public function which public policy demands shall be discharged with absolute impartiality and equality—"with equal rights to all and special privileges to none."

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliot R. R., sec. 1608), and can be considered only when the pass is issued in one of the cases permitted by our statute. It has no application to a case like this, where the contract of free carriage is illegal and the parties are *in pari delicto*.

This is a stronger case for the defendant than *Turner v. R. R.*, 63 N. C., 522, in which a soldier *contracted* with a railroad company for transportation to Johnston's Army to serve against the United States and was injured en route by negligence of the company, and it was held that he could not recover damages, *Reade, J.*, saying that the contract of carriage being illegal, the parties "were *in pari delicto*," and the court "would consult its dignity, and not interfere in their dispute." To same purport *Martin v. Wallace*, 40 Ga., 52; *Redd v. R. R.*, 48 Ga., 102; *R. R., v. Redd*, 54 Ga., 33.

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations. In refusing to grant judgment as of nonsuit, there was (517)

Error.

DOUGLAS, J., dissenting: I am inclined to think that the plea *in pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

Cited: *S. c.*, 135 N. C., 682, 720; *Marable v. R. R.*, 142 N. C., 562; *Lloyd v. R. R.*, 151 N. C., 540.

SHEPARD'S POINT LAND COMPANY v. ATLANTIC HOTEL.

(Filed 5 May, 1903.)

Navigable Waters—Grants—Riparian Owners—Easements—The Code, Sec. 2751—Laws 1889, Ch. 555—Laws 1891, Ch. 532—Laws 1893, Ch. 17—Laws 1856, Ch. 136—Waters and Water-courses.

A grant to a riparian owner of land covered by navigable water conveys only an easement therein, and a deed of the land adjoining the navigable water conveys the easement in the land covered by the water.

ACTION by Shepard's Point Land Company against the Atlantic Hotel, heard by *Brown, J.*, at September Term, 1902, of CARTERET. From a judgment for the plaintiff, the defendant appealed.

W. W. Clark and Lindsay Patterson for plaintiff.

C. L. Abernethy, Simmons & Ward, and Armistead Jones & Son for defendant.

CONNOR, J. The plaintiff brings this action for recovery of possession of a tract of land described in the complaint as "lying and being situate in the county of Carteret, in Morehead City, adjoining the square on which the hotel building of the defendant is located, and known and described as Square No. 83 in the plan of Morehead City." It (518) alleges that the defendant is in possession of the above-described lot "upon which there has been erected certain walks, wharves, bath-houses, pavilion, etc., and that such possession is unlawful and wrongful."

The defendant denies that the plaintiff is the owner of the property described in the complaint and denies that it is in possession thereof except that it has a wharf, walkway, and two bath-houses leading from the rear of said hotel over and into the waters of Bogue Sound. It avers "that Bogue Sound is an arm of the sea, navigable for sea vessels and other ships, and the said hotel is about a mile from the Atlantic Ocean; the tide from said ocean ebbs and flows daily in said sound upon the shore whereupon the said hotel is located, and the space between the said hotel and bath-houses and where the walkway and wharf are situated is covered by the waters of said sound, and the defendant is advised that the plaintiff has no title thereto."

The plaintiff claims the land, which is covered by water, described in the complaint and known in the plan and on the map of Morehead City as Square No. 83, under the following chain of title, to wit: Grant from the State to John M. Morehead and W. L. Arendell, bearing date 2 May, 1856. The grant is made to said grantees, "owners and riparian proprietors of the lands known as the Shepard's Point lands on Beaufort

Harbor." It includes the "tract or parcel of land lying around Shepard's Point lands and between high-water mark and the deep water of Bogue Sound, Newport River, and Calico Creek." The description in the grant covers 502 acres of land and surrounds the lands known as the Shepard's Point lands, which by the charter of Morehead City embraces the entire water-front of the said city and runs out from high water mark on the shores of said lands to the deep water of said sound, river, and creek. The Shepard's Point Land Company was chartered by chapter 136, Laws 1856. The charter was extended by (519) chapter 50, Laws 1887. The town of Morehead City was incorporated by chapter 172, Laws 1860-'61. Section 6 provided, "That the corporate limits of said city shall embrace the entire plan of the city of Morehead as published by the Shepard's Point Land Company, and from the terminus of the Atlantic and North Carolina Railroad Company to Fifteenth Street."

The plaintiff introduced deeds tending to show that at the time of issuing the grant, 24 May, 1856, the grantees were the owners of Square No. 1, and that said square was abutting Square 83, the latter being the water-front covered by water and extending out into Bogue Sound. The plaintiff offered deeds tending to show that the defendant company had acquired title by direct chain from John M. Morehead and W. L. Arendell through the plaintiff, who owned Squares Nos. 1 and 83 at the time of the conveyance of Square No. 1, upon which the "Atlantic Hotel" is located. The plaintiff introduced a deed from the Shepard's Point Land Company to John M. Morehead, dated 19 August, 1859, conveying Square No. 1, "bounded on the north by Arendell Street, on the east by Third Street, on the south by Evans Street, and on the west by Fourth Street." The plaintiff introduced chain of title to Square No. 1 from John M. Morehead to the defendant, and also introduced a map of Morehead City. It will appear by reference to that map that Evans Street for a considerable distance, and especially between Squares Nos. 1 and No. 83, "is covered by the tidewater at high tide and has never been opened between Squares Nos. 1 and 83, and is not used as a public street."

W. L. Arendell, a witness for the plaintiff, testified: "The hotel is on Square No. 1, and is known as the Atlantic Hotel. The water-front is Square No. 83, and is covered by water. At low tide a small portion of it is not covered by water. The wharves and bath- (520) houses on Square 83 were built in the latter part of 1880 by the Morehead City Hotel Company, under whom the defendant claims. There are two wharves or piers. They are about 8 feet wide, and one is about 200 feet long and is connected with the hotel and extends out into Bogue Sound; about 50 feet from the end of it is the gentlemen's bath-

house. The other pier extends out into the sound about 80 feet, and is connected with the other wing of the hotel, and at the end of it is the ladies' bath-house. These wharves and bath-houses are in the waters of Bogue Sound and on Square 83. The depth of the water at the end of the long pier is from 6 to 8 feet, sometimes more, sometimes less, according to the tide. The depth of the water at the end of the ladies' pier is about 5 feet, varying according to the tide. The tidewater at high tide washes up to Square No. 1 and within a few inches of the brick foundation of two of the wings of the hotel. Square No. 83 is south of Square No. 1, and is generally covered by water. There was a street leading off, upon the plan of said town, between Square 83 and Square 1. This street is called 'Evans Street' and is 60 feet wide, but it has not been opened between Squares 1 and 83 and is not used as a public street of Morehead City. At high tide it would be very nearly covered by water. The grant to John M. Morehead and W. L. Arendell covers Square 83. Evans Street was laid off on the plan of the town after the issuing of said grant. Square 83 is always covered by the tide at any ordinary high tide, and the greater part of it is covered at low tide. The ocean tide comes in at the inlet, which is about two miles off, and ebbs and flows over Square 83; this square is a part of Bogue Sound. Boats sail from the ocean and on the ocean and back to the hotel, and sail over and about Square 83, and tie up and anchor all along the pier from its end up to 75 or 100 feet towards the hotel, according to the state of the tide. Square 83 covers the deepest part of that part of Bogue
(521) Sound, and that part is connected with the balance of the sound by navigable waters for small vessels, both to the eastward and to the westward. The Shepard's Point Land Company and Morehead never did build any wharves or piers on Square 83."

His Honor submitted to the jury the following issues:

1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint as Square 83?

2. Is the defendant in possession of any part thereof?

The court instructed the jury if they believed the evidence they should answer the first issue "Yes" and the second issue "Yes," and the defendant excepted. It was agreed that the court answer the issues accordingly. Judgment was rendered thereupon, and the defendant appealed.

The plaintiff's title and right to recover are dependent upon the construction of section 2751 of The Code, being chapter 21, Laws 1854-'55, in the following language: "All vacant and unappropriated land belonging to the State shall be subject to entry except lands covered by navigable streams: *Provided,* that persons owning lands on any navigable sound, river, creek, or arm of the sea, for the purposes of erecting wharves on the side of the deep waters thereof next to thir lands, may

make entries of the lands, covered by water adjacent to their own as far as deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. And when any such entry shall be made in front of the lands of any incorporated town, the town corporation shall regulate the line of deep water to which entry shall be made."

The question presented for decision is of great importance and by no means free from difficulty. It will be well, before entering into an examination of the principle and authorities by which we shall (522) be guided in reaching a conclusion, to note the history of the legislation in North Carolina in regard to the control and disposition of our navigable waters. It was held in *Tatum v. Sawyer,* 9 N. C., 226, that lands covered by navigable waters were not subject to entry under the entry law of 1777, "not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature."

Ruffin, J., in *Ward v. Willis,* 51 N. C., 183, 72 Am. Dec., 570, said: "It happened, however, that in the Revisal of 1836 those parts of the previous act were omitted, and therefore the Court felt bound to hold in *Hatfield v. Grimstead,* 29 N. C., 139, that entries of land in Currituck Sound were good after it ceased to have a tide or be navigable by reason of the closing of the inlet, or rather of such parts of the sound as frequently were not covered by water. When the omissions of the Revisal were discovered in 1846, the Legislature by an act of that year, chapter 36, revived the provision omitted by enacting that entries of land lying on any navigable water should be surveyed in such manner that the water should form one side of the survey and the land laid off back from the water; and proceeded further to enact that it should not be lawful to enter land covered by any navigable sound, river, or creek." The Court in that case held "that land lying between the high and low water lines of the tide of the ocean or a navigable stream is not subject to private appropriation under the acts authorizing the entry and grant of lands by the State."

This continued to be the law until 1854, when the act, section 2751 of The Code, was enacted. In 1889, chapter 555, this act was amended by adding after the word "navigation" the following: *"Provided further,* that no land covered by water shall be subject to entry (523) within 30 feet of any wharf, pier, or stand used as a wharf already in existence, or which may hereafter be erected by any person on his own land or land under his control or on an extended line thereof;

but land covered by water as aforesaid for the space of 30 feet from the landing-place or line of any wharf, pier, or stand used as a wharf as aforesaid, shall remain open for the free ingress and egress of said owner and other persons to and from said wharf, pier, or stand." By Laws 1891, ch. 532, the section is so amended as to read: *"Lands covered by navigable waters. Provided* that persons owning lands on any navigable water for the purpose of erecting wharves or fish-houses or for fishing in said waters in front of their lands, may make entries of the land covered by said water and obtain title as in other cases, but persons making such entries shall be confined to straight lines, including only the fronts of their own lands, and shall in no case extend a greater distance from the shore than one-fifth of the width of the stream, and shall in no respect obstruct or impair navigation: *Provided,* nothing in this act shall apply to Currituck County."

By Laws 1893, ch. 17, sec. 2751 of The Code is amended by striking out the words, "to which entries may be made," and inserting instead thereof the words, *"to which wharves may be built."*

It is noted in the plaintiff's brief, and known in connection with the history of the State, that at or about the time the act of 1854 was passed the Atlantic and North Carolina Railroad, having its terminus at what was to be Morehead City, although projected, had not been completed to that point.

The plaintiff's title is dependent upon maintaining three propositions: (1) That the title to navigable waters, sounds, arms of the sea, etc., is vested in the State and may be granted by the State to private
(524) individuals; (2) that by the grant issued to Morehead and Arendell, pursuant to the act of 1854, they became the absolute owners of the soil covered by the navigable waters of Bogue Sound, Newport River, and Calico Creek, described in the said grant and containing 502 acres; and (3) that such title as they acquired passed to and vested in the plaintiff corporation, separate and distinct from its ownership of the soil theretofore granted by the State, upon which is located the town of Morehead City, including the defendant's lot No. 1, upon which is built the Atlantic Hotel, and that its ownership is in no respect dependent upon the use to which the land in controversy is to be put, or its riparian ownership of the shore.

It is abundantly settled by the courts of this State and the United States that after the Revolutionary War the States became the owners of and retained the title to the lands covered by navigable waters, and that they have the power to grant those lands to private individuals. This has been the well-settled doctrine in this country since the case of *Martin v. Waddell,* 41 U. S., 367. "The principle has long been settled in this Court that each State owns the beds of all tidewaters within its

jurisdiction, unless they have been granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running." *McCready v. Virginia,* 94 U. S., 391.

Ruffin, J., in *Ward v. Willis,* 51 N. C., 183, says: "It seems thus to be clear that whatever soil is at any time covered by any navigable water in its natural state is deemed to be in the same state as if it were in the bed of the water; in other words, that it is all one, whether it be under the channel or the margin between the high and low water lines. The same public purposes require that here, as in England, the State should reserve lands in that situation from private appropriation, and although it may please the Legislature to dispose of that by (525) special grant *for the promotion of trade and the growth of a commercial town accessible to vessels, it rationally accounts* for the restriction upon the common mode of granting other public lands, and enables us to *discover* the extent of the restriction imposed, and understand the terms in which it is imposed."

Mr. Justice Field, in *R. R. v. Illinois,* 146 U. S., 387, thus defines the status of lands covered by tidewaters: "It is a settled law of this country that the ownership of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that could be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this Court, and is not questioned by counsel of any of the parties"—citing *Pollard v. Hagan,* 3 How., 212; *Weber v. Harbor Commissioners,* 18 Wall., 57.

For the purpose of this discussion, we treat the first proposition as settled. There has been, however, some discussion and conflict of opinion in respect to the extent of the right of the State to grant the soil under its navigable waters, held in trust for the use of all of the citizens, to private persons.

Mr. Justice Field, in a very able opinion in *R. R. v. Illinois, supra,* in discussing the character of the title which the State holds in her navigable waters, uses the following language: "The question, therefore, to be considered is whether the Legislature was competent to thus deprive the State of its ownership of the submerged lands in the (526) harbor of Chicago, and of the consequent control of its waters, or, in other words, whether the railroad corporations can hold the lands and

control the waters by the grant, against any future exercise of power over them by the State. That the State holds the title to the lands under Lake Michigan, within its limits, in the same manner that the State holds its title to soil under tidewater by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. *But it is a title different in character from that which the State holds in lands intended for sale.* It is different from the title which the United States holds in the public lands which are open to preëmption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *The interest of the people in the navigation of the waters and in commerce over them may be improved in various instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged land, and so long as their disposition is made for such purpose, no valid objection can be made to the grants.* It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in the aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable
(527) waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the Government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in the opinions of the courts, expressive of absolute ownership and control by the State of lands under

navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular case. *A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.* The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and the use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers (528) in the administration of government and the preservation of the peace. So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State. . . . We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of a private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The plaintiff contends that this Court has construed section 2751, and that the grantees, Morehead and Arendell, by the grant issued to them pursuant thereto, acquired the absolute ownership of the soil under the water, subject only to the right of navigation by the citizens of the State. If this contention be well founded, it must be conceded that the plaintiff may bring a possessory action and remove the defendant from any occupancy thereof. If the question had been decided by this Court we would feel compelled to follow such decision, as a rule of property, without regard to our own views. The first case in which the question came before the Court is *Gregory v. Forbes,* 96 N. C., 77. An examination of the original record on file in this Court shows that the plaintiff, a riparian owner, desiring to erect a wharf in the waters of North River, obtained a grant from the State for the lands adjacent thereto "for the purpose of erecting a wharf connecting with the shore, (529) under the provisions of section 2751 of The Code." The plain-

tiff averred that the defendant, who was not a riparian owner, had erected and is using a wharf on the lands embraced in the grant, and that the plaintiff was thereby prevented from erecting his wharf. The defendant set up a lease from the county commissioners, etc. The plaintiff, after showing title to the shore line, introduced a grant from the State to "the water-covered land in front of the shore." . . . The survey, after giving boundaries of 24 acres, annexes the qualifying words, *"for wharf purposes."* *Smith, C. J.,* says: "As the owner of the shore, the plaintiff had a right under the law to enter the water-front up to deep water so as not to obstruct navigation, and thus acquire property in the soil. The survey, and we assume the entry which it must follow, *expressly declares that it is for wharf purposes, and this is the only use for which the grant could issue.* . . . And for our present purpose the grant is operative. Inasmuch as the State can only issue a grant for land covered with navigable water *for the purpose of erecting a wharf, and this only to the riparian owner,* we are unable to see how the right claimed by the defendant could be conferred by the county commissioners to a stranger, like the defendant." The court below having held upon the plaintiff's showing that he was not entitled to recover, the Court simply decided that "the case was a proper one for them to pass upon." In our opinion, this case falls very far short of sustaining the position of the plaintiff in this action. We note the careful restriction which the Chief Justice places upon the words of the grant. It is sufficient to note now that it is only for our "present purpose that the grant is operative."

As shown by Mr. Monroe's very accurate and valuable "Marginal (530) Annotations," the case is not cited in our Reports.

The next case in which the Court expresses an opinion in regard to the construction of section 2751 is *Bond v. Wool,* 107 N. C., 139. This was a controversy between two riparian owners, neither having any grant under the section of The Code referred to, but relying entirely upon their rights as riparian owners. The plaintiff sought to enjoin the defendant from interfering with his fish-house by a threatened erection of a wharf in front of the defendant's land. The construction of section 2751 was not in any way involved in the discussion or the decision of the case. The Court held that, "leaving our Legislature out of view, the plaintiff, or H. A. Bond, Sr., under whom he claims, is at least in the discussion of this appeal to be considered as holding, as an incident to the ownership of lot No. 187, the right to build fish-houses over the water at any point east of the dotted line . . . and in front of the said lot between the land and the navigable water, etc. But the defendant Wool has, if his interest is not affected by our statute, the very same right," etc. It is true that the Court proceeds to cite the statute and comment upon it, noting that the riparian owner was restricted by

Laws 1777, ch. 114, sec. 15, to the water-mark, etc., saying: "The act of 1854-'55 (The Code, sec. 2751) made an exception in favor of riparian owners on any navigable sound, river, creek, or arm of the sea, by giving to them the exclusive privilege of acquiring the absolute fee in the precise territory on their fronts, in which they already held, as incidents to the original grant, the qualified property or appurtenant right which we have defined."

In *Holly v. Smith,* 130 N. C., 85, *Clark, J.,* says: "The land here in question, as was admitted on the trial, is covered by the navigable waters of Chowan River, and therefore it was not subject to entry, *except for wharves by the adjacent riparian owner in front of* (531) *his own property,* and even then subject to restriction." No other cases in our Reports construe this section of The Code.

In *S. v. Glenn,* 52 N. C., 321, *Battle, J.,* says: "We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for navigation of sea vessels are navigable waters, the soil under which is not subject to entry and grant under our entry law." This case was decided in 1859. No reference is made to Laws 1854-'55, ch. 21.

The authorities bearing upon this subject in other States are conflicting, and it is difficult to thread our way through the divergent decisions. To some extent, this conflict may be explained by noting the distinction between the title to flats and marshes over which the tide ebbs and flows, but which are not in any correct sense of the term navigable waters, and those cases in which the land sought to be recovered is covered by navigable water. The learned counsel for the plaintiff frankly concedes that the question presented is, "Who owns the soil covered by Bogue Sound, Newport River, and Calico Creek?" Newport River is navigable some distance above Morehead City. *Doughty v. R. R.,* 78 N. C., 22.

In *Chisholm v. Cairns,* 67 Fed., 285, *Simonton, Circuit Judge,* says: "It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers and highways of commerce, and these mud shores cast up by the currents on the sides of the harbors and streams. The former must always be kept open for *public use, commerce, trade, and pleasure.* The latter can be separated from any public use and can be vested in individuals."

A correct decision of this case involves an inquiry as to the extent to which the State has parted with the title to the land described in the grant under which the plaintiff claims, and what effect (532) shall be given to the words, "for the purpose of erecting wharves on the side of the deep waters next to their lands." The grant must be read and construed as if these words were written into it. The plaintiff

insists that the absolute ownership of the soil passed under the grant; that by it the grantees, although described as "riparian owners and proprietors," became the owners of Square 83 independent of their ownership of the shore; that whatever rights they had incident to their riparian ownership were destroyed, or at least merged into their separate and independent ownership under the grant; that when the land company conveyed to John M. Morehead Square No. 1 by deed bearing date 19 August, 1859, he took title to the lot stripped of any riparian rights in respect to the navigable waters upon which it abutted; that the defendant took its title from persons claiming through Morehead in the same plight and condition. In this connection, the plaintiff calls attention to the fact that Evans Street, 60 feet wide, separates Square 1 from Square 83, and that therefore the defendant does not abut upon Square 83. The evidence in regard to the street is that of W. L. Arendell, who says: "This street is called Evans Street and is 60 feet wide, but it has not been opened between Squares 1 and 83, and is not used as a public street of Morehead City; at high tide it would very nearly be covered by water. Evans Street was laid off on the plan of said town after issuing of the grant." In the absence of any evidence that there was a dedication to or acceptance or use of the street by the town, in the view which we take of the title which Morehead and Arendell acquired by the grant, we do not think the so-called street can be considered as affecting the rights of either party to this controversy. The plat seems to have been made prior to 1860, and during all these years no (533) one has ever claimed, used, or treated these 60 feet as a street. It is incapable of being so used. We therefore dismiss this phase of the case from further consideration.

The defendant contends that the grant conferred upon the grantees only an easement, giving the right to build wharves out to deep water. Certainly, some force and effect must be given to the limitation put upon the use to which the thing granted may be put. The policy of the State from 1777 until 1854 was, as we have seen, to preserve its title to the navigable waters, as the same had been held by the King of England, in trust for the free use of all of its citizens. As said by *Ruffin, J.*, in *Ward v. Willis,* 51 N. C., 183: "When it was found that in the revisal of the statutes to prohibition against entry and appropriation had been omitted, as pointed out in *Hatfield v. Grimstead,* 29 N. C., 139, the Legislature immediately reënacted the omitted sections. Prior to 1854 the owners of lands abutting upon navigable waters had as incident thereto certain riparian rights, the extent and stability of which were not very well settled either in this or other States of the Union. The State had on 27 December, 1852, chartered the Atlantic and North Carolina Railroad Company, which was to have its eastern terminus at a

point afterwards known as Morehead City. The State aided liberally in building this road, as did the counties through which it runs. This road was to be the completion of a system of railroads connecting the western portion of the State with the ocean, and thereby making a North Carolina system of travel and transportation. It was the conception of a wise and patriotic statesmanship." *Bynum, J.,* in his very able dissenting opinion in *S. v. R. R.,* 72 N. C., 645, says: "No railroad scheme was ever devised by more of the wisdom and patriotism of the State. It was intended to be in fact what it was in name, the *North Carolina Railroad,* which, when completed from the Atlantic to the Tennessee line, would radiate a uniform system of lateral roads con- (534) necting all parts of the State in a common brotherhood by an easy and convenient intercommunication of trade and travel." Beaufort Harbor was to be the haven for vessels and steamships which were to bring to and carry from the State its imports and exports. It was expected that a great seaport city was to grow up. It is interesting to note that by chapter 136, Laws 1856, the plaintiff corporation was chartered, one of the powers conferred being to "erect wharves," and that on 16 February, 1855, ch. 22, Laws 1855, the act was passed on which the plaintiff bases its claim. In 1860, Morehead City was chartered, the boundaries of which, as we have seen, corresponding with those of the Shepard's Point Land Company. Considered in the light of the then existing conditions, it is difficult to believe that the policy of the State for nearly a century was to be reversed and the growth of the prospective seaport was to be hampered by the grant of the absolute ownership of the entire water-front thereof, separate and distinct from the ownership of the abutting lands; that the State was to part with this property which it held in trust for all of its citizens. Nothing, save a clear declaration of such purpose, would justify this conclusion. At that time the rights of riparian owners, while defined, were not settled in respect to their freedom from State interference. Lewis on Eminent Domain says: "The older and perhaps more numerous authorities hold that such an owner has no private rights in the stream or body of water which is appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the water over his land, and the public has not. . . . Access to the use of the stream by the riparian owner is regarded as merely permissive on the part of the public, and liable to be cut off absolutely if the public see fit to (535) do so." Vol. 1, sec. 77.

The courts had very generally held, both in this country and England, that such was the extent of his rights. Wood on Nuisances thus states

the law: "He does not, from the mere fact that he is the owner of the bank, acquire any special or particular interest in the stream over any other member of the public, except by his proximity thereto he enjoys greater convenience than the public generally. . . . But this is a mere convenience arising from his ownership of the lands adjacent to the high-water mark, and does not prevent the State from depriving him entirely of this convenience by itself making erections upon the shore or authorizing the use of the shore by others in such a way as to deprive him of this convenience altogether; and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria.*" 1 Wood on Nuisances (1 Ed.), 592. This doctrine had been held by the New York courts in 1852 in *Gould v. R. R.*, 6 N. Y., 522. The Supreme Court of the United States has so held in *Hoboken v. R. R.*, 124 U. S., 690. This Court in *Collins v. Bembury*, 27 N. C., 118, 42 Am. Dec., 115, held that the riparian owner did not have the exclusive right of fishing "unless right be derived from an express grant by the soverign power."

We can readily understand that Governor Morehead, a man of great sagacity and wisdom, recognized the necessity of securing the permanency as well as the extent of the riparian rights which had been acquired by the grant of the Shepard's Point lands. It is evident that it was its purpose to sell the lots, which the map in evidence shows had been laid off, and encourage persons to buy and build upon them. Cer-
(536) tainly, he did not intend to secure the absolute ownership of the entire water-front of the prospective city and hold it separate and apart from the ownership of the land, which he, as president of the land company, was conveying to purchasers. He certainly did not contemplate controlling the gateway to the channel and cutting off the fishing and other privileges incident to the ownership of the abutting land, such as building wharves, etc. To have done so would have been destructive of its growth and prosperity, and would have reversed the policy of the State for so many years. If the construction contended for by the plaintiff is correct, no purchaser of a town lot fronting on the waters could have erected a wharf, pier or bath-house, or enjoyed many other privileges incident to his riparian ownership without the consent of the owners of the navigable waters, and the Shepard's Point Land Company could now levy tribute upon the commerce, business, and pleasure of the citizens of the town. The right of navigation would be of little value if a corporation, after selling the lots with water-fronts, could prevent the building of wharves and enjoying other privleges. If this were the purpose and policy of the Legislature, why restrict the grant to the purpose of "erecting wharves on the side of deep water thereof next

to their lands"? and why restrict the privilege to "persons owning land on any navigable waters"?

It has been held in recent years, both in this country and in England that the riparian rights which vest in the grantee of lands are vested rights, and cannot be taken or separated from the ownership of the land except for public purposes, and then by paying compensation therefor.

Gould v. R. R., supra, was expressly overruled by *Rumsey v. R. R.,* 133 N. Y., 79, 15 L. R. A., 618, 28 Am. St., 600, in which it was held that the owner of land upon a public river is entitled to such damages as he may have sustained against the railroad company (537) which constructs its road across its water-front, and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. The riparian rights, which the grantee acquires by virtue of the grant of the abutting soil, are stated by *Mr. Justice Miller* in *Yates v. Milwaukee,* 10 Wall., 497: "Whether the title in the owner of such lot extends beyond the dry land or not, he is certainly entitled to all the rights of the riparian proprietor whose land is bounded by a navigable stream, and amongst those rights are access to the navigable parts of the river from the front of his land, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation."

In *Duke of Buccleuch v. Board of Works,* L. R., 5 E. and I. Appeals, 418, and 41 L. J., Ex., 137, *Lord Cairns* says: "It has appeared to me throughout that the property of the plaintiff in error in this case was what is commonly called riparian property. The meaning of that is that it had a water frontage. The meaning of its having a water frontage is this, that he had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with the right which the plaintiff in error possessed, was taken for the purposes of the act. Beyond a doubt, (538) this water right was a property belonging to the plaintiff for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the plaintiff was entitled upon that footing."

In *Lyon v. Fishmonger's Co.*, L. R. 1, Appeal Cases, 670, it is held that a riparian property owner on the river Thames and the owner of lands near a public dock upon the river were entitled to compensation in respect to their lands being injuriously affected by being deprived of access to the river and dock.

Lewis on Eminent Domain, sec. 83, says: "The following rights may be enumerated as appurtenant to property upon public waters:

"1. The right to be and remain a riparian proprietor and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water.

"2. The right of access to the water, including a right of way to and from the navigable parts.

"3. The right to build a pier or wharf out to the navigable water, subject to any regulations by the State.

"4. The right to accretions or alluvium.

"5. To make reasonable use of the water as it flows past or laves the shore."

He says it follows that any injury to riparian rights sufficient to be used is a taking for which compensation must be made.

Thus we see that when the soil was granted by the State, that certain riparian rights passed as incidents thereto, and that these rights were vested, and the State could not itself nor permit others to interfere therewith except for public purposes, and then only by making compensation.

It would seem to follow from this conclusion that the original
(539) grantees of the Shepard's Point lands acquired rights in the navigable waters which the subsequent grant could not affect injuriously, and that these rights passed as appurtenant to such lands to the purchasers thereof.

The Legislature of Florida in 1856 passed an act reciting that "Whereas it is for the benefit of commerce that wharves be built and warehouses erected. . . . ; and whereas, the State being proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving their water lots." it is thereupon enacted that the State, "for the consideration above mentioned, divests herself of all right, title, etc., in lands covered by water in front of any tract of land. . . . " The Supreme Court of that State, in *Florida v. Phosphate Co.*, 32 Fla., 82, 21 L. R. A., 189, says: "In construing this act, not only are we to keep in view the real nature of the subject-matter, but it is to be judged in the light of the rule applicable to all grants by the Government, which is, that they are to be strictly construed or to be taken most beneficially in favor of the State and against the grantee. . . . The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses

and purposes." The State, "for the consideration above mentioned," divests herself and invests the riparian owner with title to the land.

"These considerations" are for the purpose and end that commerce may be benefited by the building of wharves, piers, etc. And the grant in this case is one of the class in which the subject of the grant, as long as it is of that character to be used or built for the benefit of commerce, is apparent and controlling. The Court held that the right acquired was confined to the purposes set forth in the act.

In *Gregory v. Forbes,* 96 N. C., 77, *Smith, C. J.,* says: "The survey, and we assume the entry which it must follow, declare (540) that it is for wharf purposes, and this is the only use for which the grant could issue."

It is elementary learning that in construing a grant every part thereof must be given effect, unless absolutely inconsistent with other parts. Thus, in *Robinson v. R. R.,* 59 Vt., 426, land had been conveyed for the "use of a plank road." The description of the land was complete without these words. The Court said: "This clause can have no force as a description of the premises conveyed, and no force at all, unless as qualifying and limiting the grant. It is an important rule of construction applicable to all written instruments that every word and every clause shall so far as possible be given some force and meaning; and if, construing the whole instrument one way, meaning is given to every word and clause, while construing it another way, some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule, to prevail. This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto. Again, when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used. . . . We think this clause was intended as a limitation upon the grant, reducing from a grant of the fee to a grant of an easement for the use of a plank road, all that the grantee cared to acquire and all that the grantor would be likely to desire to part with."

In *Flaten v. Morehead,* 51 Minn., 512, 19 L. R. A., 195, it was held that in a grant or deed conveying a tract of land immediately following the description of which were these words, "Said tract of land hereby conveyed to be forever held and used as a public park," upon the face of the instrument, the grantee municipality did not acquire an absolute title to the fee in the premises. The Court says: "It (541) is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a new easement was acquired by the village or an estate on condition or in trust.

But we are obliged to consider the clause in connection with the remainder of the deed and to give it the effect intended, if that can be discovered and is reconcilable with the main purposes of the parties."

This Court has held that "riparian rights being incident to land abutting on navigable waters, cannot be conveyed without a conveyance of such land, and such lands covered by navigable waters are subjected to entry only by the owner of land abutting thereon." *Zimmerman v. Robinson,* 114 N. C., 39.

We are of the opinion that the grant to Morehead and Arendell of Square 83 operated to give to them an exclusive right or easement therein as riparian owners and proprietors to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the Shepard's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to Square No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable water as entitles it to maintain this action.

We are aware that this opinion is in conflict with many cases cited from other States, but we have given them careful consideration, and, in the absence of any controlling authority in this State, we think the conclusion to which we have arrived is consistent with the terms of the grant and the well-settled policy of this State.

There must be a

New trial

Cited: S. c., 134 N. C., 399; *Hill v. R. R.,* 143 N. C., 599; *Power Co. v. Nav. Co.,* 152 N. C., 491; *Lenoir v. Crabtree,* 158 N. C., 361; *R. R. v. Way,* 169 N. C., 4, 5, 6; *Bell v. Smith,* 171 N. C., 118; *R. R. v. Way,* 172 N. C., 775.

---

(542)

GRIER v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 5 May, 1903.)

1. Insurance—Life Insurance—Premiums—Payment—Contracts—Estoppel.

The acknowledgment in a policy of insurance of the receipt of a premium estops the company to test the validity of the policy on the ground of the nonpayment of the premium.

2. Insurance—Life Insurance—Premiums—Payment—Contracts—Application.

Where a policy of insurance is delivered, its delivery, in the absence of fraud, is conclusive that the contract is completed and is an acknowl-

edgment that the premium was paid during the good health of the insured.

3. Insurance—Life Insurance—Application.

Where a policy of insurance is delivered it is based on the status of the insured at the time of the application, and the insurance company assumes the risk of subsequent ill health of the insured.

ACTION by J. M. Grier against the Mutual Life Insurance Company of New York, heard by *Shaw, J.*, and a jury, at January Term, 1903, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Burwell & Cansler for plaintiff.
Jones & Tillett for defendant.

CLARK, C. J. On 26 February, 1901, the plaintiff's intestate made out an application for a policy of insurance upon his life, which was sent to the home office of the defendant, where it was accepted and a policy thereupon was duly executed 9 March and is dated 26 February. This policy was sent to defendant's agent for delivery, who delivered the same on 14 March. In the meantime the insured had been taken, on 6 March, with a chill from exposure which was followed by fever; on 12 and 13 March he was free from fever, and the attending (543) physician (witness for defendant) says his condition was not so good the next day (14), and on the 15th he developed catarrhal pneumonia and died 18 March. At the time the policy was applied for, the insured said he preferred to pay the premium ($23.30) in cash, and in presence of the defendant's agent told Mr. Lee, who had money of the insured in hand, to pay that sum to the defendant's agent. On 14 March the defendant's agent told Lee he had the policy, who told him, as the said agent testifies, that the insured was not well, that he had a cold, or the grippe, and was up at his house, and suggested that agent go up to his house to see him; but the agent did not do so, and delivered the policy to Lee, who offered the money to the said agent, who told him that he would get it when he collected the other premiums at that point, and on 16 March the said agent paid the premium on this policy to the district agent at Charlotte. On hearing of the death, the company sent out blanks for proofs of loss, and no offer to return the premium was made till 8 July (after this suit began), though on 26 June the district agent wrote to the plaintiff that "the amount of premium, with interest, paid on 14 March, 1901," had been returned to him by the company, who had declined to pay the loss. There were no averments in the answer of fraud in the application, or in the suppression of facts,

or misrepresentation as to the condition of health of the insured 14 March, when the policy was delivered.

The defendant excepts because the court instructed the jury that if they believed there was a material change in the health of the insured between the time of the application and the delivery of the policy, to answer the issue in favor of the defendant, "unless you further find from the evidence that the defendant company, before the delivery of
(544) the said policy, received notice of the said changed condition in the health of said Davidson, and waived its right to avoid the policy for this reason." And the defendant further excepted because the court charged that if the company accepted the application on 9 March and executed its policy and sent the same to its local agent for delivery, and, "if you further find from the evidence that on 14 March and before the delivery of the policy to said Davidson (the insured) the said Gordon (defendant's agent) received notice of the material change in the condition of the health of said Davidson, if you find there was such a change, and the said Gordon, notwithstanding such notice, delivered said policy to Lee with instructions to deliver it to Davidson at once, and for the purpose of making it a binding contract on the defendant company, and that Lee did so, and that Lee offered to pay Gordon the premium upon the policy for Davidson pursuant to instructions from said Davidson, if you find there ever were such instructions; but that Gordon for his own convenience requested that the plaintiff's premium be not paid then, but that the same should be paid him in accordance with the usual course of dealing between himself and said Lee, and that this was agreed to between said parties, and that on the 16th of said month Gordon sent the company's part of said premium in the usual course of business to the defendant, and, upon the death of said Davidson, notice thereof was given to the defendant, and that the defendant sent to the administrator of the deceased blank applications for proving the death of said Davidson, with instructions to make out said proofs, then the court instructs you to find that the defendant company, before delivering said policy, had notice that there had been a material change in the condition of the health of said Davidson since making his application and before the delivery of the policy, and had waived its
(545) right to have the policy avoided for this reason."

There is nothing in these instructions of which the defendant could complain, and our disposition of them renders it unnecessary to discuss the other exceptions.

All the points herein raised were considered and decided by a unanimous Court in the recent case of *Kendrick v. Ins. Co.*, 124 N. C., 315, 70 Am. St., 592. The policy as well as the application provides that if the application is approved and a policy *is issued,* it shall be in force

from the date of the application. When, therefore, the application was accepted and the policy was issued 9 March, it dated back to 26 February. In fact, the policy certifies that it was signed 26 February. There only remained the delivery of the policy to complete the contract. The provision in the application that the contract shall not take effect until the first premium shall have been paid, during the applicant's continuance in good health, is only a provisional agreement authorizing the company to withhold the delivery of the policy until such payment in good health; but when the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void either on account of nonpayment of premium or of ill health, which stipulations were asserted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the policy after it has been delivered.

If the premium in fact is not paid, the acknowledgment of payment, so far as it is a receipt for money, is only *prima facie,* and the amount can be recovered; but so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the contract. See *Kendrick v. Ins. Co.,* 124 N. C., 351, 70 Am. St., 592, and cases there cited. The same principle is there shown to apply to deeds and all other contracts under seal. The same rule applies to the stipulations in the application which provide that the contract shall not take effect till (546) the first payment shall have been made during continuance in good health. The application recites that the agent has given the insured a binding receipt "signed by the secretary of the company, *making the insurance in force from this date,* provided this application shall be approved and the policy signed by the secretary at the head office of the company and *issued.*" It was agreed thereby that if the application was accepted and the policy *issued* the insurance began from the date of the application. Everything counted from that date, which is the anniversary on which future premiums must be paid or the policy forfeited for non-payment. The risk of illness accruing after said date was upon the company from its acceptance of the application and "issuance" of the policy, but the company reserved to itself the advantage of a provision that the contract shall not go into effect "till payment of premium during the applicant's continuance in good health," thus giving itself a *locus penitentiæ* and making the insured bear his own risk till payment of premium and issuance of policy. But when the policy is not only issued, but delivered, its delivery (in the absence of fraud) is conclusive that the contract is completed (*Ray v. Ins. Co.,* 26 N. C., 166) and is an acknowledgment of payment during continuance in good health. If the agent had not delivered the policy, whether the circumstances would

have justified the withholding of the delivery so as to release the company from responsibility is not a matter before us. He did deliver it, and with full opportunity to see the insured and with a suggestion that he do so, and there is no allegation of fraud and collusion, as in *Sprinkle v. Indemnity Co.*, 124 N. C., 405. The delivery of the policy closed the contract like the delivery of any other deed, and the preliminary provisions in the application for withholding thereof
(547) ceased to be of any force. In *Kendrick's case, supra,* the money was not paid till after a lingering illness and on the very day of the death, and then by a friend, but it was held that the delivery of the policy was conclusive as to the contract being complete.

Numerous authorities can be cited in support of what is here said, but the matter has been sufficiently elaborated in *Kendrick v. Ins. Co.*, 124 N. C., 315, 70 Am. St., 592. To same purport *Life Assn. v. Finley* (Texas), 68 S. W., 695; *Indemnity Assn. v. Grogan* (Ky.), 52 S. W., 959; *Ins Co. v. Koehlar,* 63 Ill. App., 188; *Ins. Co. v. Schlink,* 175 Ill., 284; *Ins. Co. v. Quinn,* 41 N. Y. Supp., 1060; *McElroy v. Ins. Co.*, 94 Fed., 990. In *Life Assn. v. Findley* and *Indemnity Co. v. Grogan* the facts were identical almost with those in this case.

There is no stipulation that the policy shall not be delivered unless the insured is in good health, for that would unjustifiably shift off upon the insured any mortal illness accruing after the application and during the time for which he has paid. But the agreement is that the first premium must be paid during good health, and, in the absence of fraud, the delivery of the policy is conclusive of that fact.

It was contemplated by the parties that the payment should be made with the application and that the receipt then given should protect the insured from that date, if the application were accepted. The issuance of the policy is acceptance of the application and should be based upon the status at the time the application is made, and is not affected by a subsequent change of health, for that is part of the risk the company assumed and for which it was paid. When the premium is not paid with the application, the company reserves the right not to complete the contract till payment of the premium, while the insured is in good health. But, as already said, the actual delivery of the policy
(548) concludes the contract in the absence of fraud. If the local agent were the agent of the insured, the mailing the acceptance—the policy—directed to him would close the contract. *Adams v. Lindsell,* 1 B. and Ald., 68; Benj. on Sales, sec. 44. Certainly, as he is the agent of the company, the delivery of the policy by him is its delivery.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

Cited: Rayburn v. Casualty Co., 138 N. C., 381; *Waters v. Annuity Co.*, 144 N. C., 670; *Perry v. Ins. Co.*, 150 N. C., 145; *Annuity Co. v. Forrest*, 152 N. C., 625; *Powell v. Ins. Co.*, 153 N. C., 128; *Pender v. Ins. Co.*, 163 N. C., 102; *Gardner v. Ins. Co.*, 163 N. C., 372; *Britton v. Ins. Co.*, 165 N. C., 152; *Trust Co. v. Ins. Co.*, 173 N. C., 563.

SPRINGS v. SCOTT.

(Filed 5 May, 1903.)

1. Jurisdiction—Superior Court—Clerk Superior Court—Appeal.

Where an action is wrongfully brought before the clerk of the Superior Court and is taken to the Superior Court by appeal, the Superior Court having original jurisdiction, it will be retained for hearing.

2. Partition—Sale—Remainders—Estates.

The court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse*, when one of the class being first in remainder after the expiration of the life estate is *in esse*, and a party to the proceeding, to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse*.

3. Partition — Sale — Remainders — Contingent Remainders — Trusts and Trustees.

Where an estate is vested in a trustee to preserve contingent remainders and limitations, the court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be *in esse*, proceed to order the sale, and bind all persons either *in esse* or *in posse*.

4. Partition—Sale—Remainders—Vested Interests—Laws 1903, Ch. 99.

Since Laws 1903, ch. 99, the court has the power, where there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, to order the sale by conforming to the procedure prescribed by the act. The act is constitutional, and applies to estates prior to its enactment.

5. Partition—Sale—Remainders—Investments—Judicial Sales.

Where real estate is sold under order of the court, the decree must provide for investment of the fund in such a way as the court may deem best for the protection of all persons who have or may have remote or contingent interests.

(549) ACTION by E. B. Springs and others against J. M. Scott and others, heard by *Shaw J.*, at March Term, 1903, of MECKLENBURG. From a judgment overruling the demurrer, the defendant appealed.

Jones & Tillett for plaintiff.
Burwell & Cansler for defendant.

CONNOR, J. This is a special proceeding instituted in the Superior Court of Mecklenburg County for the purpose of obtaining an order for the sale of the land described in the petition for partition. The plaintiff and the *feme* defendant are the children and devisees of Julia Springs, deceased—the plaintiff E. B. Springs appearing in his own behalf and as trustee of Alva C. Springs. The petitioners aver that they, together with the *feme* defendant, are seized as tenants in common of a lot in the city of Charlotte under the provisions of item 5 of the will of their mother, the late Julia B. Springs, which is in the following language: "I give and bequeath unto my son Alva C. Springs $100. I also wish his expenses paid here and back to his home when I
(550) die. I also give him equal with the rest of the children, but he can only receive the interest during his life; at his death the interest will be paid to his children until they are of age, and if no children or heirs of his body, it must be equally divided among his brothers and sisters or their heirs. I appoint Eli Springs his trustee." Alva C. Springs has no children, and the said parties desire to have partition of the land; that it is for the best interest of all concerned that the partition be made, and owing to the number of shares and the character of the property, actual partition cannot be made, and it is necessary to have a sale for partition. The defendants demur to the petition, and for cause of demurrer say:

"1. That it appearing from the plaintiff's complaint, and particularly from the will of said Julia B. Springs, that the interest therein devised to Alva C. Springs is for his life only, and that after the death of Alva C. Springs there is a limitation over to his children until they are of age, and if no children or heirs of his body, to his brothers and sisters or their heirs, and it cannot now be known who the heirs are who will be entitled to take upon the death of said Alva C. Springs.

"2. That the heirs of said Alva C. Springs are not made parties to this action, and that the said heirs are necessary parties.

"3. That this court has no jurisdiction to order a sale of the land described in the complaint."

The court overruled the demurrer and directed a sale of the land. The defendant appealed to the judge, who affirmed the judgment of the clerk

and directed that the cause be retained for further hearing upon the coming in of the report. From this judgment the defendants appealed to this Court.

The only question, therefore, is whether, in the absence of any child of the said Alva to represent those next in remainder after his death, the court has the power to order the sale of the land. This would, under the decisions of this Court, present a very serious if not (551) insurmountable difficulty but for the presence of the trustee to represent and preserve the interest of such children as may be born to the said Alva C. Springs. To the suggestion that his proceeding invoking the equitable powers of the court should have been instituted in Superior Court in term, in which we concur, it is sufficient to say that the case now being in the Superior Court by appeal, will be retained, and all necessary amendments will be deemed to have been made, or, if necessary, be made in this Court. *Elliott v. Tyson,* 117 N. C., 116, in which the authorities are collected. The power of the court to order the sale of real estate limited by deed or will to persons not *in esse* or upon contingent remainders has been so often before this Court that it would seem there could be no doubt as to the law in this State. It is manifest that in the opinion of the profession the question is not regarded as at rest. The eminent counsel who argued this case so informed us. There is a large quantity of real estate in this State, especially in the towns and cities, the title to which is in such a condition by reason of contingent limitations that it can neither be sold nor improved, thereby being a burden on those who own the life estate, bringing no income and entailing a heavy expense to them by way of taxes and assessments for paving and other public improvements. We are told by counsel that the decisions of this Court are not in accord with those of other jurisdictions in regard to the power of the court to order the sale of property, the title to which is thus fettered by limitations. Our attention was called in the argument and brief of counsel to an act of the General Assembly passed at its last session, Laws 1903, ch. 99, and the plaintiffs insist that, as this proceeding was instituted since the ratification of the act, the Court, if it should be of the opinion that under the law as it existed prior thereto the plaintiffs are not entitled to relief, will (552) find in the act the power to give the relief demanded. In *Watson v. Watson,* 56 N. C., 400, this Court held that "a court of equity has no power to order the sale of land for the purpose of converting it into a more beneficial property when it is limited in remainder to persons not *in esse.*" The doctrine of this case was very materially modified by the Court in *Ex parte Dodd,* 62 N. C., 97, in which the same will was before the Court. That was a petition for the sale of land. The devise was to "Orren L. Dodd during his life and at his death in fee simple to his

child or children, if he has any living at his death, or the issue of any of the said Orren who may predecease him; failing such issue, however, the whole shall belong to and be equally divided amongst the children of his brother, Dr. Warren Dodd." The petitioners, besides Orren, were his children, who were under age and represented by guardian. Dr. Warren Dodd had no children and was never married. *Battle, J.*, says: "It is certain that if the land be devised to a person for life, with an executory devise in fee to his children, the court cannot order a sale of the land before the birth of any child, because, not being *in esse*, there can be no one before the court to represent its interests. Such was the case in *Watson v. Watson*. But if there be any children *in esse* in whom the estate in fee can vest, a sale may be ordered, because, if their interests require it, they may be represented by their guardians, and this may be done although all of the children of the class may not yet have been born. Such is the case now before us, with the exception that there is an executory devise to the unborn children of another person depending upon the event of the tenant for life dying without leaving issue. Can this latter circumstance make any difference? We think not, because the first class of children are the primary objects of the devisor's bounty, and as they have vested remainders in fee, and as their (553) interests, as well as that of the tenant for life, will be promoted by having their land sold and the proceeds invested in other lands or in stocks or other securities for their use, the court of equity is authorized under the general power conferred by the act of 1827, to which we have referred, to order the sale." It would seem that this language, which we have quoted at length because of its importance in the settlement of this question, can have no other meaning or construction than that, if the class *first in remainder* is represented, the court will take jurisdiction, although there "is an executory devise to the unborn children of another person." This, as we shall see, is in accordance with the authorities, both English and American.

In *Williams v. Hassell*, 74 N. C., 434, *Reade, J.*, in discussing the power of the court in such cases, cites *Watson v. Watson, supra*. He makes no reference to *Ex parte Dodd, supra*. He notices the *dictum* in *Watson v. Watson*, and then draws a distinction between a case in which the remainder is to *all* the children of the life tenant and one in which the remainder is to *such* children of his or her as may be living at his or her death, in which case, as it cannot be known who will be in the class when the life estate falls in, there can be no one to represent the class. *Ex parte Miller*, 90 N. C., 625; *Young v. Young*, 97 N. C., 132; *Whitesides v. Cooper*, 115 N. C., 570. It will be observed that the petition in that case was for a sale, there being no suggestion of

a reinvestment of the proceeds to preserve the limitations. In *Ex parte Dodd* the fund was ordered to be reinvested. The doctrine of representation is recognized in *Branch v. Griffin,* 94 N. C., 183; *Overman v. Simms,* 96 N. C., 451.

In *Aydlett v. Pendleton,* 111 N. C., 28, 32 Am. St., 776, the decision was based upon the ground that some of the parties interested objected to the sale. *Shepherd, J.,* says: "Thus it will be seen that, even according to this construction of a deed, there are future con- (554) tingent interests, and though these may be represented by some person *in esse,* it cannot authorize the court in decreeing a sale for partition when there is objection by some of the parties interested. It is true that in some instances a person may represent the interests of those of his class who are not *in esse,* but the court only decrees a sale in such cases where the interests of the parties will be materially and essentially promoted." The decision in *Overman v. Simms, supra,* is based upon the ground that no children had been born to the life tenant. *Irvin v. Clark,* 98 N. C., 437. In *Overman v. Tate,* 114 N. C., 571, the same limitation was dealt with by the Court as in *Overman v. Simms.* In this case the sale was ordered. It appeared that a child had been born to the life tenant, Annie Tate. *Shepherd, C. J.,* says: "The attention of the Court in *Overman v. Simms, supra,* does not seem to have been directed to the fact that the limitations were in trust, nor was the child of Annie, now Mrs. Weaver, born at that time. These considerations render it unnecessary to review the former decisions of this Court." In this case the *ulterior* limitation or executory devise was to Thomas R. Tate in fee, who was a party to the proceeding. So that the question decided in *Ex parte Dodd* was not presented.

Without discussing the case of *Lipscombe v. Hodges,* 128 N. C., 57, it is sufficient to say that the syllabus, "The courts will not decree a sale of land when it is limited in remainder to persons not *in esse.*" is misleading. That was not the real ground upon which the case was decided. There was no trustee before the court in that case.

In *Justice v. Guion,* 76 N. C., 442, the land was conveyed to a trustee for the benefit of the plaintiff for life, with remainder to her children who should survive her, to be equally divided between them, with a provision that if either of the children should die before the mother, leaving a child or children, they should represent their (555) parent. The trustee died, and upon petition the court appointed a trustee, but refused to order a sale of the land for reinvestment. The life tenant had children. This Court affirmed the judgment. It is evident from the opinion that the Court in *Overman v. Simms, supra,* overlooked the fact that there was a trustee, and the limitations over

were in trust. In *Simpson v. Wallace,* 83 N. C., 477, there was no trustee.

In *Smith v. Smith,* 118 N. C., 735, it is impossible to tell what the limitations were. It is simply stated that the lands were conveyed to certain persons "in trust for certain individuals therein mentioned, with limitations and contingent interests to numerous other persons therein named." It does not appear whether the trustees were parties or whether there was any one *in esse* to represent those first in remainder. The opinion is equally indefinite and does not cite *Ex parte Dodd,* but does cite *Watson v. Watson* and *Justice v. Guion.* The Court overlooked the decision in *Overman v. Tate.* It must be conceded that these cases are in conflict with the current of authority in this State. It is unfortunate that a question of so great practical interest, involving the security of title to valuable real estate, should be in even apparent conflict.

In *Finch v. Finch,* 2 Vesey, 491, *Lord Hardwicke* says: "It is admitted to be necessary to bring the first person in entitled to the remainder and inheritance of the estate, if such is in being. . . . If there is no first son in being, the court must take the facts as they stand. It would be a very good decree, and no son born afterwards could dispute it unless he could show fraud, collusion, or misbehavior in the performance of these trusts."

We have not discussed these cases for the purpose of overruling them, but to classify and distinguish them, and to show that the language—

(556) used in *Ex parte Dodd,* in respect to the power of the court to order a sale of land where there is an executory devise to persons unborn, there being members of a class next in remainder to a life tenant—has not been overruled or doubted. That question is not presented or decided in any of the cases we have cited. The importance of this will be manifest when we come to inquire into the validity of the statute of 1903.

For the same purpose we desire to cite some well-considered cases from other States: In *Meade v. Mitchell,* 17 N. Y., 210, 72 Am. Dec., 455, the Court says: "In the English Court of Chancery the general rule is that in actions affecting the title of land it is sufficient to bring before the court the person entitled to the first estate of inheritance, with those claiming prior interest, omitting those who might claim in remainder or reversion after such vested estate of inheritance. A decree against the person having the first estate of inheritance would bind those in remainder or reversion although the estate might afterwards vest in possession. . . . I think, therefore, that under the general principles of equity practice, independent of our statute, a decree for partition in this case would be binding as well upon those who are par-

ties to the suit as those who may hereafter come into being, entitled under the will to an interest in the premises. And as the Legislature has provided that a sale of the lands may be made in cases where partition cannot be had, I can see no reason why the judgment for a sale should not be made as conclusive as a judgment in partition." The statute under consideration was very much as ours in respect to the procedure, and received the approval of the Court. This case was cited and approved in *Monarque v. Monarque,* 80 N. Y., 322. As late as 1892, in *Kent v. The Church,* 136 N. Y., 10, 18 L. R. A., 331, 32 Am. St., 693, *Earle, C. J.,* says: "When an estate is vested in persons living, subject only to the contingency that persons may be born who will have any interest therein, the living owners of the estate for all purposes of (557) litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and vaild judgment, its proceeds take its place and are secured in some way for such persons."

In *Baylor v. Dejarnette,* 54 Va., 152, the power of the court to order a sale in cases where property was thus fettered with limitations underwent a most exhaustive investigation, and in an able opinion the power was sustained. This case presented the exact question which we have before us.

In *Falkner v. Davis,* 59 Va., 651, 98 Am. Dec., 698, after a full examination and review of the authorities, both English and American, *Moncure, P.,* says: "It seems to me, therefore, that the case of *Baylor v. Dejarnette* is a direct, binding authority in favor of the doctrine of representation before referred to and of its application to such a case as this."

The Supreme Court of Illinois in *Gavin v. Curtin,* 171 Ill., 640, 40 L. R. A., 776, quoting from *Voris v. Sloan,* 68 Ill., 588, says: "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, when the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust and do with the fund what he would have dictated had he anticipated the emergency. . . . From very necessity, a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence that power is vested in the court of chancery. . . . The question remaining to be determined is (558) whether the decree is binding upon any child or children that may

be born to the defendant in error." This question is answered by the Court in the affirmative.

In *Bofile v. Fisher,* 3 Rich. Eq. (S. C.), 1, 55 Am. Dec., 627, the same question was before the Court. The Chancellor says: "It is necessary to the best interest of society, as I have before intimated, that there should be power lodged in some judicial tribunal authorized in certain exigencies to unfetter the titles of estates; otherwise, they might be shackled to an inconvenient extent. In England the tenant for life, by suffering fine and recovery in which he alone is a party, may cut off all contingent limitations and remainders. In that country, courts of equity are in the habit under certain contingencies of doing the same thing in respect to the title, but with a more just regard to the rights of the remaindermen; for when that court by a sale divests the title of the contingent remaindermen in the property it preserves them for the fund." The power of the court of chancery in the State was sustained.

In *Ridley v. Holloday,* 106 Tenn., 607, 53 L. R. A., 477, 82 Am. St., 902, *Beard, J.,* reviewed the English and American cases upon the subject, and says: "A chancery court has inherently, without the aid and in the absence of any inhibition of statute, jurisdiction and power to bind and conclude by its decree, converting realty into personalty, the rights and interests, whether legal or equitable, vested or contingent, of all persons, whether *in esse* or *in posse* and whether *sui juris* or under disability, who are before the court, either by service of process or by 'virtual representation'; but it must satisfactorily appear that such conversion is for the best interests of all the parties, and the decree must award the several parties the same interests in its proceeds which they enjoyed in the realty, and provide for the protection of the same." He further says:

"We have examined the cases from North Carolina referred to in
(559) the able and exhaustive brief of counsel for the appellants, and while they are entitled to great consideration, we think they are overborne by the weight of authority." 15 Enc. Pl. and Pr., 646, 647.

We might, but for the length of this opinion, cite authorities from almost every State in the Union and from the English Reports showing a uniform current of the best considered judicial opinions upon this very important question. This is important as bearing upon the constitutional question raised by the demurrer in regard to the validity of the act of 1903, the first section of which is as follows: "That in all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the Superior Court at term-time, which proceeding shall be conducted in the manner pointed out in this act: *Provided,* that this provision shall

not apply to any case where the courts now have power to order a sale of contingent interests in land." (The other section prescribes the mode of procedure.) As Alva C. Springs has no child living, this case cannot be brought within the rule laid down in *Ex parte Dodd,* and although there are many authorities holding that the presence of the life tenant is sufficient to sustain the jurisdiction, we do not propose to go beyond the principle of that case. Therefore, but for the presence of a trustee, the plaintiff would not be entitled to relief. It is said, however, that the language of the will does not vest in Eli Springs any title to the property, and that he, therefore, cannot represent the interests of all parties *in esse* and *in posse.* The language of the will indicates a purpose on the part of the devisor that the property shall be sold and converted into money. She says: "But he can only receive the interest (560) during his life. At his death the interest shall be paid to his children until they are of age." We assume, though it is not so stated, that she had other property which was given to her children by her will. If she had contemplated that the title to this real estate should continue in common to all of her children during the life of Alva and until all of his children should arrive at full age, such purpose would have been indicated in unmistakable terms. If we correctly construe the will, Eli Springs, in order to discharge the trust imposed upon him, must take hold and invest the money, upon which interest is to be paid. We think the words' "I appoint Eli Springs his trustee," sufficient to vest in him such interest in the property as may be necessary to enable him to execute the trust, and that he is authorized to represent all parties in interest. *Overman v. Tate, supra.* If this should not be so, we think that the claim to relief is afforded by the act of 1903. The demurrer suggests that "it is doubtful whether the Legislature had the power to pass a law interfering with or changing the rights of the parties to this property." We are thus confronted with the constitutional question as to the power of the Legislature to pass the act, and its application to wills and deeds executed prior to its passage. It is, of course, conceded that the Legislature has no power to destroy or interfere with vested rights. Are such rights as may accrue to any children who may hereafter be born to Alva C. Springs within the meaning of this constitutional provision? This Court in 1796, in *Lane v. Davis,* 2 N. C., 277, held that the act of 1784 destroying estates tail was valid to bar a remainder dependent upon an estate tail in possession of a tenant in tail at the time of the passage of the act. *Minge v. Gilmore,* 2 N. C., 279; Cooley Const. Lim., sec. 440. "A bare expectancy is not such a vested right as will be protected by the constitutional provision." *Bass v. Nav. Co.,* 111 N. C., 439, 19 L. R. A., 247. It is well settled that courts of equity, as they existed in the State prior to the Constitution of

(561) 1868, possesed the power to order the sale of lands of infants and tenants in common when partition was impracticable, and to administer trusts. We cannot do better than refer to the learned and exhaustive argument of Mr. Moore in *Ex parte Dodd, supra.* It is equally clear that the Superior Courts, under our present judicial system, have the same power and equitable jurisdiction as the courts of equity had prior to 1868. *Barcello v. Hapgood,* 118 N. C., 726, 728.

"Where property has been settled by will or deed for life, with limitations over to persons not in being, who are incompetent to exercise a legal judgment, the Legislature may authorize a sale and the reinvestment of the proceeds for the same uses, if such a course will be for the benefit of all concerned or beneficial to some of them and not injurious to the rest." Hare's Am. Const. Law, 816. "Such a sale simply turns the property into another form where it may bear fruit for the first taker, who would otherwise have a barren inheritance and be postponed as regards real and substantial benefits to persons yet unborn. It cannot, however, be properly exercised unless the proceeds can be placed in trust and held securely for the executory devisee or remainderman." *Ibid.,* 817.

In New York the question has received a careful consideration. In *Brevoort v. Grace,* 53 N. Y., 245, 252, after declaring that courts of equity have the power to authorize the sale of lands belonging to infants *in esse,* the Court proceeds to say: "Doubts were expressed in some of the cases whether this power extended to those not in being who might thereafter be entitled to some estate in the premises. The reason upon which the rule is based as to the former applies with equal force as to the latter. In both there is a want of capacity to manage and pre-

(562) serve the property so as to protect the interests of those who are or may become entitled thereto, hence the necessity of devolving this duty upon the sovereign. For this purpose, the Legislature under our system represents and possesses the powers of sovereign authority and may discharge the duty by either general or special laws as will best protect the rights of those interested, although it is obvious that the former should be preferred in all cases when practicable."

In *Soheir v. Hospital,* 3 Cush. (57 Mass.), 483, 497, the Court says: "The Legislature authorizes a sale, taking care that the proceeds shall go to the trustees duly appointed in pursuance of the will of Benja Joy, for the use and benefit of those having the life estate and of those having the remainder under the will. This is depriving no one of his property, but is merely changing real into personal estate for the benefit of all parties in interest. This part of the resolve, therefore, is within the scope of the power exercised from the earliest time and repeatedly adjudged to be rightfully exercised by the Legislature. . . . It is deemed indispensable that there should be a power in the Legislature

to authorize a sale of the estates of infants, insane persons, and persons not known or not in being, who cannot act for themselves. The best interests of those persons and justice to others often require that such sales should be made. It would be attended with incalculable mischief, injuries, and losses, if estates in which persons are interested, who have not capacity to act for themselves or are not in being, could under no circumstances be sold and perfect titles effected. But in such cases the Legislature, as *parens patriæ,* can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

In Pennsylvania, 14 S. and R., *Estep v. Hutchman,* 29 Pa., 435, *Gibson* being then Chief Justice, the Court says: "Even in England, an act of Parliament is sometimes necessary to assist the almost (563) unlimited power of the chancellor. A conveyance made by persons authorized by the Legislature must, then, it would seem, be *prima facie* evidence of good title in the vendee against all claiming under the vendor." The constitutionality of an act upon this subject was sustained by the Court. See, also, *Blagge v. Miles,* 1 Story, 426.

Article XV, sec. 2, of the Constitution provides that, "The General Assembly shall regulate entails in such manner as to prevent perpetuities." While it is not necessary to hold that this language gives to the Legislature the power to pass either general or special laws destroying entails created before the enactment of such statutes, it would seem that the power is conferred to enact general laws vesting in the courts the power to deal with and regulate the sale of property entailed, to the end that perpetuities may be prevented. This construction of the provision is not only consistent with, but it would seem necessary to effectuate, the policy of the law to prevent entails hampering the sale of property, thus preventing its free alienation and improvement. This has always been recognized and enforced as a fundamental principle of American law. We think, both upon principle and authority, the statute is constitutional and authorizes the sale of real estate conveyed or devised before its enactment.

The importance of this question and the apparently unsettled condition of the law in this State leading to the passage of the act of 1903, we think, justifies the length of this opinion and the citation of the authorities. The act carefully prescribes the procedure, and if the courts shall be diligent to ascertain the facts in each case and proceed with caution in making orders therein, the purpose of the Legislature will be accomplished without doing violence, but rather in accordance with the principles of our jurisprudence and the preservation and protection of

(564) the rights of parties. In this cause it will be advisable, when it shall come before the court, to set out in detail the condition of the property of the parties, and in all respects conform to the procedure provided by the act.

Upon a careful examination of the cases in our own Reports and those of other States, we are of the opinion:

1. That without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that, upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in possee.*

2. That when the estate is vested in a trustee to preserve contingent remainders and limitations the court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be *in esse,* proceed to order the sale and bind all persons either *in esse or* in *posse.*

3. That since Laws 1903, ch. 99, the court has the power, when there is vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, to order the sale by conforming to the procedure prescribed by the act.

4. That the act is constitutional and applies to estates created prior to its enactment.

Of course, in each of the classes named, the decree must provide for the investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests.

In the case before us the judgment must be so modified that the Judge of the Superior Court of Mecklenburg County, in term, shall re-
(565) quire the pleadings to be amended to conform to the procedure provided by the act of 1903, and that all further proceedings, orders, and decrees be in accordance therewith.

The plaintiffs will pay the costs of this Court, to be recovered by them from the commissioner upon the sale of the property in controversy.

Judgment modified and affirmed.

Cited: Hodges v. Lipscomb, 133 N. C., 202; *Smith v. Gudger, ib.,* 627; *Settle v. Settle,* 141 N. C., 569; *Card v. Finch,* 142 N. C., 149; *Anderson v. Wilkins, ib.,* 159, 160, 161; *McAfee v. Green,* 143 N. C., 417; *Deal v. Sexton,* 144 N. C., 161; *In re Herring,* 152 N. C., 259;

Hughes v. Pritchard, 153 N. C., 145; *Stephens v. Hicks,* 156 N. C., 244; *Trust Co. v. Nicholson,* 162 N. C., 263; *O'Hagan v. Johnson,* 163 N. C., 199; *Jones v. Whitchard, ib.,* 245; *Dunn v. Hines,* 164 N. C., 121; *Bullock v. Oil Co.,* 165 N. C., 66, 67; *Ryder v. Oates,* 173 N. C., 573; *Smith v. Witter,* 174 N. C., 619; *Pendleton v. Williams,* 175 N. C., 252; *Dawson v. Wood,* 177 N. C., 163, 164; *Waldroop v. Waldroop,* 179 N. C., 676.

(566)

GORDON v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 May, 1903.)

1. Evidence—Conflicting Evidence—Verdict—Questions for Jury.

Where the evidence in a case is conflicting, the weight and credibility thereof is for the jury, and the verdict thereon is conclusive.

2. Instructions—Negligence—Contributory Negligence.

That certain parts of an instruction given on the issue of negligence pertains more properly to the issue of contributory negligence is not prejudicial to the defendant, if it operates, as in this case, more strongly against the plaintiff if given on the first issue than on the second.

MONTGOMERY, J., dissenting.

ACTION by J. F. Gordon against the Seaboard Air Line Railway Company, heard by *Robinson, J.,* and a jury, at October Term, 1902, of UNION.

This is an action for the recovery of damages for personal injury received by the plaintiff in attempting to alight from a moving train at the invitation of the conductor, as alleged by the plaintiff.

From a judgment for the plaintiff, the defendant appealed. (567)

Redwine & Stack for plaintiff.

Adams & Jerome and J. D. Shaw for defendant.

DOUGLAS, J. The defendant made the usual motion for nonsuit, which was properly refused. There was testimony tending to support the contentions of the plaintiff, and while there was equally as strong or stronger testimony for the defense, we must abide by the verdict of the jury, who alone can determine the weight and credibility of the evidence.

The defendant's first, second, and third exceptions as to the admission of testimony cannot be sustained. As they are not even alluded to in the defendant's brief, it would seem unnecessary to further discuss them. Neither does the brief allude to the fourth and sixth exceptions, which

are equally untenable; but as the fourth exception is to a certain extent involved in the fifth, upon which the defendant seems to rely, we will discuss them together.

(568) The fourth exception is to the following charge of his Honor:

"If you shall find as a fact from the evidence, and by the greater weight thereof, that the plaintiff was a passenger, then you will consider the issue as to whether he was injured by the negligence of the defendant; and if you shall find as a fact from the evidence, and by the greater weight thereof, that after the plaintiff had paid his fare to Indian Trail the train ran past his station, and the conductor promised to slow up at Matthews and let him off and that he would take him up on his return trip and let him off at his station, and that while passing Matthews, the train not moving faster than a fast walk, and the danger not being apparent to a reasonable man, and being told by the conductor—that is, if you will find as a fact from the evidence and by the greater weight thereof that the conductor did motion to him or tell him to get off—and you further find as a fact from the evidence that the danger was not apparent to a reasonable man, you will respond 'Yes' to the first issue."

The fifth exception is directed to the following part of his Honor's charge: "In passing on the second issue as to contributory negligence, the burden is still on the plaintiff to satisfy you by the greater weight of the evidence that at the time he got off the moving train the danger was not apparent to a careful, prudent man; and if he has so satisfied you, you will respond 'No' to the second issue; if he has failed to so satisfy you, you will respond 'Yes,' and will not consider the issue as to damages."

The nature of the defendant's fifth exception, the only one alluded to in his brief, is thus stated: "The appellant's fifth exception should be sustained for failure of the court to instruct the jury, in passing on the second issue as to contributory negligence in addition to the charge as given on that issue, that it was necessary for them to find as a fact that the conductor promised to slow up at Matthews and let the plain-

(569) tiff off, and that the conductor did motion to him or tell him to get off at Matthews."

This exception cannot be sustained. It does not appear that the defendant asked for any additional instructions. In any event, we think the instruction was sufficient in view of what was said in the preceding charge on the first issue. His Honor charged the jury in effect that before they could find the defendant guilty of negligence they must find that the train was not moving faster than a fast walk, that the conductor motioned to, or told the plaintiff to get off, and that the danger was not apparent to a reasonable man. Having found the defendant guilty of negligence, under the above instructions they must have found these

facts. If these facts were already found by the jury before they came to the consideration of the second issue, such facts were evidently still in their minds.

It is contended that some parts of this instruction pertained more properly to the issue of contributory negligence, but admitting this to be true, they operated more strongly against the plaintiff when given on the first issue than on the second, since the finding against him on the first issue would end his case. The issue of contributory negligence is not an independent issue in the sense of complete isolation, and can never arise until after the first issue is found in favor of the plaintiff. The first essential requisite for recovery is the negligence of the defendant, and until that is found the negligence of the plaintiff is utterly immaterial. The nature and relative connection of these issues is discussed in *Cox v. R. R.*, 123 N. C., 604; *Edwards v. R. R.*, 129 N. C., 78, and *Curtis v. R. R.*, 130 N. C., 437.

If the facts stated in the complaint were true, and they have been so found by the jury, we see no substantial difference between this case and that of *Davis v. R. R., ante,* 291. See, also, *Whitley v. R. R.*, 122 N. C., 987; *Hodges v. R. R.*, 120 N. C., 555; *Cable v. R. R.*, 122 (570) N. C., 982; *Johnson v. R. R.*, 130 N. C., 488. In *R. R. v. Egeland,* 163 U. S., 93, where the plaintiff below, a laborer in the employ of the defendant, was ordered by the conductor to jump off a train going about four miles an hour, and was injured in doing so, the Court says: "If plaintiff reasonably thought he could with safety obey the order, by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether under such circumstances he was or was not guilty of negligence."

The judgment is

Affirmed.

MONTGOMERY, J., dissenting: The plaintiff seeks to recover of defendant damages on account of personal injuries alleged to have been received by the plaintiff through the negligence of defendant. He alleged in his complaint that he boarded defendant's train at Monroe, as a passenger, intending to go to Indian Trail, and paid the conductor in charge his fare; that afterwards it was agreed between him and the conductor, on account of the steep grade at Indian Trail, that the train would not be stopped at that place, but would be moved beyond to Matthews, and that the plaintiff could wait at Matthews until the train returned, when and where the plaintiff would be taken up and carried back to Indian Trail; that the conductor told the plaintiff he would slow up at Matthews to a safe speed for him to alight from the train and that he should get off when it reached the point opposite the express office upon a signal

from the conductor; that the train did slow up and signal given, "and as he went to alight from the defendant's train the said defendant, through and by the negligence of its employees and servants, violently and quickly jerked its train forward, and by said negligence and carelessness of defendant's employees and servants the plaintiff was thrown
(571) violently upon and against the ground and received great injury herein and afterwards set forth."

Upon the trial the plaintiff testified to matters supporting his complaint. Amongst other things he said, concerning his purpose to alight at Matthews: "Then I saw him (conductor) on the step at the rear end of the car. He motioned to me and told me to get off. I started to step off and the train gave a sudden jerk, threw me to the ground and broke my collar-bone. . . . I fell because the car gave a sudden jerk as I was on the step. The train was going about the speed of a fast walk." He said on cross-examination that he had come down to get off the train before he saw the conductor. The conductor testified that he did not see the plaintiff on the day of the alleged injury, that he was not a passenger on the train, nor did he collect from him any fare; he said the train was going from ten to fifteen miles an hour as it passed Matthews. And other witnesses for the defendant, living in Matthews, testified that the speed of the train through Matthews was ten or fifteen miles an hour.

His Honor in his instructions to the jury treated the case not as one where the plaintiff had been jerked violently from the defendant's train and had been injured by reason of the jerk or wrench, but he treated it as a case in which the plaintiff got off the moving train of his own volition. This will be seen from a reading of two paragraphs in the charge which were excepted to by the defendant, as follows: "If you shall find as a fact from the evidence and by the greater weight thereof that the plaintiff was a passenger, then you will consider the issue whether he was injured by the negligence of the defendant; and if you should find as a fact from the evidence or by the greater weight thereof that after the plaintiff had paid his fare to Indian Trail the train ran past his
(572) station, and the conductor promised to slow up at Matthews and let him off, and that he would take him up on his return trip and let him off at his station, and that while passing Matthews the train was not moving faster than a fast walk, and the danger not being apparent to a reasonable man, and being told by the conductor, that is, if you should find as a fact from the evidence and by the greater weight thereof that the conductor did motion to him, or tell him to get off, and you further find as a fact from the evidence that the danger was not apparent to a reasonable man, you will respond 'Yes' to the first issue."

"In passing on the second issue as to contributory negligence, the burden is still on the plaintiff to satisfy you by the greater weight of

the evidence that at the time he got off the moving train the danger was not apparent to a careful, prudent man; and if he has so satisfied you, you will respond 'No' to the second issue. It he has failed to so satisfy you, you will respond 'Yes' and will not consider the issue as to damages."

Considering the case, then, from the standpoint of the court below, I think there was error in those parts of his charge to which the defendant excepted. It is true, the jury believed the plaintiff as to the speed of the train in preference to the conductor and the disinterested witnesses of the defendant who lived at Matthews. The plaintiff said the train was going about the speed of a fast walk. The conductor and the other witnesses for the defendant said that its speed was ten or fifteen miles an hour. His Honor instructed the jury that if they should find that the train was not moving faster than a fast walk and the danger not being apparent to a reasonable man, and that if he was told by the conductor, that is, if they should find as a fact from the greater weight of the evidence that the conductor did tell him to get off, they should answer the first issue (as to the defendant's negligence) "Yes." In that we think there was error. The plaintiff's own testimony showed that he contributed to his own injury. His standing on the bottom step (573) of the train attempting to alight under its speed, as testified to by himself, and being in a position of danger liable to be thrown off by a jerk or wrench of the cars, was in itself contributory negligence, and the getting off under the circumstances was unreasonable.

Cited: *Butts v. R. R.*, 133 N. C., 83; *Morrow v. R. R.*, 134 N. C., 99; *Graves v. R. R.*, 136 N. C., 9; *Whitfield v. R. R.*, 147 N. C., 239.

HITCH v. COMMISSIONERS OF EDGECOMBE COUNTY.

(Filed 5 May, 1903.)

1. Pleadings—Complaint—Demurrer—Waiver.

Where pleadings are not framed with technical accuracy or something is lacking to constitute a good statement of a cause of action, the defect is waived by pleading to the merits, or by not taking advantage of such defects in some proper way.

2. Counties—County Commissioners—Torts—Trespass.

A county cannot be sued for trespass upon land or for any other tort in the absence of statutory authority.

3. County Commissioners—Counties—Trespass—Damages—Highways.

If the commissioners of a county take land for a highway without authority of law they are liable therefor individually.

4. Eminent Domain—Highways—Compensation—Damages—The Code, Sec. 2040.

The owner of property must seek compensation for land taken for a highway in the manner pointed out by statute.

ACTION by Frank Hitch and others against the Commissioners of Edgecombe County, heard by *Winston, J.*, at October Term, (574) 1902, of EDGECOMBE.

It is only necessary, in order to understand the questions presented, that the second cause of action stated in the complaint and the demurrer thereto should be set out, as the first cause of action was abandoned in this Court. They are as follows:

The plaintiff for a second cause of action alleges:

1. That the defendant entered upon and took possession of the said two parcels of land hereinbefore described.

2. That said tracts of land lie adjoining and contain about three-quarters of an acre; defendant dug up said land and took the earth therefrom, causing deep, dangerous, and unsightly holes in it; the earth so removed was used in constructing an embankment about 25 feet wide at the top and about 12 to 15 feet high on and across said land on which the defendant opened a highway; that said land is destroyed and rendered useless for any practical purpose by reason of the construction and presence of said highway.

3. That said plaintiffs are damaged by reason of the act of defendants as hereinbefore set out to the extent of $700. Wherefore plaintiffs demand judgment against defendants for $700 and costs.

The defendants demur to the second cause of action set out in the complaint for that the facts stated do not constitute a cause of action, in that a trespass upon the lands in the complaint is alleged, for which trespass no statutory right of action exists.

The court sustained the demurrer, and the plaintiffs excepted and appealed.

John L. Bridgers for plaintiffs.

Gilliam & Gilliam and Paul Jones for defendants.

WALKER, J., after stating the case: This action was brought to recover damages for entering upon and injuring the plaintiffs' land. The complaint contained two causes of action, to each of which the de- (575) fendant demurred, but in the argument before us the plaintiffs' counsel abandoned the first cause of action, so that we are confined, in the consideration of the case, to the sufficiency of the second cause of action.

The plaintiffs alleged an entry upon the land, and it must be presumed that they intended to allege an unlawful or wrongful entry: otherwise

they would not have been injured in a technical or legal sense. They further allege that they have been "damaged" by the entry and by the other acts committed by the defendants upon the premises. This word "damaged" is evidently intended to be used in the sense of the word "injured," which means in the law "the privation or violation of a right," something, in other words, for which an action will lie in behalf of the injured person. An actionable wrong, 3 Blk. Com., 2; Black's Dict., 624, *"Injuria."* Mr. Black says that an injury is "any wrong or damage done to another, either in his person, rights, reputation, or property." It seems, therefore, that under the second cause of action the plaintiffs, in an informal way, it may be admitted, allege an injury to their property rights, and the allegations will be deemed to constitute a cause of action for trespass, if no motion was made to make them more definite, or if they were not demurred to upon the ground of defectiveness of statement.

It is true, the plaintiffs do not allege that the entry and other acts were unlawful or wrongful or in violation of their rights, but those or equivalent words are implied when the defendant either answers to the merits or fails to ask that the complaint be made more definite and certain, or to demur for defectiveness of statement. It is well settled that in a case where the pleading is not framed with technical accuracy or something is lacking to constitute a good statement of a cause of action, the defect is waived by pleading to the merits or by not taking advantage of the defect in some proper way, and the defective plead- (576) ing is aided and the necessary averments will be supplied by the law. This very question was decided in *Garrett v. Trotter,* 65 N. C., 430, which was an action to recover land. The plaintiff in that case failed to allege that the entry was unlawful or wrongful, and this Court held that the defendant, by answering or by not demurring, waived the defect, and under the doctrine of aider the plaintiff might proceed in the case as if the pleading had been correctly drawn. In the case at bar the defendants did not by demurrer point out the defect, and, if the complaint is not sufficient in its present form, under the liberal provisions of our present system of pleading, to constitute a good statement of a cause of action for trespass, it has become so by reason of the aid derived from the defendants' pleading. It is to be observed that not only do the defendants not take advantage of the supposed defect in the complaint, namely, that it is not alleged that the entry was unlawful or wrongful, but they expressly waived the defect, if there is any, and elected to treat the second cause of action in the complaint as one for trespass.

It comes, then, to this, that plaintiffs have sued the defendants in their corporate capacity for an unlawful entry and trespass upon their land,

or rather upon the land of the plaintiff company, and demand that they recover damages for the same. The plaintiff either alleges a trespass in the second cause of action or no cause of action at all is alleged. If the defendants entered unlawfully and wrongfully upon the land, it was a trespass; and if they entered lawfully, they are not liable to the plaintiff for any damages. If no cause of action is alleged, the demurrer was properly sustained, and if the plaintiff alleges a cause of action for trespass the judgment of the court was also right, because this Court has recently held that counties cannot be sued for trespass upon land (577) or for the commission of any other *tort* in the absence of a statutory provision giving a right of action against them in such cases. This is no new principle, as will appear by reference to the cases cited in the opinions of this Court. The reasons for the doctrine are therein fully and clearly set out and need not be repeated. *Jones v. Commissioners,* 130 N. C., 451.

The plaintiff does not allege that there has been any condemnation of the land for the purpose of constructing a public road and an assessment of damages, which by the statute (The Code, sec. 2040) are made a county charge. If the county authorities have taken the land of the plaintiff company for public purposes, it should be compensated, but in the way pointed out by the law. If there has been a condemnation of the land, the plaintiff can recover the amount assessed in its favor, and if the defendants have entered upon the land without authority of law, the members of the board are individually liable for their wrongful acts. In any view of the case, as now presented to us, we think the judge below was right in sustaining the demurrer.

PER CURIAM. No error.

MONTGOMERY, J., concurring in result: It is difficult for me to understand from a reading of the complaint the grounds upon which the plaintiff relies to recover the judgment which he demands. Two causes of action are set forth. In the first, there are allegations that the plaintiff was the owner of two small tracts of land near Tarboro, and that the chairman of the defendant board of commissioners inquired of the plaintiff if he would sell the same, and for what price; that the plaintiff answered the inquiry, stating that $700 was the price asked for the land; that the defendants made no reply, and not long thereafter they went upon the land and constructed a highway across and through it. (578) There was then a prayer that the defendants "comply with their said agreement as hereinafter stated and pay said sum, which was refused," the plaintiff alleging at that same time that "he was ready, able,

and willing to convey a clear title for said land to the said defendants for the price named and agreed upon."

The second cause of action is stated in the following words: (1) That the said defendants entered upon and took possession of the said two parcels of land hereinbefore described and set out. (2) That said tracts of land lie adjoining and they contain about three-quarters of an acre; that said defendants dug up said land and took the earth therefrom, causing deep, dangerous, and unsightly holes in it. The earth so removed was used in constructing an embankment about 25 feet wide at the top and about 12 to 15 feet high, on and across said land, on which the defendant opened a highway; that said land is destroyed and rendered useless for any practical purpose by reason of the construction and presence of said highway.

There followed a prayer for damages for $700. The defendants demurred to both causes of action. The demurrers were sustained by the court below. There was no appeal from the judgment on the demurrer in the first cause of action.

The ground upon which the demurrer to the second cause of action was interposed was stated by the pleader to be that "the facts stated therein (the complaint) do not constitute a cause of action in that a trespass upon the land described in the complaint is alleged, for which trespass no statutory right of action is alleged or exists." It looks to us that the complaint does not contain an allegation of trespass upon the part of the defendants. The allegation is that they entered upon the land and built upon it a highway, that is, a public road. There is no allegation that they entered unlawfully upon the land and built and opened the highway. The county commissioners of Edge- (579) combe, under chapter 50 of the first volume of The Code, were authorized to have laid out and constructed public roads and highways. The particular manner in which they should act is set forth in that chapter of The Code. The allegation having been made in the complaint that the defendants had laid off a public road over the plaintiff's land, the presumption would be that they proceeded according to law, that there was a petition for the laying off the road, the appointment of commissioners for that purpose, the action of the commissioners, their report, and compensation ordered by the defendants. Such proceedings on the part of county commissioners are entirely judicial, and there is a presumption that everything was done in an orderly and proper method.

As we have said, the complaint does not state that the defendants *unlawfully* entered the plaintiff's possessions and without authority of law condemned them to the public use; and it would indeed appear strange if such a thing should have been done. It seems to me, therefore, that it ought not to be concluded that the defendants have acted

in such a manner without a direct allegation to that effect. It may be that condemnation of the plaintiff's land for public purposes has been made, and that the compensation fixed by the commissioners was not satisfactory to the plaintiff. If so, relief cannot be had in the present action. The demurrer may have been sustained on the wrong ground, but it can be seen from the complaint that the plaintiff has stated no cause of action, and the same should be dismissed.

Cited: *Harvell v. Lumber Co.*, 154 N. C., 260; *Kenan v. Comrs.*, 167 N. C., 358; *Snider v. High Point*, 168 N. C., 610; *Leary v. Comrs.*, 172 N. C., 38.

---

(580)

JOYNER v. SUGG.

(Filed 5 May, 1903.)

Homestead—Exemptions—Trust Deeds—Husband and Wife—The Constitution, Art. X, Secs. 2, 3, 5, 8.

A deed in trust by the husband, in which the wife does not join, reserving the homestead of the grantor therein, conveys the entire land contained in the deed of trust, subject only to the determinable exemption in $1,000 worth thereof from the payment of the debts of the grantor during his life.

PETITION to rehear this case, reported in 131 N. C., 324. Petition granted.

Jarvis & Blow for petitioner.
Skinner & Whedbee in opposition.

WALKER, J. This is a petition to rehear and review the judgment of this Court rendered at the last term in the above-entitled case. It involves a matter of the greatest importance, as it relates to the ever recurring question of the extent of the homestead right, and requires us to declare and decide what is the nature and characteristics of that creature of the Constitution known as the homestead, and what right in or control or dominion over it the owner has and enjoys under the terms of the instrument by which it was brought into existence.

The facts in regard to this particular case—as we gather them from the record—are those stated by the Court in the prevailing opinion delivered at said term, with slight modification, not now perhaps ma-

terial to be considered in connection with the question to be discussed and decided on the rehearing, and are as follows: "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 rights therein as secured by the laws of North Carolina.' After (581) 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 therefor 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 conveyed 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 to said Davis the payment of the purchase money, which was subsequently paid off by Mrs. Joyner after the death of her husband, as appears by the testimony of W. G. Lang at page 22 of the record. 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 nieces, the defendants, who are in possession of the premises."

It was held by this Court (*Joyner v. Sugg,* 131 N. C., 324) that there was no parol trust created by Mrs. Joyner, and that the parol trust raised by the agreement between R. L. Davis and Blaney Joyner was performed by the execution of the conveyance of Davis to J. A. E. Joyner, as directed by Blaney Joyner; so that the question as to the trust is now out of the case, and we have only to determine whether the deed of trust and the subsequent deed of the trustee to Davis and of Davis to Mrs. Joyner vested in her the title to the land described in the deeds, subject only to the right of Blaney Joyner to have and occupy a part of the land to the value of $1,000, exempt from sale under execution for the time fixed in the Constitution, or whether the deeds conveyed all of said lands except the part subject to the exemption, the said part being so excepted from the deeds as that no interest whatever therein vested in Mrs. Joyner. In other words, does the Constitution (582) forbid the sale of the land itself allotted as property which shall be exempt from sale under execution without the joinder of husband and wife in the deed and the privy examination of the wife thereto, or does it merely prohibit any conveyance without such joinder and privy examination, which will transfer or convey this right of exemption, leaving the husband free to convey all other interests he may have in the excepted part to take effect in possession when the exemption has ceased?

We unhesitatingly adopt the latter construction as the one which was clearly contemplated by the framers of the Constitution, which has met with legislative sanction, as we shall hereinafter show, and which has been uniformly adopted by this Court until this case was decided at the last term.

It is provided in Article X of the Constitution as follows:

"Sec. 2. Every homestead and the dwellings and buildings used therewith, not exceeding in value $1,000, 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 $1,000, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

"Sec. 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them.

"Sec. 5. If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her (583) widowhood, unless she be the owner of a homestead in her own right.

"Sec. 8. 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."

It is perfectly obvious from a bare perusal of these sections that the sole object of the framers of the Constitution was, not to set apart property which should not be sold by the owner, but to exempt the property from execution and thereby put it beyond the reach of creditors for the time specified. Their only care and solicitude were to protect him who had been or might be overtaken by misfortune, and to save his family from utter impoverishment and destitution. They did not intend to tie the hands of the head of the family so that he could not dispose of his property, as they well knew that the *jus disponendi* would always be one of the most valuable qualities of the estate, but it was their purpose to bind the hands of the creditor so that he could not lay them upon the exempted property of the debtor in the time of his adversity, and to suspend his right to proceed against that property for the satisfaction of his claim during the period of exemption. This constituted their chief and, indeed, their only aim and purpose, and it was never intended that the humane and beneficent provision of the organic law should be

so interpreted as to take away from the owner of the right of exemption any part of his almost equally valuable right of alienation.

The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no (584) children of the marriage, and if there were children, then during th minority of the children or any one of them. The leading idea, if not the only one, was to create an exemption and not an estate, and an exemption, too, for a limited period, leaving the estate, which the debtor already had in the land unimpaired. We have said that no new estate was created, for we are told that an estate is the interest which the tenant has in his land, and no interest has been created here, but merely a right of exemption or a privilege of protection against creditors, leaving the debtor at full liberty to deal with his estate at his own free will, provided he does not alien this right of exemption or interfere with its enjoyment without the consent of his wife to be signified in the manner prescribed.

We find, therefore, that as regards the property allotted for the purpose of exemption, the debtor acquires no new right, interest, or estate in it or to it, as he is supposed already to have the entire estate, but something collateral to it; and if this something, which we may call a right of exemption or a determinable right of exemption or a quality annexed to the land whereby it is exempted, is preserved to him and his family intact, he may convey or transfer his estate or interest in the land, as he could do if this right did not exist, without infringing upon any provision of the Constitution.

The land is his, and he holds it with all the rights and incidents of ownership, among which stands preëminent the right of alienation as essential to his power and dominion over it, and the lawmakers could not have intended to put any restriction upon this right, for it would be against the policy of the law to do so, except in so far, and only in so far, as it might be necessary to protect the owner against his creditors. If he does not interfere with the right of exemption, why (585) may he not do with his own as he pleases in all other respects, and why may he not sell and convey without the joinder of his wife all of his interest in that which it is not necessary for him to keep in order to secure to himself and his family the full enjoyment of this right of exemption? When it is admitted to be a mere determinable right of exemption, as we understand it is in the opinion of this Court delivered at the last term, the result we have reached, and not the one stated by

the Court in that opinion, is, we think, the natural and inevitable conclusion that follows from the admission. The true idea is well expressed by the Court in *Hughes v. Hodges,* 102 N. C., 236: "The *jus disponendi* is a vested right and protected by the Constitution and is restricted only by provisions for dower and homestead, which restrictions must be so construed as to carry out the kindly purpose for which they were created, with no more restriction of the power of alienation than is necessary to make them effectual."

We have thus far stood upon "the reason of the thing" and the letter and spirit of the Constitution. But if there can be any doubt or uncertainty in regard to this matter, why may we not call to our aid the interpretation placed, impliedly, at least, upon this constitutional provision by the Legislature? It was provided by Laws 1869-'70, ch. 121, sec. 1 (Battle's Rev., ch. 55, sec. 26), "That it should not be lawful to levy upon or sell under execution for any debt the 'reversionary interests' in any lands included in a homestead until after the termination of the homestead interest therein." While the words "reversionary interest" are here used to describe a right which the owner has in the land subject to the determinable exemption, and were inappropriate in a technical sense for that purpose, because the homestead is not an estate, and the interest or estate of the owner in the land is in no way divided
(586) up or changed, yet it appears clearly from the act that the Legislature thought that under the Constitution the owner had a salable interest in the exempted land distinct from the right of exemption. If this is not so, and the land itself or the part of it allotted for the purpose of exemption was in the mind of the Legislature as being that thing which constituted the "homestead," why should it speak of a "reversionary interest," which implies that there is a preceding particular estate or interest, and undertake to protect that "reversionary interest" from sale under final process? It is utterly impossible to conceive that the Legislature, in staying the sheriff's hand until the right of exemption has expired, could have had any other idea than that the Constitution created only a right of exemption which left the land in the hands of the debtor exposed to sale, subject only to that privilege or right of exemption, and the exempted land which was thus liable to be sold was miscalled a "reversion." It expressed the right idea with the wrong word, but nevertheless it placed the unmistakable interpretation upon the Constitution which we have adopted. It would have been idle to protect from sale under execution something that did not exist and could not be sold; and it will not be imputed to the Legislature that it intended to do a vain thing. This Court, speaking by *Ashe, J.,* in *Adrian v. Shaw,* 82 N. C., 474, says: "In this State it is held that the homestead right is a quality annexed to land whereby the estate is exempted from sale under execution

for debt, and it has its force and vigor in and by the Constitution." If it was intended by the framers of the Constitution that all of the interest of the owner in the homestead land should be exempted from sale, it was not necessary to pass the act of 1869-'70, as the Constitution sufficiently protected it.

It was only upon the supposition that there was an interest in the exempted land which was left exposed to sale that made it necessary to pass the said act. That statute was remedial in its nature. The old law was the Constitution, which declared that a certain (587) part of the land should be set apart and to it should be attached a right or privilege of exemption only, thereby rendering it liable to sale, subject to that exemption. The mischief was that sales under execution had been and were then being made, which were recognized as valid by the courts and which were considered as injurious to the homesteader; and to remedy this evil the statute was enacted. It was not declaratory, because if the framers of the Constitution intended that "the estate in the land in its entirety should be set apart and exempted," this, as we have said, was all-sufficient without a statute to forbid its sale under execution, as we know that the Constitution does that in express and positive terms.

But let us examine the question in the light of the decisions of this Court.

Jenkins v. Bobbitt, 77 N. C., 385, is directly in point, and has never been overruled or questioned. It is well to reproduce a part of what is said in that case by *Pearson, C. J.,* for the Court: "We think it clear that this section refers exclusively to the disposition of the homestead estate by the owner thereof, and has no reference whatever to any conveyance he may make of his estate in reversion. By the proper construction, this section should read: 'But no deed *purporting to dispose of the homestead* 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.' Read in this way, there is sense to it; but to make it apply to a disposition of the reversion as well as a disposition of the homestead estate, incurs the censure of the rule *hæret in litera, hæret in cortice.* . . . As the owner of an estate in reversion after a homestead estate had a right to make a voluntary alienation, it follows that his creditors had a right to have it sold under execution. Hence the necessity for the statute, Bat. (588) Rev., ch. 55, sec. 26. If the wife had the power to put a veto upon the sale of the reversion by refusing to give her assent, that act would not have been needed. But such a power on the part of the wife, to object either to the voluntary disposition of the reversion by the husband or to an involuntary disposition of it by execution, was not then sug-

gested by any one. . . . A sale by the owner of the homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. It is his property; why should he not have a right to dispose of it? The right seems to be conceded by His Honor, unless it be restrained by the section of the Constitution upon which we have commented."

The principle of that decision has, as we think, been applied by this Court in the following cases: *Poe v. Hardie,* 65 N. C., 447; *Hager v. Nixon,* 69 N. C., 108; *Barrett v. Richardson,* 76 N. C., 429; *Littlejohn v. Egerton,* 77 N. C., 379; *Gheen v. Summey,* 80 N. C., 187; *Murphy v. McNeill,* 82 N. C., 221; *Adrian v. Shaw,* 82 N. C., 474; *Wyche v. Wyche,* 85 N. C., 96; *Grant v. Edwards,* 86 N. C., 513; *Keener v. Goodson,* 89 N. C., 273; *Lowdermilk v. Corpening,* 92 N. C., 333; *Rogers v. Kimsey,* 101 N. C., 559; *Jones v. Brittain,* 102 N. C., 166, 4 L. R. A., 178; *Hughes v. Hodges,* 102 N. C., 236; *Long v. Walker,* 105 N. C., 90; *Fleming v. Graham,* 110 N. C., 374; *Bank v. Whitaker,* 110 N. C., 345; *Davis v. Smith,* 113 N. C., 94; *Stern v. Lee,* 115 N. C., 426; 2¢ L. R. A., 814; *Thomas v. Fulford,* 117 N. C., 667; *Bevan v. Ellis,* 121 N. C., 224; *Williams v. Scott,* 122 N. C., 545.

These and many other cases either directly or indirectly recognize the right of the owner of the homestead-land to sell the same, subject to the right of exemption, and thereby to convey what was once (589) called, in default of a better word, the "reversion"; and in several cases it has been said by this Court that Article X, sec. 8, of the Constitution by which it is required that there shall be the signature and assent and privy examination of the wife to any valid deed conveying the homestead, applies only when the exempted land has been actually allotted and set apart to the homesteader. *Mayo v. Cotten,* 69 N. C., 289; *Hughes v. Hodges,* 102 N. C., 247.

In *Bank v. Green,* 78 N. C., 252, this Court, by *Bynum, J.,* says: "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 over it and power of disposition are precisely the same after as before the assignment of the homestead. The law is aimed at the creditor only, and it is upon him that all of the restrictions are imposed; and the extent of these restrictions is the measure of the privileges secured to the debtor."

"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." *Ibid.*

In *Hinsdale v. Williams,* 75 N. C., 430, *Pearson, C. J.,* for the Court, 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."

In *Ladd v. Byrd,* 113 N. C., 466, the Court states the principle as follows: "Prior to the passage of the act of 1870, when the reversionary interest could still be sold under execution, the judgment creditor might at his option recognize the claim of the debtor to a homestead by exposing to sale only such reversionary interest without affecting the validity of the sale, or in any way impairing the right of (590) the purchaser to possession of the land on the expiration of the prescribed period of exemption. *Long v. Walker,* 105 N. C., 90; *Wyche v. Wyche,* 85 N. C., 96; *Barrett v. Richardson,* 76 N. C., 423. When made expressly 'subject to the homestead,' it was held that the sale was valid and 'passed the reversionary interest only.' "

In *Vanstory v. Thornton,* 112 N. C., 116, 34 Am. St., 483, the Court distinctly recognized and applied the principle that the homestead is not a new estate, but merely a determinable exemption from the payment of debts, and that the land might be conveyed subject to this right of exemption. "The reversionary interest in the homestead land," says the Court, "may be owned by one person, while the homestead interests or estate is held by another"—citing several cases. And again: "The exemptionist may sell the land on which the benefit rests, subject to the judgment, but also protected for the time being by the suspension of the lien." While there was a dissenting opinion in that case, it was upon a question not presented in this case, and as to the principle here involved the justices were unanimous.

In *Williams v. Scott,* 122 N. C., 545, the Court says: "A sale of the reversionary interest in land by an assignee in bankruptcy, in which a homestead had been allotted, is fully recognized in our courts. *Windley v. Tankard,* 88 N. C., 223; *Murray v. Hazell,* 99 N. C., 168. 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."

In *Thomas v. Fulford,* 117 N. C., 667, there was a wide divergence of views developed, but no principle theretofore established by the Court in regard to the right of exemption was overruled or even modified. There was a concurrence in opinion of three of the jus- (591) tices to the effect that a valid sale could be made by the husband of the land allotted as a homestead without the joinder of his wife, subject to the right of exemption, though it was decided that, upon the special facts of that case, a good title could not be made; this resulted from the opinion of *Clark, J.,* that the right to a homestead was a mere

"stay of execution," which is personal to the owner of the land and also inalienable. In other respects he concurred with *Montgomery* and *Avery, JJ.*, and had it not been for his view of the law in the respect indicated, which does not affect the matter under consideration in this case, the judgment in that case would have been the reverse of what it was. Viewed in this light, the decision is a direct authority in favor of the defendant's contention in the case at bar.

In *Hughes v Hodges,* 102 N. C., 247, it is said: "Neither is it material that the wife of the defendant did not by deed assent to his receiving a homestead in the Swamp Place. Section 8, Article X, of the Constitution *applies only to a conveyance of the homestead after it is laid off.*" *Mayo v. Cotten,* 69 N. C., 294. The Court in *Hughes v. Hodges, supra,* clearly recognizes the right of the owner of the land to convey it subject to the right of exemption without the joinder of his wife (page 245).

It is not necessary to hold that there is no reversionary interest or nothing substantially equivalent to it for the debtor to sell, as his right of exemption can be fully protected and preserved without such a holding.

In *Scott v. Lane,* 109 N. C., 154, it appeared that at the time two mortgages on land, which were of less value than $1,000, were made, the mortgagor was married; that he acquired the land in 1869; that he and his wife lived upon the land and they had no children, and that he owed no debts except those mentioned in the mortgages. The (592) mortgages were foreclosed and the purchaser sued the mortgagor for possession. It was held that the purchaser acquired a good title as against the defendant, subject only to the wife's contingent right of dower, although she had not joined in the mortgages, and that he was entitled therefore to recover the land. The case is directly in point, and it is impossible to distinguish it from our case.

Markham v. Hicks, 90 N. C., 204, was relied on as an authority sustaining the conclusion of the Court at the last term, but the Chief Justice did not think that it was in point, or at least not sufficient for that purpose. In referring to that case he said: "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 the changes in its opinion." What is stated in *Markham v. Hicks, supra,* in reference to the homestead is utterly inconsistent, we think, with the decision in *Murphy v. McNeill,* 82 N. C., 221, and was directly repudiated by the Court in *Ladd v. Byrd,* 113 N. C., 468. See, also, in the same connection, the strong language of the Court in *Jones v. Brittain,* 102 N. C., 183, 4 L. R. A., 178, citing *Jenkins v. Bobbitt,* 77 N. C., 385, and *Littlejohn v. Egerton,* 77 N. C., 379. In that case the Court takes a view of the act of 1870,

forbidding the sale of "reversionary interests," differing widely from that expressed by *Smith, C. J.*, in *Markham v. Hicks, supra.*

The argument that if the owner of the land is allowed to sell subject to the right of exemption, the property would not bring much and would be bought only by speculators and result in a sacrifice to the homesteader, could apply, if at all, only to forced sales made under execution or other final process, and not to voluntary sales; for, in the latter case, the owner can sell for his own price, or refuse to sell at all. He has the power to make his own terms. Therefore, what is stated in the opinion of the Court at the last term in regard to (593) such sales can have no application to this case. When the argument was used by *Dick, J.*, in *Poe v. Hardie,* 65 N. C., 447, and by *Reade, J.*, in *Hinsdale v. Williams,* 75 N. C., 430, they were speaking with reference to the act of 1870 and referring only to forced sales.

In *Bank v. Green,* 78 N. C., 252, *Bynum, J.*, says: "The Court should not listen to an argument based upon advantage to the debtor or be influenced by considerations of benefit to him, but should construe the law as it is written. The courts cannot by judicial legislation even do so bold a thing as to confer new rights and exemptions in the face of plain legislation by the lawmaking power. . . . Such an argument should not be addressed to a court, which cannot make, but only construe and administer the law as it is written. If worthy of consideration, it should be directed to the Legislature as a reason for changing the law."

We cannot understand why a conveyance of land subject to the owner's right of exemption should not be permitted to have full force and effect to convey all the interest he has in it, subject only to his right to use and enjoy it during the period of the exemption. This is all that the Constitution secures to him, and every principle of law and public policy requires that his right of alienation should be as little hampered as possible.

But we have said, and we now repeat, that the prohibition of section 8, Article X, of the Constitution, against the conveyance of the husband without the voluntary signature and assent of the wife, to be signified by her privy examination, was not intended to become effective until the homestead is actually allotted to the owner of the land. It is provided by that section that no owner of a homestead shall convey it without the assent of his wife, and this necessarily implies that there has been an actual allotment, as no one can be said to be the owner of that which does not exist. The *right* to the homestead always exists and is guaranteed by the Constitution, but the home- (594) stead itself cannot come into existence until it has been "selected

by the owner" of the land and actually allotted and thereby identified as his homestead. *Mayo v. Cotten* and *Hughes v. Hodges, supra.*

This very question was involved in *Hager v. Nixon,* 69 N. C., 108, and the meaning of the words of the Constitution, "owner of a homestead," as used in the several sections above quoted, was clearly defined. In that case the husband died without owing any debts and without having had any homestead set apart to him. His wife and minor children applied for the allotment of a homestead, and the Court decided that section 5, by which it is provided that "if the owner of a homestead die leaving a widow" she shall have the benefit of the homestead during her widowhood, meant that the homestead must have been allotted to the husband, and he must in that way have become the "owner of a homestead" before she could have the benefit of it. "It is implied," says the Court, "that the ancestor had been the owner of the homestead, by which, in this connection, must be meant a part of his property set apart and designated as exempt, and not merely land occupied and owned by him." *Ibid.,* p. 110.

The words "owner of a homestead" are used in section 8, by which the sale of the homestead without the assent of the wife is forbidden, and as the Court has said in *Hager v. Nixon, supra,* that the same words in all of the sections must of necessity receive the same construction, the restraint of alienation imposed by section 8 can apply only to a homestead which has been actually allotted. See, also, *Bruce v. Strickland,* 81 N. C., 267. The prohibition of that section cannot, therefore, affect this case, as there had been no allotment of the homestead when Blaney Joyner executed the deed of trust to Allen Warren.

(595) It follows from what we have stated that J. A. E. Joyner acquired a good title to the land in question by sale and deed to her, subject to Blaney Joyner's homestead right and his determinable right to use and occupy the same, exempt from the claims of his creditor; and, this right having expired at his death, the "homestead" right of J. A. E. Joyner merged in the fee simple she acquired by the deed and gave her a good and indefeasible title to the land, which she devised to the defendants. They are, therefore, entitled to the same as against the plaintiffs.

The former judgment of this Court is reversed and the judgment of the lower court is affirmed.

Petition allowed.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

DOUGLAS, J., dissenting: Still adhering to the views contained in the opinion of the Court as delivered by me at its last term, I am compelled to dissent from the present opinion of the Court. Here my dissent would end if the present opinion simply expressed its present views, but as it is in greater part a critical review of the former opinion, I deem it proper to say something further. The opinion of the Court speaks of the construction "which has been uniformly adopted by this Court until this case was decided at the last term." This alleged uniformity of construction I have been utterly unable to discover. It may exist somewhere, but if so, in a state too intangible for my mental grasp. Perhaps it shares the ethereal existence of that quality of exemption which is said to be capable of existing independently of the substance which it qualifies. The case of *Thomas v. Fulford,* 117 N. C., 667, in which a distinguished member of the Bar wittily said that there were five dissenting opinions, may be cited as an example of uniformity.

The Court again says that the framers of the Constitution "never intended that this humane and beneficent provision of the (596) organic law should be so interpreted and misunderstood." Perhaps not. My only way of knowing their thoughts is from their written words.

In the construction of the constitutional provisions creating the homestead, there are two different views, either of which might reasonably be followed; but they are antagonistic. If one is right, the other must be wrong; and it seems to me that the effort to combine these inconsistent principles is the real cause of the confusion that has arisen in the construction of the homestead, and is the vital error in the present opinion of the Court. The homestead must be either a mere quality annexed to land or a particular estate carved out of the fee. The very definition of the one excludes the other. A quality in itself has no independent existence, but must remain annexed to the subject which it qualifies. The *qualities* of a horse are generally considered as including strength, speed, endurance, gentleness, and intelligence. The owner cannot sell the horse and still keep these qualities for himself. The qualities must go with the horse or cease to exist. On the contrary, no one would include the mane and tail of a horse among his qualities. They are *parts* of the horse and can be cut off and separated from the horse. So, if the homestead is a mere quality annexed to land, it must remain with the land; but if it is a particular estate carved out of the fee, it may exist and be conveyed independently of the reversion. We adopted the former view as being more logical, in view of the repeated decisions of this Court; but I readily admit that the latter is not un-

reasonable, provided it is not confused with a lot of inconsistent qualities.

The logical result of the present opinion of the Court is to turn the homestead into an estate or interest in land. Its parts are (1) a particular estate for life to the homesteader; (2) a remainder to his children until they have become 21 years of age; (3) a con-
(597) tingent remainder to his widow during her widowhood, unless she has a homestead of her own; and (4) the ultimate fee or reversion, which may be retained or conveyed by the homesteader. This idea seems to have been running through the minds of the Court in one form or another for many years, from their frequent use of the terms "homestead estate" and "reversion."

The Court principally relies upon *Jenkins v. Bobbitt,* 77 N. C., 385, which it says "is directly in point and has never been overruled or questioned." Then follows a long extract from that opinion in which occur the following paragraphs: "As the owner of an *estate in reversion* after a *homestead estate* had a right to make a voluntary alienation, it follows that his creditors had a right to have it sold under execution." And again: "A sale by the owner of the homestead of his *estate* in reversion stands as at common law." This is a distinct recognition of two different estates carved out of the same fee.

This Court in its present opinion uses the following language: "If this is not so, and the land itself, or a part of it allotted for the purpose of exemption, was in the mind of the Legislature as being that thing which constitutes the 'homestead,' why should it speak of a 'reversionary interest,' which implies that there is a preceding *estate* or interest?"

It may be asked why, if I am now willing to call it an *estate,* I did not so call it in writing the former opinion of the Court? One sufficient reason was that this Court, while frequently using the words "estate" and "reversion," had repeatedly declared in unequivocal terms that the homestead was merely a *quality* of exemption attached to land, which is utterly inconsistent with the idea of an estate. Now that this Court has virtually turned it into an estate by giving it all the elements
(598) that constitute an estate, I think it should be called by its proper name.

Although feeling compelled to dissent from the opinion of the Court, it is proper to say that I shall offer no further opposition to the adoption of the rule. It cannot be said that it is in violation of any of the constitutional or inherent rights of the citizen; and as the personnel of this Court insures the permanency of this opinion for many years to come, I shall not further attempt to weaken what I cannot change.

Where no moral question is involved, the mere consistency of individual opinion bears no importance compared to the necessity of establishing settled rules of property.

Cited: Atwell v. Shook, 133 N. C., 391; *Rodman v. Robinson,* 134 N. C., 505; *Shackleford v. Morrill,* 142 N. C., 222; *Davenport v. Fleming,* 154 N. C., 293, 295; *Dalrymple v. Cole,* 156 N. C., 358; *Caudle v. Morris,* 160 N. C., 173.

McENTYRE v. LEVI COTTON MILLS.

(Filed 12 May, 1903.)

Evidence—Declarations—Agency—Corporations—Officers.

The declarations of an agent of a corporation are not competent if made after the transactions and are not a part of the *res gestæ*, and it makes no difference that the agent was an officer of the corporation.

ACTION by H. A. McEntyre against the Levi Cotton Mills Company, heard by *Jones, J.,* and a jury, at March Term, 1903, of RUTHERFORD. From a judgment for the plaintiff, the defendant appealed.

McBrayer & Justice for plaintiff.
Eaves & Rucker for defendant.

MONTGOMERY, J. The plaintiff brought this action in the court of a justice of the peace to recover of the defendant $8.35 for work and labor done in the defendant's cotton mill. Judgment was rendered against the defendant for the amount claimed by the plaintiff. The defendant's defense was that by a rule of the company the (599) usual and customary pay day of the defendant for work in the factory was on 14 April, and as the action was commenced before the pay day, *i. e.,* before the amount was due, the plaintiff could not recover. On the appeal of the defendant, the jury answered the issue, "Is the defendant indebted to the plaintiff, and if so, in what amount? Yes; $8.35." In the Superior Court a witness (Wood) testified that he heard M. Levi, president of the cotton mills, and R. H. Smith, the superintendent, testify in the justice's court. Wood was then permitted to testify over the defendant's objection that he heard Smith say, in the trial before the justice, that he (Smith) had discharged the plaintiff from service at the mill; that Levi in the justice's court did not deny owing the amount sued for, but that the amount was not

due until the 14th of April. The evidence of Wood was not competent. When the defendant company filed its answer to the claim of the plaintiff, the power of the president or superintendent to make any further admission or declaration which could bind the company in reference to the cause of action had passed. The admissions or declarations of the agent are received in evidence against the principal, not as admissions or declarations merely, but as parts of the *res gestæ;* hence, only such as accompany the transaction in which the agent acted can be proved; what the agent said at a subsequent time is inadmissible. Rice on Evidence, 446. Whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents. And (Story), "Where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ.*" Greenleaf on Ev., sec. 184c; *Branch v. R. R.,* 88 N. C., 573; *Craven v. Russell,* 118 N. C., 564. It (600) makes no difference that the agents Levi and Smith were officers of a corporation. The same rule applies. *Smith v. Melton,* 68 N. C., 108; *Rumbough v. Imp. Co.,* 112 N. C., 751; 34 Am. St., 528.

New trial.

Cited: Fleming v. R. R., 168 N. C., 250; *Parrish v. Richardson,* 176 N. C., 405.

SMITH v. HUFFMAN.

(Filed 12 May, 1903.)

1. Judgments—Estoppel—Executors and Administrators—Judicial Sales—Debts of Decedents—Collateral Attack.

Where in an action to sell land for assets the administrator alleges that certain real property belonged to the deceased, and a party having a deed to the same, being a party to the action, fails to set up title thereto, he is estopped by the order of sale and decree of confirmation.

2. Judgments—Irregularity—Judicial Sale.

The recital in a decree of confirmation of a sale of land that the matter in controversy was heard before the date set for hearing by consent of parties is conclusive of that fact.

ACTION by John Smith and others against Amos Huffman and others, heard by *Justice, J.,* on 20 January, 1903, at Rutherfordton, N. C. From an order refusing an injunction, the plaintiff appealed.

John T. Perkins for plaintiffs.
Avery & Ervin and A. C. Avery for defendants.

CONNOR, J. In 1878 David Vanhorn and wife executed a deed for the land sued for in this action, to Nancy Smith, a married woman, mother of the plaintiff. Vanhorn died intestate 1884. In 1885 his administrator filed a petition before the clerk of the Superior Court of Burke against the heirs at law of David Vanhorn (including Mrs. Nancy Smith), to sell intestate's lands to pay debts. No (601) answer was filed by Mrs. Smith. An order of sale was made and the two tracts in controversy were sold to William Vanhorn. The proceeding was in all respects regular, except that upon the coming in of the report of sale, notice was issued to the defendants in said proceeding to show cause at the courthouse in Morganton on 23 December, 1885, why the sale should not be confirmed. Copies of this notice were served on Waits Smith and wife, Nancy, on 5 December, 1885. In response to said notice the said Waits and Nancy Smith, on 22 December, 1885, filed an answer in which they alleged that as to Lots 2 and 5, being the lots in controversy in this case, "David Vanhorn did not die seized of the said two tracts, but had sold the same to the *feme* respondent for valuable consideration by deed duly probated and delivered and now recorded, long before his death. That the *feme* respondent, by virtue of said deed, is owner in fee of said two tracts of land." On 24 December an order was made in the cause reciting as follows: "This cause coming on to be heard this day, by consent, and it appearing that the administrators of David Vanhorn have sold the first, second, third, fourth, and fifth tracts of land described in the petition in manner and form as follows, to wit, . . . And it further appearing that notice was issued to all of the defendants except Waits Smith and wife, Nancy Smith, to show cause, on 23 December, 1885, why said sale should not be confirmed, and notice having issued to Waits Smith and wife, Nancy Smith, to show cause, on 26 December, 1885, why said sales should not be confirmed, the said last-named defendants having filed an answer to said notice and said sales, from the 'report of administrators,' and the answer of said defendants appearing to be reasonable, and no sufficient cause being shown why said sales should not be confirmed: It is now, on motion of I. T. Avery, attorney for plaintiffs administrators, ordered, adjudged, and (602) decreed that said sales be in all respects confirmed." The order further directed the administrators to execute deeds to the purchasers.

This cause was heard before his Honor, *Judge Justice,* upon a motion to restrain the defendants from cutting timber on the said tracts of

land in controversy, on 20 January, 1903. His Honor made the following order: "I find from proofs by affidavit and deed offered by plaintiff, and the affidavits and copy of record and deeds offered on the part of the defendant, that the plaintiff has failed to show a *prima facie* title to the land in controversy, the plaintiffs being estopped by the record offered by defendant to claim title to said land against the defendants." His Honor proceeds to refuse the motion for an injunction and requires the defendants to execute a bond conditioned to pay plaintiffs such damages as they may recover in this action. The plaintiff appeals.

We are of the opinion that his Honor's ruling is correct. The petition alleges that David Vanhorn died seized of the land in controversy. Nancy Smith was a party to this petition and filed no answer. Judgment was thereupon rendered directing a sale of the land. This judgment was strictly in accordance with the allegations of the complaint, and until vacated is conclusive upon the parties thereto of the facts alleged in the petition and found to be true. The Court could not in this proceeding inquire into or make any order affecting the integrity of the judgment. *Syme v. Trice,* 96 N. C., 243. There is certainly no irregularity in the record *anterior* to the final decree confirming the sale. It is true that the decree recites that the notice issued to Nancy Smith was returnable on 26 December. Her answer is filed on the 22d, and the order made on 24 December, 1885, confirming the sale, recites that it was "heard by consent." This recital is conclusive on us that the time for hearing the motion for
(603) confirmation was consented to by all parties, and although it is adjudged that the answer of Nancy Smith is reasonable, it is expressly adjudged that "no sufficient cause being shown why said sale should not be confirmed," the order of confirmation is made. If it had been irregular to hear the order before 26 December, such irregularity could be cured by the consent of the parties, and the recital in the judgment that such consent had been given is conclusive in this action. *Chambers v. Penland,* 78 N. C., 53. It will be observed that the plaintiff declares upon a legal title, making no reference to the proceeding instituted by the administrator of David Vanhorn, for any irregularity or for infirmity in that record. If she desired to attack the record for fraud, she could have specifically alleged such vitiating facts and asked to have the sale and proceeding set aside. This she has failed to do. If she complains of irregularities in the proceedings she can only take advantage thereof by a motion in the cause. These principles have been so thoroughly settled by numerous decisions of this Court that it is not necessary to review the authorities. *Morris*

v. White, 96 N. C., 91. We concur with his Honor that upon the record before us the plaintiff is estopped from asserting title to the land in controversy. "A purchaser at a judicial sale will be protected if the sale was authorized by a judgment of a court having jurisdiction of the subject-matter and the person, although the judgment may be impeached for irregularity." *Dickens v. Long,* 112 N. C., 311.

The plaintiff suggests that there is nothing in the record to identify any of the land therein mentioned as the tracts sued for, or to have put Mrs. Smith on notice that her lands were sought to be sold in that proceeding. The complaint describes the land in controversy, and the defendant expressly claims title to the same land in the proceedings referred to. His Honor heard the case upon this assump- (604) tion, that these were the lands in controversy, and we see nothing to suggest the contrary.

Judgment affirmed.

Cited: Card v. Finch, 142 N. C., 146; *Pinnell v. Burroughs,* 168 N. C., 318.

GROSS v. SMITH.

(Filed 12 May, 1903.)

Gifts—Delivery—Evidence—Declarations—Questions for Jury.

A gift of personal property is not complete without delivery, but declarations of an alleged donor that he had given certain property is competent evidence from which the jury may infer and find whether there was a delivery.

ACTION by Nannie Gross and others against John Smith, heard by *Winston, J.,* and a jury, at November (Special) Term, 1902, of RUTHERFORD.

The plaintiffs brought this action for the recovery of a cow which they allege to be in the possession of the defendant Smith. It appears that the cow was sold by the defendant W. F. Snider, as administrator of J. B. Snider, and bought by John Smith, his codefendant. The *feme* plaintiff claims ownership of the cow by virtue of a parol gift from her father. In order to establish her title to the cow, she introduced evidence tending to prove that her father had frequently stated that the cow was not his, but belonged to her, and that he had given it to her, and when the father was asked to sell it to other persons, he always replied that he could not do so, as it was not his cow, but belonged to his daughter Nannie. The *feme* plaintiff was under age and

lived with her father, and the cow was kept in her father's pasture during his lifetime. On several occasions, while the cow was in the pasture, he pointed her out and said that he had given her to the *feme* plaintiff, and that it was not his cow. He further stated that he
(605) had given each of his children a cow, and that this cow was the one he had given to the *feme* plaintiff. After the death of J. B. Snider the cow remained on his place, but in the possession of the *feme* plaintiff's husband. There was also evidence tending to show that the defendant W. F. Snider, administrator of J. B. Snider, before the sale to his codefendant, had admitted that the cow belonged to the *feme* plaintiff, and L. H. Gross, the husband of the *feme* plaintiff, testified upon his examination that the *feme* plaintiff claimed the cow because her father had given the cow to her when she was under age and was living with him as a member of his family. There was no objection to any of the testimony.

The defendants at the close of the testimony moved to dismiss the complaint or for judgment as in case of nonsuit under the statute. The motion was overruled, and the defendants excepted. No testimony was introduced by the defendants.

The court charged the jury in substance as follows: "That to constitute a gift of personal property, there must be a change of possession. If the plaintiff's father pointed out the cow and said to her, 'That is your cow; I give it to you,' and then retained possession of the cow, it was not a gift, and the plaintiff cannot recover. In order to constitute a valid parol gift of the cow, the jury must find that the father parted with the possession and control of the cow and let the possession and control pass to the *feme* plaintiff. If the plaintiff never had possession before the death of her father, no subsequent possession would complete the gift, but that the gift, to be effectual, must have been absolute when made, and must have been accompanied by a transfer of possession—the delivery being the essential element of the gift." The court further charged the jury that the burden was upon the plaintiff to satis-
(606) fy them of the delivery, which was required to make a valid gift.

The jury rendered a verdict in favor of the plaintiff, and judgment was entered accordingly. The only exception is the one taken to the refusal of the court to dismiss the action. From a judgment for the plaintiffs, the defendants appealed.

McBrayer & Justice for plaintiffs.
Eaves & Rucker for defendants.

WALKER, J. We think there was evidence sufficient to be submitted to the jury upon the question of the parol gift. There can be no doubt

that delivery of possession is essential to constitute a valid gift. "The necessity of delivery," says Chancellor Kent, "has been maintained in every period of English law." 2 Kent Com., 438; 2 Blk., 441. But the question in this case is whether there was a delivery in fact. The declarations or admissions of the intestate and the other testimony are not conclusive upon that question, but the jury must find the fact of delivery from all the evidence. When the intestate said that he had given his property to his daughter, and that it belonged to her, his declaration included the idea or admission that he had before that time delivered it to her, for the transfer of possession was essential to constitute the gift. This Court, in *Tiddy v. Graves,* 127 N. C., 502, held that where, in order to vest in the husband an estate by the curtesy, it was necessary to be shown that the marriage took place prior to the date of the adoption of the Constitution in 1868, an admission that the husband was tenant by the curtesy was equivalent to a statement of the fact that the marriage had occurred prior to that time.

All courts hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the acts, conduct, and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct, and (607) declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony. In *Rooney v. Minor,* 56 Vt., 527, it was held that the admissions of an intestate that she had made the gift did not prove the fact in the sense that it was conclusive, but that it was some evidence to be weighed by the jury upon the question of delivery. It tended to show the fact, though it was not sufficient in law to constitute a gift *inter vivos,* unless the jury should find therefrom that there had been a delivery. This is the very point in our case. In *Spencer v. Littlejohn,* 22 S. C., 358, the same question was involved, and the Court held that, while a gift of personal property is not complete without delivery, declarations of the alleged donor to the effect that he had given the property was competent evidence from which the jury might determine whether the gift had been made. The Court says: "It is true that delivery must be proved, but this is a question of fact for the jury; and inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'give' or 'I have given' may sometimes be intended to include the delivery; and when such declarations have been used by the donor and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery; and it ought not to be laid down as a

rule of law to govern the jury that such declarations in themselves are insufficient to prove the gift." In *Davis v. Boyd,* 51 N. C., 249, 251, *Ruffin, C. J.,* speaking for the Court, said that the declarations of the plaintiff that he had given the property to the defendant, and "had made him a good title, as he thought," were not sufficient to establish such a gift. But a careful reading of that case will disclose that the
(608) distinguished Chief Justice placed the decision upon the ground that it appeared in the case affirmatively that there had not been and could not have been any delivery, and he would seem to imply that had it not been for this fact the declarations would have been competent and, if the jury believed them to be true, they were sufficient in law to support a finding that there had been a valid gift of the property by delivery of possession.

We conclude that, in this case, the declarations of the father of the *feme* plaintiff that he made a gift to her of the cow were competent, and they were properly submitted to the jury for their consideration in connection with the other evidence bearing upon the question of delivery.

The cases cited by the learned counsel of the defendant can be distinguished from our case. If they are closely examined, it will be found that the declarations under consideration in those cases were held to be insufficient in themselves to establish a delivery.

We are of the opinion that the case was correctly tried in the court below, and the verdict and judgment must stand.

No error.

Cited: Davis v. R. R., 134 N. C., 303; *Swindell v. Swindell,* 153 N. C., 22; *Patterson v. Trust Co.,* 157 N. C., 14; *Zollicoffer v. Zollicoffer,* 168 N. C., 328; *Askew v. Matthews,* 175 N. C., 190.

McBRAYER v. HAYNES.

(Filed 12 May, 1903.)

Chattel Mortgages—Priority—Parties—Burden of Proof—Payments—Intervenor.

The holder of a first chattel mortgage who is sued by a junior mortgagee for the mortgaged property does not occupy the position of an intervenor, and the burden of showing that the first mortgage has been paid is on the holder of the second mortgage.

ACTION by T. C. McBrayer against R. R. Haynes, heard by *Jones, J.,* and a jury, at March Term, 1903, of RUTHERFORD. From a
(609) judgment for the plaintiff, the defendant appealed.

No counsel for plaintiff.
McBrayer & Justice for defendant.

WALKER, J. The plaintiff brought this action against the defendant for the recovery of two mules, and alleged that he was entitled to them by virtue of two mortgages executed by one J. C. Phillips to him. The defendant denied the plaintiff's title and right of possession and averred that J. C. Phillips had, prior to the date of his mortgages to the plaintiff, executed two mortgages to the Gaffney Live-stock Company for the same mules to secure a debt due by him to said company, which were registered before those of the plaintiff. These mortgages of Phillips to the Live-stock Company were duly assigned to the defendant.

The plaintiff alleged that the debt secured by them had been paid, and that the mortgages being thereby satisfied, he was entitled to recover under the mortgages made to him. Upon the issue thus raised between the parties, the court instructed the jury to find as a fact whether the mortgages, under which both claimed, embraced the same mules, and to find further whether the mortgages under which the defendant claimed had "been paid off and discharged as contended by the plaintiff," the defendant contending that they had not been discharged. The court further charged the jury that the defendant occupied the position of an intervenor, and in that capacity he asserts his title to be superior to that of the plaintiff, and that the defendant must satisfy them by the greater weight of evidence that he purchased the notes and mortgages from the Live-stock Company and that the same are still due and unpaid, and, if he had so satisfied the jury, they should answer the first issue "No"; and if they find that the notes and mortgages had been paid, they should answer the issue "Yes." If they answered the issue "No," the plaintiff would not be entitled to recover. The first issue was in the following form: "Have the notes and mortgages executed by Phillips to the Gaffney Live- (610) stock Company been paid?"

We think that the latter part of this instruction was erroneous. The defendant was not an intervenor in any view of the case. He was brought into court by the plaintiff and called upon to defend his title, and he did not, as the court supposed, come in voluntarily and assert ownership to the property. The court correctly charged the jury to find as a fact whether the defendant's mortgages conveyed the property in dispute, and then to find further whether they had been discharged by payment of the debts secured by them, "as contended by the plaintiff." The error consisted in imposing the burden of proof as to the fact of payment upon the defendant. When the defendant introduced the mortgages, under which he claimed the mules, and showed that

the mules were conveyed by these mortgages, he was entitled to recover unless the plaintiff could show that the debt secured by the mortgages had been paid. The burden of establishing the plea or allegation of payment is always on him who relies upon it. *Zachary v. Phillips,* 101 N. C., 574; *Stronach v. Bledsoe,* 85 N. C., 473; *Bank v. Walker,* 121 N. C., 115; *Hudson v. Wetherington,* 79 N. C., 3.

It is familiar learning and a maxim of the law that the burden of proof rests, not upon him who denies, but upon him who affirms, and the form of the issue can make no difference in the application of the principle. If the affirmative of the issue is really with a party, and it is essential that he should establish it in order to recover, the burden of proof is necessarily upon him. *Hudson v. Wetherington,* 79 N. C., 3. If a party would avoid the legal effect upon his fortunes in a case of any admitted fact, or confessed, or established by his adversary, the burden, of course, is upon him to do so. *McQueen v. Bank,*
(611) 111 N. C., 509; *Mitchell v. Whitlock,* 121 N. C., 166; *Ferree v. Cook,* 119 N. C., 161.

The court had charged the jury with reference to the plaintiff's right to recover, as follows: "The court charges you that if the plaintiff has shown by the greater weight of evidence that the mules in controversy are the same mules conveyed in the mortgages executed by J. C. Phillips to the plaintiff, then the plaintiff has made out a *prima facie* case, and, nothing else appearing, would be entitled to recover." Why was not this same rule applicable to the defendant's position when he had introduced his mortgages, which antedated those of the plaintiff? He was equally entitled to recover, unless the plaintiff could avoid the legal consequences of this proof. When the plaintiff introduced his mortgages *and* showed that they conveyed the property in dispute, the burden then rested on the defendant to meet the case thus made by the plaintiff and assail his title, or show that he, the defendant, had a better title. When he introduced his mortgages and showed that they covered the property, he thereby proved a better title than that of the plaintiff, who derived his title under mortgages of a subsequent date, and the burden therefore shifted back to the plaintiff to impeach the defendant's title by showing payment of the debt secured by his mortgages, or in some other way.

But it seems to us that the very question now presented was decided in *McIver v. Smith,* 118 N. C., 73. That was an action brought by the vendee of a mortgagor against the purchaser at a sale under a power contained in the mortgage, to have the sale declared invalid, as the plaintiff alleged that nothing was due on the mortgage. The defendant, who was the purchaser at the sale, averred in his answer that there was an amount due on the mortgage notes at the time of the sale

which was equal to the amount of his bid, and this Court held that the burden was on the plaintiff to show that the debt secured by the mortgage had been paid. The two cases cannot be distin- (612) guished in principle.

For the error in the charge as indicated, a new trial is awarded.

PER CURIAM. New trial.

Cited: Bank v. Thompson, 174 N. C., 350.

PIPES v. NORTH CAROLINA MICA, MINERAL AND LUMBER COMPANY.

(Filed 12 May, 1903.)

Limitations of Actions—Statute of Limitations—Pleadings—Sufficiency—The Code, Sec. 138.

An averment that more than three years have elapsed since the date of the alleged promise before the action was brought and the services rendered as alleged is a sufficient plea of the statute of limitations.

ACTION by C. S. Pipes against the North Carolina Mica, Mineral and Lumber Company, heard by *Hoke, J.,* at October Term, 1902, of MCDOWELL. From a judgment for the defendant, the plaintiff appealed.

Justice & Pless for plaintiff.
P. J. Sinclair for defendant.

CLARK, C. J. The only exception is as to the sufficiency of the plea of the statute of limitations, which is as follows: "And for a further defense alleges. . . . Third, that more than three years have elapsed since the date of the alleged promise before this action was brought and the services rendered as alleged." His Honor properly held that this was sufficient without labeling the plea by adding thereto, as plaintiffs contend should have been done, the words, "and therefore plead the statute of limitations in bar to this action."

The plaintiffs rely upon *Pope v. Andrews,* 90 N. C., 401; (613) *Turner v. Shuffler,* 108 N. C., 642, and *Lassiter v. Roper,* 114 N. C., 18, but in those cases the defendant merely pleaded "the benefit of the statute of limitations," omitting the facts, which the Court held were the essential matter to be pleaded. Here the defendants pleaded, "as a further defense, that three years had elapsed since the date of the alleged promise and before this action was brought," thus pleading the essential matter of fact and leaving out the allegation that therefore

he was entitled to the benefit of the statute of limitations, which was a matter of law and need not be pleaded, and which when pleaded alone, without allegation of the facts, was held in the above cases to be insufficient to set up the defense. "Under The Code it is the facts and not the conclusions of law which should be set out in the pleadings." *Crawford v. McLellan,* 87 N. C., 169. The statute of limitations must be set up by the answer (The Code, sec. 138), but this has been sufficiently done by pleading as a defense the facts upon which the statute of limitations arises as a conclusion of law.

No error.

---

(614)

SNIDER v. NEWELL.

(Filed 12 May, 1903.)

1. Pleadings—Demurrer—Evidence—Seduction.

A demurrer to the evidence of the plaintiff admits the truth thereof and any reasonable inference that may be drawn therefrom.

2. Seduction—Evidence—Loss of Services—Damages—The Code, Sec. 233, Subsec. 2.

It is not necessary in order for a parent to maintain an action for the seduction of his daughter, that he show actual loss of services.

Concurring opinion by CLARK, C. J.

ACTION by J. F. Snider against W. B. Newell, heard by *Shaw, J.,* and a jury, at March Term, 1903, of MECKLENBURG. From a judgment of nonsuit, the plaintiff appealed.

Jones & Tillett for plaintiff.
Burwell & Cansler for defendant.

CONNOR, J. This is an action prosecuted by the plaintiff for the recovery of damages alleged to have been sustained by reason of the seduction by the defendant, of his daughter, whereby he "lost the services of his said daughter, and the reputation of his family was thereby greatly injured and he suffered great mental anguish and humiliation." The defendant admitted that he had illicit carnal intercourse with the daughter, but denied that the plaintiff lost her services thereby, or suffered otherwise. The plaintiff introduced evidence tending to show that his daughter, when about 18 years of age, was seduced and de-

bauched by the defendant; that he had repeated acts of sexual intercourse with her in the plaintiff's house, in which his daughter resided as one of his family; that such intercourse was had at night, the defendant going to the room of the daughter, entering through her bedroom window; that the plaintiff knew nothing of the de- (615) fendant's conduct until it had continued about a year, when he charged the defendant with it, when he admitted the truth of the charge. The plaintiff testified that he was greatly shocked; that the matter greatly pressed on his mind and he thought they were all disgraced; that the daughter was, prior to the sexual intercourse with the defendant, chaste, pure, and virtuous; that defendant is a married man. The defendant introduced no testimony, but moved the court to dismiss the action as upon a nonsuit. The court allowed the motion, and the plaintiff excepted and appealed.

The judgment of his Honor is based upon the consideration of law that the plaintiff had not shown any loss of service or any diminution of the daughter's capacity to serve him, and could not for the other injuries alleged maintain the action. The demurrer to the evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff, but presents the question whether the plaintiff's testimony is sufficient to base a finding of such loss of service as is necessary to maintain the action.

The plaintiff has alleged a loss of service, mental anguish, and mortification. We have been unable to find, after a very careful and diligent search, a case in England or America in which the declaration or complaint has failed to allege loss of service. The action at common law was trespass *vi et armis,* or trespass on the case *per quod servitium amisit. Briggs v. Evans,* 27 N. C., 16. The gravamen of the action was that the daughter was the servant of the plaintiff, and that by her seduction he lost her services. *Taylor, C. J.,* in *McClure v. Miller,* 11 N. C., 133, says: "It is characterized by a sensible writer as one of the 'quaintest fictions' in the world, that satisfaction can only be come at by the father's bringing the action against the seducer for the loss of his daughter's services during her pregnancy and nurturing." In *Kinney v. Laughenour,* 89 N. C., 365, it is said: "The action for (616) seduction does not grow out of the relation of parent and child, but that of master and servant and the loss of services. It is true that this is a *fiction of the law.*" In *Hood v. Sudderth,* 111 N. C., 218, *Clark, J.,* said *arguendo:* "It is true that at common law an action for seduction could technically only be brought by a father, master, or employer, and that damages were alleged *per quod servitium amisit* for value of services lost; and this, though in fact no services were lost,

and even when a woman was of full age and the father was not entitled to recover for her services from any one else. It was well understood that this was a mere fiction, and damages were awarded for the wrong and injury done her." The question decided in that case does not arise upon this record. In *Scarlett v. Norwood,* 115 N. C., 284, there was an allegation of loss of service, seduction, etc., "thereby damaging said plaintiff, and for medical care, nursing, attendance," etc. The action was brought by the father. In *Abbott v. Hancock,* 123 N. C., 99, the plaintiff alleged that her daughter was in her actual service, residing with her in New Bern and being under 21 years old and unmarried. In *Willeford v. Bailey, ante,* 402, there was an allegation of loss of service, abduction, etc., the action being brought by the father, the girl being under 21 years of age. *Nash, J.,* in *Briggs v. Evans,* 27 N. C., 16, says: "It is but a figment of the law to open the door for the redress of his injury. It is the substratum on which the action is built. . . . He comes into court as a master; he goes before the jury as a father." The case of *Anthony v. Norton,* 60 Kan., 341 (72 Am. St., 360), 44 L. R. A., 757, unmistakably holds that "the action could be maintained on the bare relation of parent and child alone."

It is one of the most striking illustrations of the conservatism of the profession and the bench that although there has been a constant (617) protest against the necessity for resorting to this "quaintest fiction" or legal "figment," the courts have not felt justified in abandoning it. We find most careful and accurate counsel in all of the cases alleging loss of service. Sir Frederick Pollock, in his work on Torts, pp. 222, 223, says: "There seems, in short, no reason why this class of wrongs (injuries in family relations) should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustices which flow from disguising real analogies under transparent but cumbrous fictions. But as a matter of history (and pretty modern history), the development of the law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations not by openly treating them as analogies in principle, but by importing into them the fiction of actual service, with the result that in the class of cases most prominent in modern practice, namely, actions brought by parent (or person in *loco parentis*) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of the family, but whether he can make out a constructive 'loss of service.'" He discusses the question with his usual clearness and force, saying: "The capricious working of the action for

seduction in modern practice has often been the subject of censure. Thus, Sergeant Manning wrote more than fifty years ago: 'The *quasi* fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread among strangers.'" While in a certain sense "fictions have had their day" and are not to be permitted to hamper the courts in the administration of justice, we must be careful that we permit not ourselves, because we live in days of Codes of Civil Procedure, to conceive that (618) we may altogether break away from the wisdom and experience of the past. As was said by *Chief Justice Pearson* in regard to estoppel: "According to my *Lord Coke,* an estoppel is that which concludes and 'shuts a man's mouth from speaking the truth.' With this forbidding introduction, a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer the law as a system." *Armfield v. Moore,* 44 N. C., 161. Sir Henry Maine in his great work on Ancient Law tells us that a legal fiction is "a rude device absolutely necessary in early stages of society; but fictions have had their day." He says: "It is not difficult to see why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the fiction of adopting which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from swaddling clothes and taken its first step towards civilization. . . . To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of the law. But at the same time it would be equally foolish to argue with those theorists who, discovering that fictions have had their uses, argue that they ought to be stereotyped in our system." Pages 25, 26. He wisely concludes that it will be necessary to "prune them away."

However interesting and inviting this field may be, it is hardly proper to investigate it in the decision of this case. We are not called upon to say more than that courts should move forward, and yet cautiously, in dispensing with even "fictions." We must bear (619) in mind that the law of procedure as well as substantive law is not a thing to be manufactured, but is the result of growth and careful, conservative progress. While we find no difficulty in holding that "it is not necessary in order for a parent to maintain an action for the

seduction of his daughter that he prove actual services or the loss thereof," it is sufficient that it be shown that the child is a daughter of the person suing, and residing in his family as such, or is elsewhere with his consent and approval. Rodgers on Domestic Relations, sec. 839.

We carefully refrain from advancing further than is necessary in this case. It would not require any considerable foresight to see a large yielding of suits for seduction brought by collateral relations, upon the suggestion of loss sustained in social position, business relations, mortified sensibilities, etc. We have a striking illustration of this in *Young v. Tel. Co.,* 107 N. C., 370, 9 L. R. A., 669, 22 Am. St., 883, in which it was held that a husband to whom a message had been sent notifying him of the sickness of his wife could, in an action for failure to deliver promptly, recover, in addition to nominal damages, compensation for mental anguish. Since the decision of that case, we have suits for "compensation for mental anguish" brought by persons of almost every kind and degree of kinship, and we have good reason for thinking that "the end doth not yet appear." It is undoubtedly true that, as we come into a clearer view of social, domestic, and business relations, with their resulting rights and duties, the courts will guard these relations and protect them by appropriate remedies, both preventive and remedial. In doing so, the principles underlying our jurisprudence must not be violated, or sentimental emotions be made cause of actions; nor must we permit the tenderest and most sacred relations of life to become sources of profit and (620) speculation.

In the view which we take of this case, the plaintiff was entitled to maintain his action upon his allegation and proof. We find abundant authority, both in and beyond this State, to sustain this conclusion. In *McDaniel v. Edwards,* 29 N. C., 408, 47 Am. Dec., 331, *Ruffin, C. J.,* says: "When the daughter is living with the father, whether within age or of full age, she is deemed to be his servant for the purposes of this action, in the former case absolutely, and in the latter if she render the smallest assistance in the family, as pouring out tea, milking, and the like." In *Kennedy v. Shea,* 110 Mass., 150, *Ames, J.,* said: "According to numerous decisions of the courts of New York, Pennsylvania, and some other States of the Union, this relation is sufficiently proved by the evidence that the daughter was a minor, and that her father had the right of her services." In *Bartley v. Ritchmier,* 4 N. Y., 38, 53 Am. Dec., 338, *Branson, C. J.,* says: "Since it has been settled that the value of the services actually lost does not constitute the measure of damages when the action is brought by the father, it has been held sufficient for him to show that the daughter was under

age and lived in his family at the time of her seduction, without proving that she had been accustomed to render service. It has been thought enough that the father was entitled to her services and might have required them if he had chosen to do so." See, also, notes to this case, 53 Am. Dec., 338. In *Martin v. Payne,* 9 Johns., 387, 6 Am. Dec., 288, *Spencer, J.,* says: "She was his servant *de jure,* though not *de facto,* at the time of the injury, and being his servant *de jure,* the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury." *Coon v. Moffet,* 3 N. J. Law, 583, 4 Am. Dec., 392.

The English cases are equally as clear upon this point. In *Fores v. Wilson,* Peaks N. P. Cases, 55, *Lord Kenyon* held "That there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined when daughters of the highest and most opulent families have been seduced the parent (621) may maintain an action on the *supposed* relation of master and servant, though every one must know that such a child cannot be treated as a menial servant." In *Mauder v. Venn,* 1 Moody and M., 323 (22 Com. Law), it is held that "it is not necessary to show any acts of service done by the daughter. It is enough that she lives in the father's family under such circumstances that he has a right to her services. This case is singularly like the case before us. It is said in the course of the plaintiff's proof, a difficulty occurred in making out any acts of service of the daughter. It being, however, proved that the seduction took place while she was residing with the plaintiff and forming a part of his family, *Littlejohn, J.,* interposed and said that 'the proof of any acts of service was unnecessary; it was sufficient that she was living with her father, forming part of his family and liable to his control and demand; the right to the service is sufficient.'" Judge Cooley thus sums up the law: "The father suing for this injury in the case of a daughter, actually at the time being a member of his household, is entitled to recover in his capacity of actual master for a loss of service consequent upon any diminished ability in the daughter to render service. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received." Cooley on Torts, p. 221; Pollock on Torts, p. 27.

We thus see that, while the courts have protested against the rule of law requiring the allegation of the fiction upon which the action is based, they have wisely wrought out the substantial remedy by recognition of the relation, with all of its incidents, rights, and duties, of parent and child. It is difficult to conceive how a daughter, who has been seduced and debauched as the testimony in this case (622)

shows, can be said not to have had her ability to serve her father diminished; hence, we place our decision upon the allegation and testimony in the record.

His Honor was in error in sustaining the demurrer to the evidence, and the case should have been submitted to the jury under proper instructions.

There must be a

New trial.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

CLARK, C. J., concurring in result: The opinion of the Court holds, quoting Rodgers' Domestic Relations, sec. 839—"It is not necessary, in order for a parent to maintain an action for seduction of his daughter, that he prove actual services or the loss thereof." There are numerous authorities to maintain that proposition. It follows, therefore, that under our Code, sec. 233(2), loss of services need not be averred, except when such loss is an element of damages. That section provides that the complaint shall contain "a plain and concise statement of *the facts constituting a cause of action*"; hence none other should be stated. Nothing now needs to be averred which it is not necessary to prove. It can serve no purpose to make an unnecessary or untrue averment in any pleading under The Code, and *a fortiori* it cannot be a fatal defect to fail to make such averment.

The whole subject is summed up with full citation of authorities in the American and English Encyclopedia in the article "Seduction." It appears therefrom that the real causes of action when brought by a father for the seduction of his daughter are the wrong and injury done him in the ruin of his daughter, his wounded feelings and sense of dishonor, the stain and grief brought upon his family; and the
(623) jury can add exemplary damages as punishment to the defendant.

Of course, in addition, there can be compensation for loss of services, if any. The matter is thus summed up in a review of many authorities, but is stated in none better than in *Russell v. Chambers,* 31 Minn., 54: "As to the damages the parent may recover, the loss of service is a comparatively unimportant part, and he is entitled to recover for his wounded feelings and sense of dishonor, loss of the society of a virtuous daughter, and in short, all that a father can feel from the nature of the loss." In *Lawyer v. Fritcher,* 54 Hun., 591, 7 N. Y. Supp., 912, *Landon, J.,* says: "This artifice is properly termed a legal fiction, the real ground of recovery being for damages for the outrage perpetrated."

So entirely is it an action for punitive damages, for the tort, the wrong and injury and humiliation inflicted, that it is said in *Morgan v. Rose,* 74 Mo., 318: "It is believed that no case can be found in the books where the verdict in an action like this has been set aside upon the ground of awarding excessive damages." In *McClure v. Miller,* 11 N. C., 133, it was held that the action was in truth to recover vindictive damages "for the disgrace and degradation" caused by the defendant, and hence abated on the death of the plaintiff (the father), *which would not be the case if it were an action for loss of services.*

In many States, by statute it has been made unnecessary to allege or prove loss of services, when such loss is a fiction (as it is in most cases), and also authorizing the woman to bring the action herself when of age. *Stoudt v. Shepherd,* 73 Mich., 589, and other cases cited in Am. and Eng. Enc., *supra.* In this State and others in which fictions have been abolished by The Code, the same result has been attained thereby. In *Hood v. Sudderth,* 111 N. C., at p. 221, it was held that The Code had abolished "the fiction of lost services in an action of seduction, which henceforth became, upon 'a plain statement of the facts constituting a cause of action' in legal (624) construction, an action for exemplary damages. It would be singular, to say the least, to retain the fiction that the action is based on the loss of services and not for the wrong itself, when the Legislature has made the conduct complained of a felony." The same case held, also, that under another section of The Code (177) the woman, if of age, being the party in interest, can bring the action.

In *Willeford v. Bailey, ante,* 404, it is again said: "The action is really for the humiliation, the mental suffering, and anguish inflicted by the seducer and for punishment to the seducer." In *Scarlett v. Norwood,* 115 N. C., 285, and *Abbott v. Hancock,* 123 N. C., 99, it was held that the jury can allow the parent "punitive damages for the wrong done him in his affections and the destruction of his household." The action is really based, not on the relation of master and servant, which was fiction, but on that of parent and child (*Terry v. Hutchinson,* L. R., 3 Q. B., 599), and hence when the father is dead, it could be brought by the mother. *Abbott v. Hancock, supra.* By virtue of the parental relation, there is not necessarily any loss of services, and failure to allege or to prove, if alleged, that insignificant element of damages does not deprive the parent of proving and recovering for the injury really sustained.

When the action is brought by the woman herself, of course there can be no allegation or proof of loss of services by the father. When the female is under age, there are decisions (*Smith v. Richard,* 29 Conn., 232; *McCoy v. Trucks,* 121 Ind., 292; *Stevenson v. Belknap,*

6 Iowa, 97; 71 Am. Dec., 392) which hold that the girl herself may also maintain an action for the injury to herself, the action of the father (or mother) being for the injury to the head of the family upon whom, in public estimation, rests the responsibility for the conduct of the children. In actions by the father (or mother when (625) the father is dead) it is hence admissible to show, in mitigation of damages, carelessness in exposing the daughter to the danger (1 Big. Torts, 151), or in bar of the action that he assented or connived at the seduction (Rodgers Dom. Rel., sec. 839); but the father's conduct in this respect could not be set up in an action brought by the woman herself. Cooley on Torts (2 Ed.), 276. In *Scarlett v. Norwood, supra,* at p. 286, it was left an open question whether the infant daughter might not also bring an action for the injury done to herself, which is something distinct from the wrong and humiliation brought upon the parent.

A fiction is defined as a "false averment on the part of the plaintiff which the defendant is not allowed to traverse, the object being to give the court jurisdiction." Maine Anc. Law, 25; Best on Ev., 419, cited by Black Law Dict., "Fiction." As it is "not necessary to prove loss of services," it is not necessary to aver what is not a part of the cause of action, under the reformed procedure which, abolishing fictions and subterfuges, requires to be averred and proved that which is the true ground of the plaintiff's action, and that only. When there has been actual loss of services, the complaint can so allege; but when there has been no real loss thereby, the plaintiff is not required to aver such loss, much less to swear to it in a verified complaint. He should set out the truth, the facts which constitute the real basis of his demand for damages and upon which he expects to obtain a verdict. In *Anthony v. Norton,* 60 Kan., 341 (72 Am. St., 360), 44 L. R. A., 757, *Doster, C. J.,* holds in a very able opinion that, under a statute similar to ours, the courts are no longer driven to resort to the fiction, the subterfuge, that there has been a loss of services when there has been none or it is of imponderable value, and that the action of seduction "can be maintained on the bare relation of parent (626) and child alone." This is straightforward and in accordance with the spirit of the times, as evidenced in our system of legal procedure, under which the real matter in dispute should be clearly and plainly stated, tried, and decided, leaving all outworn fictions to sleep in the limbo of things discarded by a practical age. Thus have passed away Richard Roe and John Doe in ejectment, the pretense of goods found in the old action of trover, and other like fictions.

Many courts have deplored the "manifest absurdity," as they style it, of basing this action for a great moral, social, and personal wrong upon a fictitious allegation that the father is a master who by reason of such wrong has lost the services of his daughter (*Ellington v. Ellington,* 47 Miss., 351; Cooley on Torts, 2 Ed., 275; *Doyle v. Jessup,* 29 Ill., 462, and many other cases), and courts have solemnly sustained verdicts for thousands of dollars when no loss of services whatever has been proved. From that anomaly our statute and decisions have happily freed us.

In *Doyle v. Jessup, supra, Caton, J.,* says: "It is beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages." Sir Frederick Pollock in his work on Torts (6 Ed.), 229, deplores that the English courts had not in the beginning "taken the bolder course, which might have been done without doing violence to any legal principle," of resting this action on its true basis, and quotes with approval Sergeant Manning's statement that the "fiction of loss of services affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn bread among strangers," and adds that the enforcement of a just claim should not depend upon such a mere fiction. The law itself is beholden to deal in truth with things as they are, and not in falsehoods, fictions, evasions, or subterfuges, and the real status of this action, under our Code, cannot be better summed up than by *Chief Justice Doster* at p. 367 of the opinion in *Anthony v.* (627) *Norton, supra* (the whole opinion in which is well worth perusal), as follows: "If necessity ever existed for cloaking the real cause of action under the nominal disguise of another one, it no longer exists, and we hold accordingly. In this State a parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expenses of sickness." This goes straight to the mark, like the arrow of Robin Hood on the heath at Ashby de la Zouch. The Kansas statutes cited and relied on by him, Kansas Code, sec. 6, "There can be no feigned issues," and Kansas Code, sec. 85, the complaint "must contain a statement of the facts constituting the cause of action, in ordinary and concise language and without repetition," are almost identical, *verbatim* with our Code, secs. 135 and 233 (2). Bouvier Law Dictionary, "Fiction," says: "As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Bentham Ev. 300; 2 Pothier Ob. (Evans' Ed.), 43." The Constitution and The

Code in this State abolished all fictions in legal procedure in 1868. They have been dead thirty-five years. We cannot revive them, and there is no need to regret them.

Cited: Craft v. R. R., 136 N. C., 51; *Kearns v. R. R.,* 139 N. C., 482; *Kime v. R. R.,* 153 N. C., 399; *Howell v. Howell,* 162 N. C., 287; *Hodges v. Wilson,* 165 N. C., 327; *Lloyd v. R. R.,* 168 N. C., 649; *Tillotson v. Currin,* 176 N. C., 481.

(628)

WIGGINS v. PENDER.

(Filed 12 May, 1903.)

1. Covenants—Warranty—Deeds—Grantee—Grantor.

A covenant of warranty in a deed inures to the benefit of the assignee of the grantee, though the word "assign" is not used in the warranty.

2. Covenants—Warranty—Deeds—Mortgages—Grantee—Grantor.

The reconveyance of land by a mortgage by the grantee to grantor does not extinguish the covenant of warranty in the deed, and a purchaser at a sale under the mortgage is protected by the covenant in the original deed.

3. Limitations of Actions—Covenants—Warranty—Deeds.

The statute of limitations does not begin to run on a breach of covenant of warranty in a deed for land until after eviction.

4. Evidence—Covenants—Warranty—Deeds—Eviction—Ouster.

A judgment for possession and profits in favor of a prior grantee from the common source of title is a sufficient eviction to entitle a person to sue for breach of a warranty of title in the common grantor's deed, under which plaintiff claimed.

5. Attorney and Client—Fees—Covenants—Warranty—Notice—Eviction.

Where a grantee in a warranty deed is evicted, and did not give the grantor notice of the suit, he cannot in an action on the breach of warranty recover of the grantor counsel fees necessary for defending the title.

6. Covenants—Warranty—Deeds—Executors and Administrators—Heirs.

In an action by the assignee of a grantee in a warranty deed against the administrator of the grantor, the assignee may recover, though no real assets descended to the heirs of the grantor.

WIGGINS *v.* PENDER.

ACTION by J. H. Wiggins against James Pender, administrator of John Armstrong, and others, heard by *Winston, J.,* at October Term, 1902, of EDGECOMBE.

This action was brought to recover damages for the breach of a covenant of warranty and was heard in the court below upon the following statement of facts agreed upon by the parties: (629)

On 18 December, 1876, John Armstrong, the intestate of the defendant Pender, executed to Preston Justice and D. R. H. Justice a deed for a certain tract of land lying in said State and county, for the recited consideration of $850; that the said deed contained the following covenant, to wit: "And the said John Armstrong and wife, Margaret, covenant that they are seized of said premises in fee and have the right to convey the same in fee simple; that the same are free from all encumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whomsoever." On the same day the said Preston and D. R. H. Justice reconveyed the said premises to the said John Armstrong, by deed of mortgage to secure the purchase price, in fee with all rights, privileges, and appurtenances thereto belonging, with usual power of sale in the event of default; that in the said deed of mortgage to the said Armstrong the said Justice warranted the title to the said land in fee simple for themselves, their heirs and assigns, to the said Armstrong, his heirs and assigns.

The said land was thereafter sold under said mortgage in a foreclosure proceeding under order of the court, and the same was conveyed in fee simple by the commissioner of the court to the ancestor of the plaintiff, "with all privileges and appurtenances thereto belonging, to him, his heirs and assigns," without covenants of warranty; and thereafter said land was allotted and set apart to the plaintiff in the division of his father's estate.

At April Term, 1901, of the Superior Court, A. L. Parrish and wife, Maggie, brought their action against the above-named plaintiff to recover from him the possession of said land and the rents and profits thereof; that the said Maggie claimed said land by virtue of a deed by John Armstrong and wife prior in date to his deed to the said Justices, and in said action it was adjudged that the said Maggie Parrish was entitled to recover the possession of the (630) land and the rents and profits thereof, for that the said Armstrong had only a life estate in the land at the date of his deed to the Justices; that the plaintiff was evicted and ousted from said land, under and by virtue of said judgment, and has since brought this suit and paid to the said Maggie the sum of $250.44 as rents and profits of the land, and paid the further sum of $18 costs of said action;

that $100 was a reasonable attorney's fee for defending said action against the plaintiff.

John Armstrong died in July, 1885, and on 10 July, 1885, Margaret Armstrong duly qualified as his administratrix, and the said Margaret died in 1892, and thereafter, to wit, on 6 May, 1901, James Pender duly qualified as administrator *de bonis non* of said John Armstrong. The plaintiff brought his action on 6 May, 1901. Maggie Parrish died in the spring of 1902 leaving a will and one child, and on 27 October, 1902, A. L. Parrish qualified as executor of the will and as guardian of the child.

It is agreed that the amount of damage which the court shall consider in the plaintiff's recovery, if the court be of the opinion that he is entitled on these facts to recover the same, is $850, the purchase price of the land, and the sum of $218.99, being the rent, profits, and costs up to 15 April, 1901, when judgment was recovered against the plaintiff as above stated, and he was ousted, and the interest on $1,068.99 from said date, and the further sum of $50 paid as rent since said judgment, with interest thereon from 5 December, 1901, and the further sum of $100 reasonable attorney's fees paid by the plaintiff in defending the title to the land in said suit.

Judgment was rendered for the plaintiff against the defendant James Pender, as administrator alone, for the sum of $1,166.99, with
(631) interest on $1,068.99 from 15 April, 1901, and costs, from which judgment the defendant appealed.

The following are the contentions of the defendant, as appears from the case agreed:

1. That the plaintiff was not the assignee of the covenants contained in the deed from John Armstrong to Preston and D. R. H. Justice, and cannot maintain this action for the breach of same.

2. That the covenants contained in said deed were extinguished by the reconveyance of said land to John Armstrong by the said Preston and D. R. H. Justice, and no right of action accrued thereon to the plaintiff.

3. That any cause of action arising upon the covenants in said deed is barred by the statute of limitations pleaded in the answer.

4. That it does not appear from the "agreed statement of facts" that A. L. Parrish and wife recovered said land of the plaintiffs by reason of a paramount title.

5. That neither the costs nor attorney's fees incurred by the plaintiff in the suit of A. L. Parrish and wife should be included in the damages, for that no notice was given the defendant to defend said action.

6. That on the facts agreed the plaintiff is not entitled to recover.

The plaintiff also contended in his brief that it does not appear from the agreed facts that any real assets descended to the heirs of Armstrong.

From a judgment for the plaintiff, the defendants appealed.

John L. Bridgers and G. M. T. Fountain for plaintiff.
Gilliam & Gilliam for defendants.

WALKER, J. The argument in this case was confined to the first contention of the defendant, namely, that the plaintiff is not the assignee of the covenant contained in the deed from Armstrong to the Justices, as the covenant does not contain the word "assigns," (632) and he cannot, therefore, maintain this action for a breach of the same. This important question was discussed with much learning and ability, but the other exceptions were not argued by counsel, though they were not abandoned, and it is therefore our duty to consider and decide them in connection with the exception just mentioned.

It is a mistake to suppose that the modern covenant for title is to be construed by the same rigid rule as the ancient warranty. The latter never existed in this State, and in England, by Statute of 3 and 4 William IV, the effect of warranty in tolling a right of entry was taken away, and writs of *warrantia chartæ*—when the warrantee was impleaded in an assize, and a voucher or vouchee to warranty in a real action, by the help of which the party wishing to obtain the protection of the warranty might have defended himself or received lands of equal value in place of those he had lost—were abolished, so that the warranty of real estate, which had long been disused, has no practical operation, and indeed we are told by Blackstone that the covenant in modern practice entirely superseded it. 2 Sharswood's Blackstone, 303, and notes.

The defendant's counsel relied on *Smith v. Ingram,* 130 N. C., 100; but it will be seen by reference to Coke that in the passage quoted in that case, viz., "if a man doth warrant land to another without this word 'heirs' his heirs shall not vouch; and regularly if he warrant land to a man and his heirs without naming *assigns,* his assignee shall not vouch," he referred to the ancient warranty, for in the very next passage he says, "but note, there is a diversity between a warranty that is a covenant real, which bindeth the party to yield land or tenements in recompense, and the covenant annexed to the land which is to yield but damages, for that a covenant is in many cases extended further than the warranty." Coke, 384b. He further (633) says that even though the assignee is a stranger to the covenant, that is, not a privy in contract, he can nevertheless have an action on

the covenant for a breach, because the covenant runs with the land. "In this case the assigns shall have an action of covenant, *albeit* they were not named, for that the remedy by covenant doth run with the land, to give damages to the party grieved, and is in a manner appurtenant to the land. See, in *Spencer's case,* before remembered, divers other diversities between warranties and covenants which yield but damages." Coke, 385a. And so it was resolved in *Spencer's case* that if a man makes a feoffment by words sufficient to imply a warranty, the assign of the feoffee shall not vouch; but if a man make a lease for years by words which imply a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant; for the lessee and his assignee hath the yearly profits of the land which shall grow by his labor and industry, for an annual rent, and, therefore, it is reasonable when he hath applied his labor, and employed his cost upon the land and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee has bound him to. The principle does not depend upon tenure, but upon privity of estate. The question involved is whether the parties have sufficient mutual relation to the land which the covenant concerns, or, as it is commonly expressed in the cases, whether there is a privity of estate, which is considered necessary when there is no privity of contract. It will be seen that the necessary relation is something different from the ancient privity of estate, and that in many cases the expression is used in a modern sense. . . . The original and ancient warranty was a real covenant (634) the remedy on which was by voucher or writ of *warrantia chartæ,* and which bound the covenantor to replace the lands, in case of the eviction of the grantee, by others of equal value. The modern covenants of title, which are often spoken of as personal covenants because the action on them is a personal action, have taken the place of this. All of these are for the benefit of the land, and as loss suffered by breach of any usually, if not always, falls on the owner of the land, there would seem much practical advantage if the owner of the land, who suffers loss by a breach of any of them, could have this action against the covenantor. . . . But, however it may be with covenants of seizin and against encumbrances (which are necessarily broken, if at all, when made), a covenant of warranty, that is, the covenant to warrant and defend, is always regarded as a prospective covenant, the benefit of which will run with the land to any successive grantee, and of which there will be no breach until eviction. . . . This covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner dur-

ing whose possession a breach occurs can sue any or all previous covenantors, even though the deed under which he himself claims has no covenants of warranty. . . . In order that an assign shall be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. In this case, privity of estate is considered as something entirely different from tenure. Clearly, the presence of tenure is not necessary to enable covenants, either as to their benefits or their burdens, to run with the land. *Spencer's case,* 1 Smith L. C. (9 Ed.), 174, and notes.

It is said by Mr. Rawle in his excellent work on Covenants, (635) that "In the earliest days of the law of which we have accurate knowledge, warranty, which like homage was a natural incident of tenure, passed with the transfer of the estate and inured to the benefit of the owner for the time being. When, later, deeds were introduced and the warranty was either express or was implied from the word of grant, *dedi,* neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named. But while this was so as to warranty, it was not so as to certain covenants—and chiefly among those were the covenants for title—the benefits of which passed with the land to the heir or the assign, though not expressly named. Just why or how this was so is nowhere stated in the old books with such precision as would preclude argument. In more modern times, amidst much differences of opinion, the doctrine has been variously supposed to depend upon privity of tenure, or privity of estate, upon the nature of the estate, upon the nature of the covenant and upon the relation of the covenant to the estate; and the difficulty of the questions themselves is not less great than the practical importance of their results. But whatever may have been the grounds on which the doctrine was originally based, it has been from the earliest time consistently held, both with regard to the ancient warranty and the modern covenants for title, that they run with the land to its owner for the time being—that is to say, the owner of the land is considered entitled to the benefit of all the warranties and covenants which the prior owners in the chain of title may have given." Rawle on Covenants (5 Ed.), p. 292, secs. 203, 204. He further says, quoting from Coke the passage above mentioned: "As respects the rights of the *assignee,* a distinction always existed between warranty and the covenants for title. Thus the warranty implied by the word *dedi* could not

(636) be taken advantage of by the assignee of him who had received it, but, 'if a man made a lease for years by the word *concessi,* or *demisi* (which implies a covenant), if the assignee of the lessee be evicted, he shall have a writ of covenant.' So, with respect to the warranty and the covenant when expressed in words. 'Regularly,' says Coke, 'if a man warrant land to another and his heirs, without naming assigns, his assignee shall not vouch'; but with respect to a covenant, the rule is different, and the assignee could take advantage of it, though not named." Rawle, *supra,* sec. 318.

We have the authority of *Chancellor Kent* for saying that the remedy by the ancient warranty never had any practical existence in this country, and the personal covenants have superseded the old warranty, the remedy upon them being by action of covenant against the grantor or his representatives to recover compensation in damages for the land lost by the eviction for failure of title. Upon eviction of the freeholder, no action of covenant lay at common law upon the warranty. The party has only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of the value of his freehold. The covenant of warranty and the covenant of quiet enjoyment are not strictly personal, like the covenant of seizin, which is broken when the deed is delivered if the title is defective, but they are prospective in their operation, and an ouster or eviction is necessary to constitute a breach. These covenants are, therefore, in the nature of real covenants and run with the land conveyed, and descend to the heirs and vest in assignees or purchasers. 4 Kent (13 Ed.), p. 471 (538) *et seq.*

It is said in Minor's Institutes: "Covenants which run with the land are those which affect the nature, quality, or value of the thing granted, where there is a privity of estate between the contracting parties, as a covenant to be answerable for the title. Covenants of this description pass with the land and are binding on, and in favor of, the assignee, although assigns be not expressly named. The (637) most important by far of covenants which run with the land are those which relate *to the title.*" 2 Minor Inst., p. 718. "Covenants for title are termed real covenants and pass to the assignees of the land by the common law, who may maintain actions on them against the vendor and his real and personal representatives; and as to covenants relating to the land, it seems that an assignee may maintain an action on the covenants, although the covenants were entered into with the original grantee and his heirs only." 2 Sugden on Vendors (9 Ed.), p. 89. "A covenant which has for its object something annexed to or inherent in or connected with real property, such as a covenant for quiet enjoyment, for repairs, for payment of rent, runs with the thing demised, and the assignee, though not named therein, is

bound thereby and entitled to the advantages of it." 1 Leigh Nisi Prius, p. 620; *Sacheverelle v. Froggath,* 3 Saunders, 371; *Bally v. Wells,* Wilson, 25; *Tatem v. Chaplin,* 2 H. Blk., 133; 3 Washburn on R. P., pp. 497-504. Certain covenants are appurtenant to the estate granted by the deed in which such covenants are contained and bind the assignees of the covenantor, and vest in the assignees of the covenantee in the same manner as if they had personally made them. In England, all covenants for title are considered as appurtenant to the land, and to run with it. But in this country, the covenants for title, considered as running with the land, are those for quiet enjoyment, for further assurance, and of warranty. 2 Devlin on Deeds, sec. 940; *Myggatt v. Coe,* 142 N. Y., 86. In *Bradford v. Long,* 7 Bidd., 225, the Court says: "In this country, the covenant of warranty is considered as only binding the party to give damages as a compensation for the loss of the land warranted; and such a covenant is in this respect more extensive than the ancient warranty, for the assign, though not named in the covenant, may have a remedy for breach of it," citing Coke, secs. 386b and 385a, *supra.* "The covenant of general warranty is one that runs with the estate in reference to which it is made, (638) and may be availed of by any one to whom the same may come by conveyance sufficient to transfer the title to the land." *Chandler v. Brown,* 59 N. H., 370. "It is of the nature of this covenant to partake of the estate in the land and to pass with it by descent or purchase, so long as it remains unbroken." *Ford v. Waldsworth,* 19 Wend., 337. "It is a convenient incident to the estate, made for its security and protection, and beneficial to the person to whom the estate should come, but to no other." *White v. Whitney,* 3 Metc., 86.

The above authorities establish the proposition that the covenant of warranty is a covenant real, in the sense that it is annexed or incident to the estate conveyed by the deed and runs with it inseparably for the benefit of all who may succeed to the title by purchase, and who sustain the relation toward the original covenantee of privies in estate, whether those who succeed to the title as assignees are expressly named as such in the covenant or not. *Lewis v. Cook,* 35 N. C., 193; *Markland v. Crump,* 18 N. C., 94; 27 Am. Dec., 230.

In this State the warranty has been treated as a personal covenant annexed to the estate and running with it as a safeguard and protection to the grantee and his heirs or the assignees or purchasers of the estate in question, and is not regarded strictly as a covenant real within the meaning of the old law and the operation of the principles concerning real actions. A more liberal construction is given to it with the view of "meeting more fully the intention of the parties and the ends of justice." *Spruill v. Leary,* 35 N. C., 419; *Southerland v.*

Stout, 69 N. C., 449; *Markland v. Crump,* 18 N. C., 94; *Blount v. Harvey,* 51 N. C., 186.

But in this case we think the covenant, by a clear and necessary implication, must inure to the benefit of the plaintiff as assignee, (639) although the word "assigns" was not used in the warranty.

The words "heirs and assigns" are used in the *habendum,* and the grantees are also named in the *habendum,* but not in the warranty. Can it be supposed that the grantor did not intend a covenant for the benefit of the grantee? Yet this must be true unless it is held that the covenant should be construed as made for the benefit of him who is named in the *habendum.* In *Herrin v. McEntyre,* 8 N. C., 410, this Court held that, when the *habendum* in a deed is to a man and his heirs forever, he may recover for an eviction on a general warranty, though his name is not mentioned in the warranty, and though it is not stated in the clause of warranty to whose benefit it shall inure, for, "it is the nature of a warranty to run with the estate, and," as Coke says, "though in the clause of the warranty it be not mentioned to whom, etc., yet shall it be intended to the *feoffee.*" Coke, sec. 384. If it inure to the *feoffee,* when not named in the warranty, why not as well and with equal reason to the heirs and assigns to whom the estate is limited in the *habendum,* when they are not named in the warranty?

We conclude, therefore, that the plaintiff can maintain this action for the breach of the covenant, unless barred of a recovery for some other reason set up in defense. The reconveyance of the land by mortgage from the Justices to Armstrong did not have the effect of extinguishing the covenant, but the mortgagee was entitled to the benefit of the covenant in the mortgage as an indemnity against the acts of the Justices, in so far as necessary to protect the estate he held as security for the debt from any defect of title which might arise from said acts. There was no estoppel or rebutter, and, when the land was sold, the benefit of the original covenant passed to the purchaser. This subject is fully discussed in Rawle on Covenants, secs. 266, 217, and 218, and the cases are there collated. See, also, 3 Washburn (640) on Real Property; *Resser v. Carney,* 52 Minn., 397; *Lewis v. Cook, supra; Markland v. Crump, supra.* "Where land is conveyed by deed of warranty, and the same premises, at the same time, are reconveyed in mortgage with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed." *Brown v. Staples,* 28 Maine, 497. "Nor will they operate by way of rebutter to prevent circuity of action." *Haynes v. Stevens,* 11 N. H., 28; *Sumner v. Barnard,* 12 Metcalf, 459; *Hubbard v. Norton,* 10 Conn., 422.

The plaintiff's cause of action is not barred by the statute of limitations. It did not accrue until there was an eviction, which took place in 1901, and the statute does not commence to run until the right of action has accrued.

We are also of the opinion that it sufficiently appears in the case that there was an eviction by one holding a paramount title. It is admitted that Mrs. Parrish brought her action against the plaintiff and recovered judgment, and that, by process issuing upon said judgment, the plaintiff was evicted. Both parties claimed under John Armstrong, and Mrs. Parrish held a deed from Armstrong prior in date to the deed from him to the Justices, under which the plaintiff in this action claims. As the parties were estopped to deny the title of John Armstrong, the older deed of Mrs. Parrish was sufficient to show that she held the better title, as between her and the plaintiff.

The next question in the case relates to the damages, and especially to the right of the plaintiff to have counsel fees, which he paid out in defending the suit of *Parrish v. Wiggins,* included in the recovery. The covenant of warranty is a contract of indemnity, and while the usual rule is that the plaintiff recovers only the amount of the purchase money and interest, it is held by many courts outside of this State that he can recover also any amount he is compelled to pay, as costs and expenses, in defense of the title, so that he may be (641) fully indemnified against any loss by reason of the breach of the covenant—provided, always, the cost and expenses so paid by him are reasonable. It seems to be conceded in some of the cases that he is entitled to recover as a part of his compensation or damages the cost of defending the suit in which the judgment against him for the possession of the premises was given, and also that attorney's fees may be included when the warrantor has been notified of the suit and requested or vouched to come in and defend the title; and it is held in the greater number of cases that he is entitled to recover attorney's fees whether the covenantor was notified or not. The reason for this rule, as gathered from the cases, would seem to be based upon the following considerations: If the covenantee defends the suit in good faith and with proper diligence, what he does is for the benefit of the covenantor, and such expenses as are necessarily incurred by him are, therefore, inseparably connected with his claim of indemnity. It would be too much to require the grantee in a deed of warranty to decide at his peril on the validity of a title set up in opposition to that which the grantor undertook to convey. By the covenant, the grantor agrees not only to warrant, but to defend the title, and if the covenantee is compelled to make the defense or suffer a judgment by default, he should recover in an action on the covenant, as it is a contract of

indemnity, what he has thus been compelled to pay out. *Smith v. Compton,* 23 E. C. L., 106; *Sumner v. Williams,* 8 Mass., 162, 5 Am. Dec., 83; *Rickert v. Snyder,* 9 Wendell, 416; *Ryerson v. Chapman,* 66 Me., 557; *Meservy v. Snell,* 94 Iowa, 222, 58 Am. St., 391; *Harding v. Larkin,* 41 Ill., 420. Whether these considerations should induce us to allow counsel fees as a part of the damages is a question we need not decide until it is actually presented in a case before us. While,

(642) as we have already said, it seems to be held in a majority of the cases that the covenantee may increase his damages by the amount of reasonable costs and counsel fees paid by him in defending the suit for the recovery of the land without giving notice to the covenantor, we prefer to adopt the rule which appears to us to be more in consonance with reason and right, and to recognize and enforce the just principle that a man should be heard before he is required to pay, or to have his day in court or at least a chance to have it. We think that the covenantor was entitled to notice to come in and defend the suit, and that he should not be adjudged to pay any counsel fees without having had an opportunity to comply with his contract and defend the suit himself, or, if he desired to do so, to submit to a judgment and save any additional costs and expenses, if he should discover that his title was so defective as to render useless further resistance to the suit. This view is well expressed in the case of *Chestnut v. Tyson,* 105 Ala., 163: "If notice had been given to the appellants (covenantors), they might have thought proper to defend the suit and employ their own counsel, or they might have come to the conclusion that the title of the plaintiff in the ejectment could not be successfully resisted, and they might, therefore, have determined not to incur useless expense in making a defense, and preferred to perform their covenant by paying to the appellees the amount of damages to which they might be entitled. Of course, this rule would not apply to such of the costs of the ejectment suit as would be adjudged against the defendant therein, though no defense was made, as upon default, for instance; and these, we apprehend, might be recovered on the covenant notwithstanding notice to the covenantor had not been given, since it is only the expense of *defending* the suit which he would have, upon notice, the election of incurring or not." *Chrisfield v. Storr,* 36 Md., 129-151.

(643) The rule we propose to adopt is the safest and best, as it is easy and convenient for covenantor to give such notice, and, besides, important advantages might accrue to him from doing so. There is no hardship in the rule, as there would or might be if a contrary rule were laid down.

The appellant does not except to the allowance of the costs of the other suit in which plaintiff lost the land, but does except to the award of counsel fees as part of the damages, because no notice of the suit was given. As it does not appear in the case that any such notice was served on the defendant, this exception is sustained and the judgment of the court below is modified accordingly.

The last objection to the plaintiff's right to recover upon the facts stated cannot be sustained. It is not necessary, in this case, that real assets should have descended to the heirs of Armstrong. They are not sued in the case for the breach, and, in an action on the covenant, as distinguished from the ancient warranty, the plaintiff is not required to show that the heirs received real assets. The plaintiff is not trying to avail himself of the warranty by way of rebutter. The ordinary covenants for title are personal covenants, in the sense that they are binding on the personal representative of the covenantor and, though they run with the land, they are not strictly real covenants within the meaning of the ancient feudal law. *Carter v. Denman*, 23 N. J. L., 260. This is like any other action on a covenant sounding in damages, and the judgment will be satisfied out of the assets of the covenantor, whether personal or real, in like manner as a recovery upon any other obligation. Under our present procedure, the plaintiff merely recovers judgment for his damages, and he must obtain satisfaction not by execution, but by proceeding to have the assets of the intestate applied to its payment. There must be assets, it is true, before the plaintiff's claim can be satisfied, but the fact that no assets have descended to the heirs will not defeat the plaintiff's right to have a judgment against the administrator. If there are no (644) personal or real assets, the plaintiff will get nothing on his judgment. That is all.

There was no error in the judgment of the court below, as above indicated, and judgment will be entered in accordance with the principles stated in this opinion.

PER CURIAM. Judgment modified and affirmed.

Cited: Smith v. Ingram, post, 963; *Houser v. Craft,* 134 N. C., 330; *Jones v. Balsley,* 154 N. C., 67; *Culver v. Jennings,* 157 N. C., 565; *Cedar Works v. Lumber Co.,* 161 N. C., 614; *Weston v. Lumber Co.,* 162 N. C., 197; *Herring v. Lumber Co.,* 163 N. C., 487; *Winders v. Southerland,* 174 N. C., 235; *Wilson v. Vreeland,* 176 N. C., 506; *Pridgen v. Long,* 177 N. C., 194.

CAROLINA AND NORTHWESTERN RAILWAY COMPANY v. PENNEARDEN LUMBER AND MANUFACTURING COMPANY.

(Filed 12 May, 1903.)

1. Eminent Domain—Railroads—Summons—Special Proceedings—The Code, Secs. 199, 278, 279, 1943.

A special proceeding for the purpose of condemning land for railroad purposes must be begun by the issuance of a summons.

2. Burden of Proof—Eminent Domain—Railroads—Special Proceedings—The Code, Secs. 1932-2006.

In a special proceeding by a railroad company to condemn land for railroad purposes, the burden of showing that the company intended in good faith to construct the road and had complied with the requirements prescribed by law for the condemnation of a right of way, is on the petitioner.

ACTION by the Carolina and Northwestern Railway Company against the Pennearden Lumber and Manufacturing Company, heard by *Long, J.*, at February Term, 1903, of CALDWELL. From a judgment for the plaintiff, the defendant appealed.

C. E. Childs and Battle & Mordecai for plaintiffs.
Edmund Jones for defendant.

CONNOR, J. This proceeding was instituted for the purpose of condemning a right of way over the lands of the defendant for the (645) use of the plaintiff's railroad, pursuant to the provisions of chapter 49, Vol. I of The Code. The plaintiff's attorney issued on 10 November, 1902, the following notice to the defendant: "You will please take notice that on 20 November, 1902, at 3 o'clock p. m., a hearing in the above-entitled cause, upon the petition therein filed, will be had before J. V. McCall, clerk of this court, the same being a petition to condemn real estate for railroad purposes, owned by you. A copy of said petition, map and profile of the same, are herewith sent. J. H. Marion, C. E. Childs, petitioner's attorneys. Dated 10 November, 1902."

The notice was served on George O. Shakespeare, general manager of the defendant, on 10 November, 1902, by reading the same to him and delivering a copy of the notice with a copy of the petition, map, and profile, by the sheriff of Caldwell County. The plaintiff on the same day filed in the office of the clerk of the Superior Court of said county its petition, in which it alleges its incorporation and organization; that the defendant is a corporation, and the petitioner is operating a railway over its own line from the town of Chester, S. C., to the town of Lenoir in this State; that it is its intention and purpose in

good faith to extend its line and to construct and finish a railroad from the town of Lenoir, through the counties of Caldwell and Watauga, to the Tennessee line; that it has duly complied with the terms and conditions of its charter in respect to the location and extension of said line of railway; that the defendant owns a tract of land in said county, a full description of which is attached and marked Exhibit A; that a portion of the land is required for the purpose of constructing and operating said railroad which the plaintiff intends to build; that said portion of said land is fully described in a paper attached marked B, and a certain map, profile, etc.; that the petitioner has not been able to acquire a right of way over said land or agree upon a price with the defendant. Accompanying the petition are (646) the maps, etc.

On the day named in the notice, 20 November, 1902, the defendant by its counsel entered a special appearance before the clerk, and made a motion to dismiss the proceeding for that no summons or other proper notice was issued from the court, and that no summons or proper notice was served upon the defendant, and that the court had not acquired jurisdiction. The clerk declined to allow the motion, and the defendant appealed to the Superior Court in term. The plaintiff's counsel objected to allowing the appeal at this time, upon the ground that the order refusing the motion was interlocutory. The clerk intimating that he would proceed with the hearing, the defendant filed an answer, which the clerk held raised issues of fact, and transferred the cause to the civil-issue docket.

The defendant in its answer demanded strict proof of the plaintiff's capacity to sue, etc., admitted its own corporate existence, and that the plaintiff was operating a railway as alleged, and denied the remainder of the allegation of intention to build or extend its road. It admitted its ownership of the land sought to be condemned, and denied that no one else had any interest therein. The other portions of the petition were denied.

For further answer the defendant averred that it was the owner of about 43,000 acres of timber land on the waters of Wilson's Creek; that the proposed road would cross said land and that said land was chiefly valuable for timber thereon; that said timber and the facilities for manufacturing the same had cost the defendant more than $60,000; that for the purpose of utilizing this timber and of supplying a large mill belonging to the defendant at Lenoir, N. C., a distance of 20 miles, it became necessary to construct a railroad from Lenoir to Wilson's Creek, for which purpose, and for the further purpose of extending said road across the Blue Ridge Mountains to con- (647) nect with a system of railroads of Tennessee, the Caldwell and

Northern Railway was chartered and organized, and it has built and equipped a line of road from Lenoir to Collettsville, a distance of 10 miles; that it intends to build the said road up Wilson's Creek; that said road is now a common carrier, and in daily operation to within about 4 miles of what is known as the "gorge" of said creek; that the plaintiff's road extends no further than Lenoir, a distance of 14 miles away; that the said Caldwell and Northern Railroad Company now has a corps of engineers locating its line from Collettsville to said gorge, and also has a force of hands at work in said gorge, grading its road; that almost the entire capital stock of the Caldwell and Northern Railway Company is owned and controlled by stockholders of the defendant company; that owing to the physical conformation of the country, there is no practicable line of railway except through the gorge of said creek, and owing to the narrowness and almost precipitous sides of said gorge, there is room on the east side for only one track, without a vast and ruinous expenditure; that the defendant has already conveyed by deed to the Caldwell and Northern Railroad Company the right of way sought to be condemned by the plaintiff; that it is not necessary that the plaintiff should acquire a right of way through the gorge, as a line up and along Johns River is entirely practicable to it, as short if not shorter than the proposed line up Wilson's Creek; that the map or profile attached to the plaintiff's petition is not in accord with the statutory requirements.

The cause coming on for trial at the regular term of the Superior Court, the defendant again entered a special appearance, and brought forward the exceptions taken before the clerk for that no summons or other proper notice had been issued, and that it was not in court by "due process of law"; that the court had no jurisdiction, etc.

His Honor overruled the motion to dismiss the proceeding, (648) and the defendant excepted.

The defendant thereupon moved the court to dismiss for that the map and profile are not a compliance with chapter 396, Private Laws 1893. The motion was denied, and the defendant excepted.

His Honor thereupon submitted to the jury the following issues:

1. Does the map served with the notice on 10 November, 1902, by the plaintiff on the defendant, show how the line of the road is located on the land sought to be condemned? Yes.

2. Does the profile served at the same time show the depth of the cuts and the height of the embankments on the land sought to be condemned, and at what points on the land such cuts and embankments are to be located? Yes.

3. Has the plaintiff been unable to agree with the defendant for the purchase of the land required for its proposed road? Yes.

4. Is it the intention of the plaintiff in good faith to construct and finish the proposed road, as alleged in the petition? Yes.

5. Did the defendant on 17 November, 1902, execute to the Caldwell and Northern Railroad Company the deed of bargain and sale marked Exhibit E for the easement or right of way in the land sought to be condemned in this proceeding? Yes.

The parties introduced testimony tending to establish their respective contentions upon the several issues. The defendant made a number of requests for instructions, some of which were given either as asked or as modified, and some denied. In the view which we take of the case, it is not necessary to set out or pass upon the rulings of the court below upon these prayers for instructions.

The court charged the jury that the burden of proof was upon the defendant upon the *first issue* to show by a preponderance (649) of evidence that the map does not show how the line of the proposed road is located on the defendant's land;

That the burden was upon the defendant upon the *second issue* to show by preponderance of the evidence that the profile does not show the depth of cuts and height of embankments on the line of the proposed road on the defendant's land;

That the burden was upon the defendant upon the *third issue* to show by preponderance of evidence that the petitioner was not, before this proceeding was begun, unable to agree with the defendant for the purchase of the land at a reasonable price;

That the burden was upon the defendant upon the *fourth issue* to show by preponderance of the evidence that it was not, when this proceeding was begun, or is not now the intention in good faith of the petitioner to construct and finish the proposed line of road from Lenoir to the Tennessee line.

To each of these instructions the defendant excepted and assigned the same as error. Upon the coming in of the verdict, the defendant moved for a new trial for the errors assigned. This being refused, the defendant excepted. The court rendered judgment remanding the cause to the clerk, with directions to appoint commissioners to assess the compensation which the petitioner should pay the defendant for the land condemned. The defendant excepted. The commissioners were appointed by the clerk—the defendant excepting. They made their report, to which the defendant also excepted. The report was confirmed. The defendant excepted and, from the final judgment, appealed to this Court.

It is not necessary for us to consider the exceptions to the proceedings subsequent to the judgment of *Judge Starbuck*, as we are of the

(650) opinion that there are errors fatal to the proceeding in the records prior to that judgment. We will consider only two of the defendant's exceptions:

1. That there was no summons or citation issuing from the Superior Court.

2. That his Honor was in error in placing upon the defendant the burden of proof upon the several issues submitted to the jury.

We are aided in the decision of this cause by excellent, full, and well-considered briefs and arguments.

The first exception presents the question whether the court has ever acquired jurisdiction of the person or the subject-matter in this proceeding. While there was some confusion incident to the change of our judicial system wrought by the Constitution of 1868 and the introduction of The Code of Civil Procedure, in regard to the distinction between "civil actions" and "special proceedings," it is now well settled that with a few statutory exceptions, not necessary to be enumerated, every judicial proceeding known to our system of remedial justice is either a civil action or a special proceeding. It is equally well settled that, with the exceptions referred to, jurisdiction is acquired by the issuing and service made upon or accepted by the defendant of a summons. These propositions may at this time be regarded as beyond the domain of discussion. The summons is the substitute for the original writ in common-law actions, and the subpœna in suits in equity. The action (or proceeding) is begun when the summons is issued as original process. *Fleming v. Patterson,* 99 N. C., 404. The petitioner contends that this proceeding is neither a civil action nor a special proceeding. Section 1943 of The Code prescribes: "In case any company . . . is unable to agree for the purchase of any real estate required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the *special proceeding* prescribed in this chapter." While chapter 49 of The Code is

(651) composed of several acts of the Legislature, it has its force and effect by virtue of its enactment in and as a part of The Code of 1883. The Code, sec. 3876; *S. v. Chambers,* 93 N. C., 600. The Code expressly provides that "civil actions shall be commenced by issuing a summons." Section 199. "The provisions of The Code of Civil Procedure are applicable to special proceedings, except as otherwise provided." Section 278. The next section, 279, prescribes the form of the summons in special proceedings. Section 287. When the term "special proceeding" is used in section 1943 it must be construed to have same meaning as in other sections of The Code. This is essential to an orderly and systematic procedure. In a proceeding to secure the right of drainage, commenced by a summons,

Smith, C. J., said: "Undoubtedly, a case should be constituted between proprietors of adjoining lands before the appointment of commissioners." *Durden v. Simmons,* 84 N. C., 555. After reviewing the several statutes on the subject of procedure in such cases, he says: "This construction gives force to both acts, and produces harmony and consistency in their application to the classes of cases in which each was intended." Page 559. The Court of Appeals of New York has held that a proceeding to condemn land for railway purposes is a special proceeding. *Cortland v. R. R.,* 98 N. Y., 336; 1 Enc. Pl. and Pr., 114. It is true that section 1943 of The Code provides that upon the filing of the petition, a copy thereof, with notice of the time and place when and where the same shall be heard, must be served on all persons whose interests are to be affected. This is not inconsistent with the general provision of The Code requiring that a summons issue as the original process giving the court jurisdiction. It is not easy to understand why the law should require that a summons must issue in a civil action involving the title to a cow or horse, and in special proceedings; whereas that, in the exercise of the right of eminent domain given by the State to a corporation involving valuable rights of property, a simple notice signed, as in this (652) case by two gentlemen of the bar as "petitioner's attorneys," is sufficient. In all other proceedings jurisdiction is acquired by a command "from the State of North Carolina," issuing out of "our Superior Court"; whereas in this proceeding a simple notice or polite letter is addressed to the defendant. It may be that we should construe the word "notice" in harmony with the general provisions of The Code to mean *summons,* thereby conforming the proceeding, from its inception to its conclusion, to the general system of procedure. This construction harmonizes the statute with the underlying principle of our government, "that no man shall be deprived of his life, liberty, or property, except by due process of law." "Due process implies correct and orderly proceedings which are due because they observe all the securities for private rights which are applicable to particular cases." *Civil Rights Cases,* 109 U. S., 3. This construction of the statute is also in harmony with the well-settled principle that the authority to exercise the right must be strictly construed. "In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which the owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the

power by the Legislature to private corporations." *Matter of Poughkeepsie Bridge Co.,* 108 N. Y., 490; Lewis on Eminent Domain, sec. 253; 7 Enc. Pl. and Pr., 468. It is true that in *Click v. R. R.,* 98 N. C., 390, being a proceeding instituted by the owner of land over which the defendant had built its track, the Court said:

"This is neither a special proceeding nor a civil action as defined
(653) by The Code. It is a *summary proceeding.*" The appellee's very accurate and learned counsel has shown to us by the original record in his argument that the names of the landowners were signed to the notice by the counsel. With the utmost deference to the learned Justice delivering the opinion, we find no authority in The Code or any statute for calling the proceeding a "summary proceeding." As we have seen, the Legislature has called it a "special proceeding," and we think correctly so. Nothing is decided in that case in conflict with the question presented in this, because no objection was made to the notice or the form of the procedure, hence in the conclusion to which we have arrived we are not called upon to overrule the case.

We are of the opinion that the proceeding authorized by section 1943 of The Code is a special proceeding and that a summons should issue as in all other cases. The clerk should have allowed the defendant's motion, or at least have issued a summons, retaining the cause until the return day. His Honor was in error in refusing the motion.

The decision of this question puts an end to this proceeding, but among other exceptions there is one which may arise upon another trial in a proceeding properly begun, which we think should be settled. His Honor put the burden of proof upon the defendant upon the several issues. In this he was in error. We presume that he was led to make this ruling by the peculiar language of the statute. The exact question has been decided in New York, construing a statute in the same language as ours: "That the court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petitioner, it shall make an order for the appointment of commissioners." The Court said: "It is claimed on the part of the company, and the court at special term held, that this section cast upon the respondent the burden of proving that the lands were
(654) not required for any purpose stated in the petition, and that in default of such proof the petitioner was entitled to the order. The provision that the landowner may disprove the allegations of the petition gives color to this construction, but it seems to us contrary to the general intent of the act. The provision securing notice and a right of being heard to all persons interested, and requiring the court to hear the proofs and allegations of the parties, show that the Legis-

lature intended that the landowners should not be deprived of their property except by a judicial trial, or investigation and determination of the right claimed by the corporation, and that this was to be a substantial protection and not a mere matter of form." *In re R. R.*, 66 N. Y., 407. "When the allegations of the petition are controverted, such averment does not relieve the plaintiff of the necessity of making strict proof of its right to take defendant's property." *R. R. v. Robinson,* 133 N. Y., 242. The law is as held in these cases.

It would be a strange conclusion that the owner of land could not prevent the taking of his property unless he could disprove the allegations of the corporation seeking to take it, by showing, for instance, that it did not in good faith intend to build its road, and other material facts resting almost if not exclusively in the breasts of the agents of the corporations. This would be to give to the petitioner an advantage not accorded to other suitors. The general rule, with some exceptions, in regard to the *onus probandi* being that the party holding the affirmative issue has the burden of proving it. We do not pass upon the proficiency of the map and profile, but it appears to us from the testimony that they do not substantially comply with the requirements of the statute. The proposed right of way is through a narrow gorge of a creek in precipitous mountains. It is said that but one track can be laid. It is therefore very material that an accurate (655) survey be made and a map filed showing clearly and distinctly where the proposed road is to be located. The averments in the answer, in regard to which there was evidence, show that it is a matter of very great interest to the parties whose lands are to be affected, to have a strict compliance with the statute in this respect.

Proceeding dismissed.

Cited: R. R. v. R. R., 148 N. C., 63, 64, 70; *Abernathy v. R. R.,* 150 N. C., 103; *R. R. v. Oates,* 164 N. C., 174.

HARRILL v. SOUTH CAROLINA AND GEORGIA EXTENSION RAILWAY OF NORTH CAROLINA.

(Filed 12 May, 1903.)

1. Jurisdiction—Actions—Transitory Actions—Negligence—Personal Injuries—Executors and Administrators.

Where the statutes of another State authorize a recovery for death by wrongful act, and are substantially the same as those in this State, an administrator appointed here can sue here for the death of his intestate which occurred in the other State, the courts of that State not having construed its statutes to the contrary.

2. Evidence—Declarations—Res Gestæ—Negligence.

In an action to recover for the death of an engineer while attempting to cross a bridge, an exclamation by a bystander at the time of the accident tending to show the dangerous condition of the bridge is competent as a part of the *res gestæ*.

ACTION by R. M. Harrill, as administrator of Jake Metcalf, against the South Carolina and Georgia Extension Railway Company of North Carolina, heard by *Winston, J.*, and a jury, at June (Special) Term, 1902, of RUTHERFORD. From a judgment for the plaintiff, the defendant appealed.

Justice & Pleas and McBrayer & Justice for plaintiff.

P. J. Sinclair, G. W. S. Hart, N. W. Hardin and W. A. Henderson for defendant.

(656) MONTGOMERY, J. This action was brought by the plaintiff to recover damages of the defendant, a domestic corporation of North Carolina, on account of the death of his intestate, Jake Metcalf, alleged to have been caused by the negligence of the defendant. The intestate was a resident of South Carolina and was killed in that State while engaged in trying to drive an engine and cars over the railroad bridge and trestle at Buffalo Creek. The bridge and trestle were on the line of the railroad of the South Carolina and Georgia Extension Railway Company of South Carolina, a domestic corporation of that State. The allegation of the plaintiff in his complaint is that the intestate at the time of his death was in the service of the defendant, and was running a train of cars and engine from Blacksburg in South Carolina to Marion in North Carolina. The plaintiff was qualified as administrator of the intestate in Rutherford County, North Carolina.

The first question we are called upon to decide is whether or not the plaintiff can maintain his action in this State. The statute laws of South Carolina, following the text of what is known as Lord Campbell's Act, give the right of action to an administrator in cases where death has ensued upon injury caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party to maintain an action and recover damages in respect thereof. Those statutes are substantially like the statutes of North Carolina on that subject, and the method of distribution of recoveries is the same in both States. The contention of the counsel of the defendant is that, as the right of action arose in South Carolina where the death occurred, the right was an asset in the State of South Carolina and it could be controlled and recovered only by an administrator appointed in South Carolina; and

it was argued by the counsel that this Court should adopt that (657) construction of the South Carolina statutes for the reason that the Supreme Court of South Carolina had made decision to that effect in the case of *In re Estate of Mayo,* 60 S. C., 401, 54 L. R. A., 660. If such had been the construction of the South Carolina statute, we would feel bound to follow that construction in the present case; but upon a careful reading of that case, we cannot agree with the counsel as to their interpretation of the same. Unembarrassed, then, as we think, by any decision of the court of South Carolina on the exact point, we are free to give the statute such construction as we think may be reasonable and just for all concerned, and at the same time consonant with the meaning and intention of the lawmaking power.

The South Carolina statutes do not say that in such cases the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction. If they did, we would be controlled by the requirement. The liability of the person or corporation being fixed and made absolute where death arises from their negligence, a right of action has accrued, and it seems to us that that liability can be enforced in any court which may have jurisdiction of the subject-matter and can acquire jurisdiction of the offenders, and where the laws are the same as where the liability occurred. The action certainly is in the nature of trespass to the person, and all such actions have been uniformly held to be transitory.

In North Carolina, as we have seen, our statute law is substantially, if not exactly, like the statutes in this respect in South Carolina, and how can it be said that our courts will not be permitted to enforce a liability, purely personal, recognized by the laws of both States, and not required by the law of the State where the liability was fixed to be enforced by a particular person in the latter State only?

We think the action was properly brought in this State. Upon facts similar to the facts in this case, there are many decisions of the courts confirming our view of this matter. *Leonard v.* (658) *Nav. Co.,* 84 N. Y., 49, 38 Am. Rep., 491; *Worden v. R. R.,* 13 L. R. A., 458; *Demmick v. R. R.,* 103 U. S., 11, and cases there cited; *Nelson v. R. R.,* 88 Va., 971, 15 L. R. A., 583. In the last-mentioned case the plaintiff was killed in West Virginia, administration was granted in Virginia, and the action was brought in Virginia. The statutes in both States were copies substantially of Lord Campbell's Act. The Court said there: "The plaintiff in this action is the duly appointed administrator of the deceased, and is therefore entitled to sue, for the statute of West Virginia does not say that suit shall be brought only by a personal representative appointed there; and as the rights of the parties are determined by the statute of that State, a

recovery in this action would be to the same use as would be a recovery in West Virginia. It would seem, therefore, to follow that a recovery in this action would be a complete bar to another action, here or elsewhere, for the same wrong; for it is not to be presumed that the rule of comity upon which a statute of one State is enforced in another would be so far disregarded by the courts of the former State as not to give free force and effect to the proceedings in the latter State wherein a recovery is made."

There is a question of evidence involved in the appeal which presents error so clear and so serious that a new trial would have to be ordered, if there was no other error in the record. The whole evidence tended to show that at the time the intestate lost his life there was a great flood in the creek. The section master flagged down the train as it approached the trestle, and the section master, the conductor, the train hands and neighboring people went out on the bridge and trestle to make an examination. The section master testified that he advised the intestate not to attempt to cross, for the waters were higher than ever before (659) known, the bridge was already out of line and had subsided in places, and the whole surroundings were dangerous. He said further, and so did the conductor, that the intestate went to his engine and without signal from the conductor moved the engine forward over the bridge. The evidence then was that moving very slowly (the train hands having gotten off the cars and walked on over the bridge) the engine had crossed over that part of the bridge over the water and had struck the trestle on the ground when one of the bystanders, Jones, and others, exclaimed "Jake is safe." The trestle instantly gave way and the engine and tender were pulled back and fell into the water. Jones testified that "Just before the engine went down, I said that 'Jake was safe' because I thought he had her on the mainland. I thought he was on solid ground. I looked carefully on the movement across the trestle, because I did not know what was going to happen. I could not tell what was going to happen. The track was not in good shape." That exclamation, "Jake is safe," was competent evidence going to show the dangerous condition of the bridge and the peril of crossing and the effect the effort to cross had on the bystanders. Especially so, as one of the witnesses said that the bridge and trestle were not apparently seriously out of order. The evidence was clearly a part of the *res gestæ* under the rule in its strictest construction. His Honor admitted it as evidence, but in his charge he instructed the jury not to consider it as evidence. We might content ourselves with what has been written, for a new trial must be had for the reasons assigned, but it is well to add that we read no evidence, more than a scintilla, to the effect that the defendant was employed at the time of his death

by the defendant company. And we might as well add that on the plaintiff's own evidence it was not certain that his death was not caused proximately by his own negligence; but we will leave (660) that matter open.

New trial.

DOUGLAS, J., concurs in result.

Cited: Seawell v. R. R., 133 N. C., 519, 522; *S. v. Spivey,* 151 N. C., 681; *Harrison v. R. R.,* 168 N. C., 384.

MENZEL v. HINTON.

(Filed 19 May, 1903.)

Mortgages—Foreclosure of Mortgages—Limitations of Actions—Power of Sale—The Code, Sec. 152.

The time within which a sale must be made under a power of sale in a mortgage is not limited, and is not affected by the fact that the right to sue on the debt is barred.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by P. T. Menzel and others against C. E. and W. E. Hinton, heard by *Justice, J.,* at December (Special) Term, 1902, of CAMDEN. From a judgment for the defendants, the plaintiffs appealed.

G. W. Ward and W. M. Bond for plaintiffs.
E. F. Aydlett for defendants.

CONNOR, J. The Code, sec. 152(3), provides that the period prescribed for the commencement of "an action for the foreclosure of a mortgage or deed of trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same." We are unable to discover in this language any period of time fixed within which the mortgagee is required to execute the power of sale. It will be observed that this (661) section prescribed the time for bringing an action, (1) for the foreclosure of a mortgage, (2) or deed in trust for creditors with power of sale. The instrument executed by Foreman to Hinton is a mortgage containing a power of sale and is not within the language of the statute.

It was not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power; hence, no time is fixed by the statute within which he must execute the power. The word "action" in the paragraph evidently has reference to the action for foreclosure and not to the execution of the power of sale, which requires no action. To construe the statute otherwise would be to write into it language which we do not find there.

It must be conceded that the language used by this Court in *Hutaff v. Adrian,* 112 N. C., 259, would seem to sustain the contention of the plaintiff. In that case the bond for the security of which the mortgage was given was barred by the statute of limitations, the last payment thereon having been made more than ten years before the threatened execution of the power. The mortgagor applied for an injunction to restrain the sale by the mortgagee under the power, which was refused. The only question presented in that case was whether the mortgagor had any equity upon which to base his application for the interference of the court. The case is correctly decided. If the execution of the power was not barred by the statute, he was of course not entitled to an injunction; if it was barred and his right to execute the power at an end, the legal title would not pass by the sale. It will be observed that this case was decided prior to the passage of Laws 1893, ch. 6, permitting action to be brought to remove a cloud from title. *Clark, J.,* in that case says: "The court will, therefore, not interpose (662) by an injunction merely to prevent a cloud upon the title."

Hutaff v. Adrian, supra, is cited in *Smith v. Parker,* 131 N. C., 470. No question was involved in that case regarding the statute of limitations, nor was it cited for that purpose. Conceding that an action *in personam* upon the note held by Hinton against Overton was barred by the statute, it would not affect the decision of this cause. It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. *Capehart v. Dettrick,* 91 N. C., 344. This, because the bar of the statute affects only the remedy and not the right. *Parker v. Grant,* 91 N. C., 338; *Rouse v. Ditmore,* 122 N. C., 775, 19 A. & E., 146; *Sturges v. Crowningshield,* 4 Wheat., 206. Hence it is that in an action upon a debt barred by the statute, for the payment of which a "new and continuing promise" is relied upon, the "cause of action" is the original debt, and the new promise is relied upon to repel the bar. *Falls v. Sherrill,* 19 N. C., 372. In *Kull v. Farmer,* 78 N. C., 339, the distinction between an action on a debt barred by the statute and one discharged in bankruptcy is pointed out; in the latter "the cause of action" is the new promise, the old debt being a consideration to support the promise. The reason for the dis-

tinction is obvious. Prior to the adoption of our Code, there was no statute of limitations in regard to sealed instruments, bonds, and mortgages. There was a presumption of payment or satisfaction after the lapse of ten years. Rev. Code, ch. 65, sec. 18. The presumption affected the *right* as distinguished from the *remedy*. *Copeland v. Collins,* 122 N. C., 619; *Long v. Clegg,* 94 N. C., 764. Of course, if the debt is paid or satisfied either by actual payment or by presumption of law, the mortgage which is incidental to the debt is likewise discharged, and, in equity, the purpose for which the legal title was conveyed being accomplished, would be treated as discharged (663) and the mortgagor as the owner of the land. *Ray v. Pearce,* 84 N. C., 485; *Edwards v. Tipton,* 85 N. C., 480; *Simmons v. Ballard,* 102 N. C., 109. That such is not the law under our statute of limitations is settled by the uniform and unanimous decisions of this Court.

In *Long v. Miller,* 93 N. C., 227, *Smith, C. J.,* said: "As to the enforcement of the mortgage . . . there is no statutory bar. While the personal action is barred, the action to enforce the mortgage is not, as was decided in *Capehart v. Dettrick.*" *Ijames v. Gaither,* 93 N. C., 364.

In *Arrington v. Rowland,* 97 N. C., 131, *Merrimon, J.,* said: "If the debt secured by the deed of trust had been independent of and apart from the deed, as contended by the defendants, the plaintiffs would have the right to have the trust executed. The court would not, in that case, deny the plaintiffs this remedy, simply on the ground that the debt intended to be secured is barred by the statute of limitations."

Clark, J., in *Taylor v. Hunt,* 118 N. C., 172, said: "The security, when not barred, is enforcible, though action on the debt is barred."

Smith, C. J., in *Overman v. Jackson,* 104 N. C., 4 (8), said: "Equally without support is the suggestion that if the debt is barred so must the mortgage to secure it be. These are essentially distinct as affected by the statute of limitations, as is held in *Capehart v. Dettrick* and *Long v. Miller.*"

In *Jenkins v. Wilkinson,* 113 N. C., 532, *McRae, J.,* said: "Indeed, though an action upon the note was barred by the statute, the lien created by the mortgage is not impaired in consequence of the running of the statute of limitations on the debt."

In *Hedrick v. Byerly,* 119 N. C., 420 (422), *Montgomery, J.,* said: "The statute of limitations defeats the remedy when the note is sued upon, but it does not discharge the debt, and although (664) the debt may be barred by the statute, yet the mortgage by which the debt is secured, if itself not barred, may be foreclosed by the mortgagee in proceedings for that purpose."

Thus we see it uniformly and without dissent held by this Court that the right to subject the mortgaged land to the payment of the debt is not affected by the statutory bar of the debt. This is in accordance with the current of authority in other courts.

The question is clearly set forth and discussed in *Goldfrank v. Young,* 64 Texas, 432, in which *Stayton, A. J.,* said: "In reference to the operation of the statute of limitations in any matter in which the recovery of money is sought, the statute itself limits it to 'actions or suits in courts,' and it provided within what time 'actions or suits' in the different classes of cases may be brought, but it does not attempt to determine within what period any one must enforce a right which the debtor has placed it in the power of the creditor to enforce otherwise than by an 'action or suit in court.' . . . The declaration that persons must institute 'suits or actions in courts' within a fixed period to enforce their claims, which can be enforced only in that manner, is not equivalent to declaring that a creditor who has been given by contract a right and means by which he may enforce his claims otherwise than through the courts, shall not enforce it after the time at which he might institute an action or suit, without subjecting himself to the bar which would be urged by a plea of limitation. It is not always true that rights which cannot be enforced through the courts are valueless, nor that contracts which the courts cannot enforce are invalid." In this case the Supreme Court of Texas held, "that the statute of limitation which applied to a money demand operates upon the remedy when its enforce-
(665) ment is sought by 'suits or actions' in courts. It does not deprive the creditor of a remedy when he had provided by contract to enforce through a trust deed the payment of his claim."

This case was approved in *Fievel v. Zuber,* 67 Texas, 275, the Court saying: "The statute does not say that no debt shall be collected, but that *no action* shall be brought. Nor does it provide that the debt shall be extinguished. Any statutes of limitation worded like ours are generally held to operate solely upon the remedy in the courts, and not to destroy the debt." *Tombler v. Ice Co.,* 17 Texas Civ. App., 596. To the same effect is *Hartrauft's Estate,* 153 Pa., 540; 34 Am. St., 717; *Slagmaker v. Boyd,* 38 Pa., 216; *Gardner v. Terry,* 99 Mo., 523; 7 L. R. A., 67. In *Grant v. Burr,* 54 Cal., 298, it is said: "The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment; therefore, where the legal title to land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under

the deed. The statute of limitations is to be employed as a shield and not as a sword; as a means of defense and not as a weapon of attack."

In *Hayes v. Frey,* 54 Wis., 503, it is held: "The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage." Jones on Mortgages, sec. 1204; *Bush v. Cooper,* 26 Miss., 599; 59 Am. Dec., 270.

"Except when the statute expressly or by fair inference destroys the remedy upon the mortgage at the same time that the remedy is destroyed as to the debt, it may be enforced after the statute has run upon the debt, unless the same statutory period is applicable to both." 2 Wood on Limitations, sec. 223, p. 549; *Harding v.* (666) *Boyd,* 113 U. S., 765.

"The maker of a trust deed or mortgage with a power of sale cannot enjoin a sale thereunder on the ground that the debt is barred by the statute of limitations; and this is held to be true even in those States where the general rule is that the bar of the debt bars the right to institute suit to foreclose. . . . For similar reasons, when the trustee or mortgagee has sold the mortgaged property under an express power of sale contained in the mortgage or trust deed, the sale cannot be set aside on the ground that the debt and the instrument securing it were barred at the time of the sale." 19 A. & E. (2 Ed.), 178; Minor Inst., Book 3, p. 366.

These authorities conclusively settle the proposition that the right to enforce the mortgage is not affected by the statutory bar of an action *in personam* upon the debt. As we have said, a mortgage containing a power of sale not being within the words of the statute, and therefore the execution of the power not being affected thereby, we can see no reason why the mortgagee may not execute the power at any time. The debt being in existence, unpaid, no court of equity would enjoin the execution of the power upon the theory that there was a presumption of payment of the debt. It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage after the expiration of ten years from the last payment on the debt, the mortgagor being in possession, he would be barred because, in that event, he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar.

The point upon which we rest our decision is, that as the mortgagor has expressly put it in the power of the mortgagee to sell the land for the payment of the debt, and thereby relieved him of the necessity of bringing an action for that purpose, his right is not affected by the

(667) statute of limitations, which applies only to actions brought for the enforcement of rights. The Legislature may, if in its wisdom it should see fit, place the execution of the power of sale, in respect to the time within which it must be exercised, upon the same footing as actions to foreclose a mortgage with power of sale; but we cannot, in the absence of any legislative declaration, make the law. It is ours simply to declare it.

This opinion does not overrule or question *Hutaff v. Adrian, supra,* in respect to the point decided in that case, to wit, that the plaintiff was not entitled to injunctive relief. In so far as it is said that after the expiration of ten years the mortgage is dead, the right is destroyed, we cannot concur.

The judgment of the court below is

Affirmed.

CLARK, C. J., dissenting: The exact point presented in this case has twice been decided in this Court, without dissent, and having become a rule of property, men have acted upon it, and its reversal would shake titles which have been acquired in reliance upon these decisions. In *Hutaff v. Adrian,* 112 N. C., 259 (1893), there was a mortgage with power of sale, and more than ten years after maturity of the note the mortgagee advertised under his power of sale. The Court held that upon those facts alleged in the complaint, "the bond and mortgage are alike barred by the statute of limitations. The Code, sec. 152 (2) and (3). *A sale under such mortgage would carry to the purchaser no title.* The plaintiff mortgagor being in possession, has a full defense to an action for ejectment. *Capehart v. Biggs,* 77 N. C., 261; *Fox v. Kline,* 85 N. C., 173."

If this had not been so prior to chapter 6, Laws 1893, a mortgagor in a mortgage with power of sale never would have been protected by the lapse of time. At the last term, by an unanimous Court, *Hutaff* (668) *v. Adrian* was reviewed and reaffirmed in *Smith v. Parker,* 131 N. C., at p. 471, the Court saying: "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," except for the statute of 1893, ch. 6, which had been enacted subsequent to *Hutaff v. Adrian.*

The basic reason of these decisions is this: A power of sale is no part of the conveyance, but is merely a power of attorney to do an act which is equivalent to a power to waive judgment in an action,

if not barred by payment or otherwise, on the bond and for foreclosure. A power of sale changes in nowise the characteristics and incidents of a mortgage. 2 Pingree on Mortgages, sec. 1313. When by lapse of time the bond and mortgage are both barred, or the debt has been paid, the power of sale falls and ceases to be of any validity. A party is entitled to take the benefit of the statute, just as he would of actual payment having been made, if he pleads it at the first opportunity. The statute is simply an irrebuttable presumption of payment, and, like payment, must be pleaded. If an action had been brought to foreclose this mortgage after the lapse of ten years, the mortgagor could have pleaded the statute of limitations. Only his failure to do so would be a waiver. The absence of the mortgagor from the State suspended the running of the statute as to the action on the bond, but not as to the lien on the land. *Anderson v. Baxter,* 4 Oregon, 105.

When there is a sale under the power of sale, there is no opportunity to plead either the statute or payment, and the mortgagor hence is entitled to do this when an action of ejectment is brought (669) (as is held in the above cases), because this is his first and only opportunity to plead it as a defense. The action of ejectment not having been brought, the mortgagor is now proceeding, as authorized by chapter 6, Laws 1893, to bring this action to remove a cloud upon title, in which equitable proceeding he can set up the fact that he would have pleaded the statute of limitations if the purchaser had brought an action of ejectment. This is the identical ground which would have authorized him to sustain an injunction to prevent the sale, had he so chosen. He has the election, being in possession, to do either, or to await an action of ejectment, provided he sets up the payment or statute of limitations at the first opportunity in proceedings pending in court.

There is no statute of limitations against the execution of a power of sale, and none is needed. It is a mere power of attorney. When either payment or the statute of limitations can be and is set up to the debt and mortgage, the execution of the power of attorney is a nullity, for the debt and mortgage have lost their validity, provided the defense is pleaded at the first opportunity. This opportunity may be afforded by an action of ejectment brought by the purchaser, or it may be set up by the mortgagor himself, either in an action for an injunction before the sale or in an action to remove cloud upon title after the sale, as in this case. The statute, chapter 6, Laws 1893, does not compel an injunction to prevent a sale, but gives relief after sale, when, as here, the claimant does not bring his action of ejectment.

The substantial matter *is* the debt and mortgage, and the mortgage is barred in this case by the lapse of time, and the statute has been

pleaded at the first opportunity in a proceeding in court. The power of sale is outside of court, and there was no opportunity afforded to plead the statute to that proceeding, even if there were one.
(670) Here the mortgage became barred 19 February, 1895, being ten years from the last payment. The sale under the power of sale, 4 May, 1899, had no efficacy if the purchaser had chosen to bring an action of ejectment and the defendant had pleaded the statute. *Hutaff v. Adrian* and *Smith v. Parker, supra; Simmons v. Ballard,* 102 N. C., at p. 109. Hence, doubtless, the purchaser did not move. The first proceeding, actually in court, in which the statute could be pleaded, is this to remove the cloud upon title. Upon the facts agreed, judgment should have been in favor of the plaintiffs.

It is true that the mortgage is not necessarily barred when the debt is, but when the bar of the statute of limitations can be successfully pleaded to the mortgage, the power of sale (which is a mere power of attorney to dispense with the formality of an action and judgment of foreclosure) is barred, because it has nothing to act upon. Powers of sale are not favorites of the law (*Mosby v. Hodge,* 76 N. C., 387), and it would be exceeding strange if when, by reason of the statute of limitations, an action cannot be maintained to foreclose the mortgage, a power of attorney to sell without formal decree of foreclosure should put vitality into a mortgage upon which a court is powerless to decree foreclosure.

DOUGLAS, J., dissenting: I am forced to dissent from the opinion of the Court for several reasons, principally because it is in direct conflict with the opinion of this Court in *Hutaff v. Adrian,* 112 N. C., 259. In that case this Court says: "Upon the allegations in the complaint, taken as true, the defendant's bond and mortgage are alike barred by the statute of limitations. A sale under such mortgage would carry to the purchaser no title. The plaintiff mortgagor being in possession, has a full defense to an action for ejectment when brought by the purchaser. The court will, therefore, not interfere by injunction merely to prevent a cloud upon the title."

I have omitted the citations of authority. This is prac-
(671) tically the entire opinion. It is no *dictum,* but a clear and explicit enunciation of the essential principle underlying the case. It was delivered ten years ago by a unanimous Court, and has since remained without question an established rule of property. It was cited with approval at the last term of this Court in *Smith v. Parker,* 131 N. C., 470.

It is suggested that while the *decision* in *Hutaff's case* was right, the *reasons* given therefor were wrong. This may apply to the rulings

of the Superior Court, but not to the opinions of this Court, which not only become the settled law of the case, but are published for the guidance of the profession and the people in all future cases of a similar character. If this were not so, it would be better that opinions were never written—certainly that they were never published. Mere *per curiam* orders of affirmance would be equally efficient with less danger of harm. I cannot bring myself to say that the learned Court that delivered the opinion in *Hutaff's case,* while expressly basing their decision upon principles essentially erroneous, stumbled blindly upon the right. Not only has that decision since remained unquestioned, but as far as I am informed it is not in conflict with any preceding decision. During the ten years that have elapsed since its rendition the personnel of this Court has repeatedly changed, but the unchanging principle has remained with at least the silent acquiescence of five different legislatures. As it has become a settled rule of property, not in violation of any constitutional or natural right, I think it should remain unchanged. It is said that this Court has held that the debt may be barred and the mortgage remain valid. Such a decision in no way conflicts with *Hutaff's case,* nor has it any application to that at bar. If the note is not under seal, it may be barred in three years, and yet the mortgage securing it might not be barred in less than ten years. Regarding the security as merely incidental to the debt, I have doubted the correctness of this doctrine; but, neverthe- (672) less, it is in accordance with our decisions, and would apply to an action for foreclosure as well as a power of sale. Those decisions are to the effect that the mortgage, *if itself not barred,* may be foreclosed by action or sale after the debt is barred, but they do not go to the extent of holding that the power of sale exists forever. This is clearly the effect of the decision in *Hedrick v. Byerly,* 119 N. C., 420, which is cited by the Court.

But if this were an open question, why should we decide otherwise? While statutes of limitation were formerly looked upon with some disfavor, they are now regarded within proper limits as necessary for the security of property and the peace of society.

Our present statutes of limitation take the place of our old statutes of presumption, and are in legal effect irrebuttable presumptions, especially when relating to land. They were intended to strengthen and not to limit the old statutes. Therefore it may be well to see what was the force and effect of the preceding statute of presumptions. In *Powell v. Brinkley,* 44 N. C., 154, it was held that (quoting the syllabus), "The statute of presumption of payment on mortgages, from the lapse of time, is payment *at the day* the debt fell due, and the legal estate revests in the mortgagor without a reconveyance." The Court,

by *Pearson, J.*, says in the opinion: "There was a presumption of payment *at the day when the debt fell due.* . . . The condition of the deed was performed, and consequently there was no necessity for a reconveyance. The title revested by force of the condition. It is familiar learning that if the debt secured is paid on the day of forfeiture, the estate is revested without a conveyance. If a forfeiture takes place at law, the estate becomes absolute, and then a reconveyance is necessary, as it has become an equitable as distinguished from a legal right to redeem and have back the estate; as in the case when part pay-
(673) ment after the day of forfeiture has been made—for the presumption refers to the day of the last payment. But even in such case it seems clear that the same grounds which raise a presumption of the payment of the mortgage debt, and consequently of the satisfaction of the mortgage, must necessarily raise a presumption of the reconveyance of the estate created to secure the debt—which has been satisfied. This doctrine has been fully and ably discussed by the late *Chief Justice Ruffin* in *Roberts v. Welch,* 43 N. C., 287." The Court evidently followed this line of thought in *Hutaff v. Adrian.*

It is true, subsection 3 of section 152 of The Code in terms applies only to *an action* for the foreclosure of a mortgage, but the same rule would apply by analogy with greater force to powers of sale, which, to use the words of *Judge Pearson,* "are looked upon by the courts with *extreme jealousy* because the mortgagor is thereby put entirely in the power of the mortgagee." *Mosby v. Hodge,* 76 N. C., 387.

In *Kornegay v. Spicer,* 76 N. C., 95, the Court, speaking through the same great jurist, says: "A mortgagee with a power of sale is a trustee, in the first place, to secure the payment of the debt secured by the mortgage, and in the second place for the mortgagor, as to the excess. The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground that in a plain case, when the mortgage debt was agreed on and nothing was to be done except sell the land, it would be useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default. But this power of sale has al-
(674) ways been watched with great jealousy." The opinions of *Judge Pearson* are neither misty nor evasive, and the clear meaning of the above quotation is to the effect that a court of equity will not permit the execution of a power of sale when the court would not or could not sell in an action for foreclosure. In other words, a sale by the mortgagee was permitted only to save the expense of an action, and *"in*

a plain case, when the mortgage debt was agreed on and nothing was to be done except sell the land." But we are told that this construction "would be to write into it (the statute) language which we do not find there." I do not see it in that light. The statute does not say that a power of sale may be executed by the mortgagee a hundred or a thousand years after the debt is due, as will be the effect of the opinion of the Court. To sustain *Hutaff's case* we are required neither to write anything into the statute nor to write anything out of it. It is in thorough accord with the general policy of our laws, and is not forbidden by law. Section 3867 of The Code repeals only public and general statutes, and does not profess to interfere with the great principles of legal or equitable jurisprudence. We are constantly recognizing and enforcing pleas in bar not alluded to in The Code—such, for instance, as "contributory negligence" and "fellow servant."

But if it were ever necessary to write it into the statute, *we* are not called on to do it. It has been done for us, and in the ten years that have since elapsed, it has by the uniform decisions of this Court and the continued acquiescence of the Legislature become a settled rule of property under which in all probability lands have been bought, titles have been acquired and homes established, that may be swept away by this decision. And for what purpose? Perhaps to follow more closely some ideal rule of logic or to conform to the decisions of some other State. I see no sufficient reason to depart from the time-honored maxim of *stare decisis.*

Cited: *Cone v. Hyatt, post,* 812, 818; *Robinson v. McDowell,* 133 N. C., 185; *Miller v. Cox, ib.,* 582; *Woodlief v. Wester,* 136 N. C., 168, 170; *Call v. Dancy,* 144 N. C., 496; *Jones v. Williams,* 155 N. C., 193; *Graves v. Howard,* 159 N. C., 600; *Hayes v. Pace,* 162 N. C., 293.

Corrected by Rev., 1044; *Scott v. Lumber Co.,* 144 N. C., 46; *Ferrell v. Hinton,* 161 N. C., 350; *Jenkins v. Griffin,* 175 N. C., 186.

---

(675)

CAUDLE v. LONG.

(Filed 19 May, 1903.)

1. Evidence—Sufficiency—Nonsuit—Ejectment.

In an ejectment suit, where the plaintiff offers no evidence except a deed and possession thereunder for two years, a judgment of nonsuit should be granted.

2. Ejectment—Deeds—Estoppel—Burden of Proof.

The defendant in ejectment is not estopped to dispute the title of the plaintiff by having accepted a deed from mother of plaintiff after the

death of plaintiff's father, it not appearing that her dower had been assigned, and the burden of showing this being on plaintiff.

ACTION by Serena M. Caudle and H. A. Mullis against John S. Long, heard by *Robinson, J.*, at August Term, 1902, of UNION. From a judgment of nonsuit the plaintiff appealed.

Adams & Jerome for plaintiffs.
Redwine & Stack and Armfield & Williams for defendant.

DOUGLAS, J. This is an action in the nature of ejectment in which the plaintiffs seek to recover lands admittedly in the possession of the defendant. The plaintiffs introduced in evidence a deed from Thomas B. Little to Solomon H. Mullis, dated 21 September, 1860, and registered 12 October, 1901. Plaintiffs then introduced Mrs. R. E. Phifer, who testified that Solomon H. Mullis "was my first husband, and we were married about forty-six years ago. We moved to the land in 1860 or 1861, about the time my husband bought it. We made one or two crops; it was war times and my husband went to the war and I moved with our two children to my father's. My husband came from the war very sick and died in my father's house during the (676) war. We had two children, Hampton M. Mullis and Serena M. Mullis. Serena married ..... Caudle, her present husband, when she was only 17 years of age, and she has been married to him ever since. Hampton is now 45 years old. No crop was raised by us after my husband moved off. Jacob Helms went into possession of the land soon after we moved off, and after him the defendant Long went into possession and has been in possession ever since. I do not know when they took possession. I got the crops off the land after my husband's death. After his death I married J. W. Phifer. After I married Phifer the defendant Long came to me and said he wanted to buy my interest in the land, and my husband and I made him a deed." Plaintiff introduced deed dated 6 January, 1873, and registered 10 December, 1885. This was introduced to show that the defendant claimed under Solomon H. Mullis. The answer admits possession. Plaintiff rested, and defendant moved to nonsuit, which was allowed.

As far back as *Taylor v. Gooch*, 48 N. C., 467, it was said that the rule that the plaintiff in ejectment must recover on the strength of his own title, either as being in itself good against all the world, or good against the defendant by estoppel, was too well established in this State to be the subject of discussion. Hence we will look alone to the title of the plaintiffs. If they own the land, they must show it. If they do not own the land, it makes no difference to them who does

own it, and the defendant may remain in possession until the true owner asserts his right. The plaintiff must show at least a *prima facie* title before any evidence is required from the defendant. In *Mobley v. Griffin,* 104 N. C., 112, the different methods by which the plaintiff may show such *prima facie* title are thus stated by the Court:

1. "He may offer a connected chain of title or a grant direct from the State to himself.

2. "Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title to himself and those (677) under whom he claims, for twenty-one years before the action was brought.

3. "He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought.

4. "He may show as against the State possession under known and visible boundaries for thirty years, or as against individuals for twenty years, before the action was brought.

5. "He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought.

6. "He may connect the defendant with a common source of title, and show in himself a better title from that source."

In support of these propositions, numerous authorities were cited by the learned Justice writing the opinion, and we are not aware that their correctness has since been questioned.

In the case at bar the only evidence of title in the plaintiff's ancestor Mullis is the deed from Little dated 21 September, 1860, and there is no evidence of possession for the *seven years* necessary to ripen a title. Hence, no *prima facie* case has been established.

The plaintiffs further contend that as the defendant took a deed for the land from Mrs. Phifer, the widow of their father, Mullis, that he is estopped to deny Mullis' title. This would be so if Mrs. Phifer had been one of the heirs or devisees of Mullis, but she had no interest in the land beyond her right of dower, which does not appear to have been assigned. Her deed to the defendant is not in the record, and hence we cannot tell what it purports to convey. It is argued that it conveyed only her right of dower, but as that was a fact to be proved by the plaintiffs, we cannot assume its truth. If the de- (678) fendant had held under a deed from one of the heirs or from

the widow conveying her right of dower, he might hold as tenant in common with the heirs; but no such facts appear, nor is there proof tending to establish them. The mere existence of a deed is no proof of its contents. Where there is no evidence tending to establish a fact essential to the plaintiff's recovery, as in the case at bar, a motion for nonsuit is properly sustained. *Wittkowsky v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., 141. The judgment of the court below is

Affirmed.

MORROW v. COLE.

(Filed 19 May, 1903.)

1. Fraudulent Conveyances—Notice—Executors and Administrators.

In an action for land alleged to have been fraudulently sold by an administrator, a subsequent purchaser is entitled to an issue as to whether he bought with notice of the fraud.

2. Fraudulent Conveyances—Executors and Administrators—Notice.

In an action for land alleged to have been fraudulently sold by an administrator, it is error for the trial court to instruct that the title of a subsequent purchaser depended on whether he knew of the rights of an heir to the property, without reference to the knowledge of the purchaser of the fraudulent sale.

3. Fraudulent Conveyances—Notice.

In an action to recover land alleged to have been fraudulently sold by an administrator, it is error for the trial court to instruct that if the administrator was guilty of fraud in making the sale, that subsequent purchasers were guilty of fraud, without adding that such subsequent purchaser must have had notice of such fraud.

4. Fraudulent Conveyances—Executors and Administrators—Damages.

An administrator whose sale of realty is set aside by an heir for fraud is not liable for injury to such realty committed by his grantee, it not appearing that he aided in such injury.

(679)

ACTION by J. O. Morrow and wife against G. H. P. Cole and others, heard by *Councill, J.,* and a jury, at May Term, 1902, of HENDERSON.

From a judgment for the plaintiffs, the defendants appealed.

J. C. Martin, Geo. A. Shuford and W. J. Peele for plaintiffs.
Merrimon & Merrimon for defendants.

MONTGOMERY, J. The plaintiff's mother, at the time of her death in 1877, had title to the tract of land which is the subject of this action, and that title descended to the plaintiff at the mother's death, she being her only heir at law. The father of the plaintiff, who is now dead, became tenant by the curtesy upon the death of his wife in 1877. He afterwards married again, and he with his wife conveyed the land in *fee simple* with warranty to the defendant Long, who, in exchange, conveyed to the father of the plaintiff another tract of land. Long mortgaged the tract of land which he acquired, by exchange from the father of the plaintiff, to the defendant Cole, and when the debt fell due Cole demanded his money, and Long procured the services of Rickman to raise money on the land to pay the Cole debt. In the investigation of the title Rickman found that Long got no title in the exchange with the plaintiff's father, and so informed Long and Cole. Rickman said he could perfect the title. The plaintiff alleged in her complaint that Rickman, Long, and Cole conspired to cheat and defraud the plaintiff, who was then Mary R. Dunlap, an infant under 21 years and a resident of the State of South Carolina, out of her land with the view of perfecting the title in Long and Cole, by caus- (680) ing the land to be sold under a proceeding to be instituted in the Superior Court of Henderson County, ostensibly for the purpose of creating assets with which to pay the debts of the plaintiff's mother, although she owed no debts whatever, which all the parties knew. The undisputed evidence shows that Rickman was appointed administrator of Mary R. Dunlap, the plaintiff's mother; that he immediately filed his petition in the Superior Court of Henderson County, in which he alleged that Mary R. Dunlap died seized of the land, leaving as her only heir at law the plaintiff Mary R. Morrow, then Mary R. Dunlap, an infant about 12 years of age; that Mary Dunlap, the deceased, owed debts to the amount of about $1,000, and that she left no personal estate whatever. The petitioner asked that service of summons be had upon said nonresident defendant by publication as required by law. A summons was issued and returned by the sheriff of Henderson County with the indorsement that the defendant (the plaintiff here) was not to be found in that county. Afterwards, H. C. Johnson, a cousin of Rickman, was appointed guardian *ad litem* of the defendant in that proceeding, the plaintiff in this, and Rickman wrote the answer for the said guardian *ad litem,* in which he admitted all the allegations of the complaint. Johnson testified that, relying upon representations made by Rickman and Long, he signed the answer. An order of sale was procured under which Rickman sold the land and Long bid it in at $500. The sale was reported and confirmed, and Rickman executed a

deed to Long on 29 November, 1890, the consideration recited being $500. No cash was paid by Long. He simply passed his receipt to Rickman for the $500, "to be credited for that amount on my claim against said estate, this being the amount of my bid for said land." Four (681) months afterwards Cole foreclosed his mortgage against Long, and at the sale Maddry, an employee of Cole, bid off the property, Cole as mortgagee executing a deed to said Maddry. Maddry afterwards reconveyed to Cole. No money was paid by Maddry. Afterwards, Long conveyed the tract of land to Cole for the nominal consideration of $25. On 1 March, 1886, following, Cole executed a deed for said land to the defendant Guice. The complaint contains an allegation that Guice paid only a nominal consideration for the land and took the deed with full knowledge of the plaintiff's right in said land and of the said fraudulent proceeding instituted and conducted by the said T. J. Rickman in the Superior Court of the said county of Henderson, for the purpose of bringing said land into sale and of depriving the plaintiff, Mary R. Morrow, of her said property. The plaintiff further alleges that the proceeding instituted by Rickman for the sale of the land, and the sale of the land thereunder, and the deed made by Rickman to Long, were fraudulent and void, and did not divest the title of the plaintiff in said land, but that she is still seized of the same and entitled to the possession thereof against Guice, who is in the unlawful possession of the same. There was evidence against Rickman, Long, and Cole, going to show the fraud alleged in the complaint, and the jury found in the affirmative the first issue, "Was the sale of the land described in the complaint procured by fraud as alleged?"

The defendant Guice was entitled to have an issue submitted to the jury, which he tendered, but it was refused. That issue was in these words: "If the sale was fraudulent on the part of Long, Cole, and Rickman, did Guice take his deed with knowledge of the same?" The word "notice" would have been a more appropriate word than "knowledge," and may be substituted for the word "knowledge" in the issue to be submitted on the next trial. Instead of submitting the above issue, his Honor submitted one in the following words: "Did P. H. Guice, one of the defendants in this action, take title to the land in con- (682) troversy from George H. P. Cole with notice of the rights of the plaintiff, Mary R. Morrow, in said land?" The jury answered that issue in the affirmative. It seems to us that the jury might have well understood that the sense of the issue, which was submitted, was that if Guice had heard that the plaintiff was her mother's sole heir and had inherited the land, that would be sufficient to require him to investigate the proceedings in the Superior Court

instituted by Rickman for a sale of the land, beyond looking to see whether the court had jurisdiction of the subject-matter of the suit and of the parties and the decree ordering the sale, before he could become a *bona fide* purchaser for value without notice. What if he did know that the plaintiff acquired her land through descent from her mother, the proceedings in the Superior Court instituted by Rickman were regular in all respects, and their inspection was a full protection to him, unless he knew or had notice of matters which if examined into would reasonably lead him to a knowledge of the fraud perpetrated by Rickman, Long, and Cole by means of the special proceeding referred to. The complaint, as we have said, alleged that he had knowledge of the fraud in the special proceeding. There was no evidence that he had any knowledge of the fraudulent character of these proceedings.

The court erred, too, in charging the jury on the issue which was submitted as to Guice's conduct. His Honor said: "If the plaintiff's evidence has greater weight upon your minds, and leads you to the conclusion that he, Guice, did have knowledge and bought with knowledge of the rights of Mary R. Morrow, you should answer 'Yes'; otherwise, 'No.'" That did not explain to the jury what would constitute the rights of Mary R. Morrow, and, because taken in connection with the ninth special prayer asked by the plaintiff, he might have come to the conclusion, as he had a right to do, that the claims and rights of the plaintiff had been disposed of by the sale of the defendant (683) Rickman, the administrator; and, further, because it assumes as matter of law that notice of her claims and rights would have resulted in a knowledge of a fraud charged in the complaint; whereas it should have been left to the jury as a question of fact, upon the evidence, whether or not Guice made proper investigation on account of any notice which he might have had; and it should also have been left to the jury to say whether or not as a matter of fact the notice, if any, which the defendant Guice had of the plaintiff's claim, was notice to him of the fraud of Rickman.

As we have said, there was evidence of the fraudulent conduct of Long and Rickman and Cole in the special proceeding under which the land was sold. But in the giving of the third and ninth special prayers asked by the plaintiff, the court charged the jury, in effect, that Cole and Guice would both be guilty of fraud and conspiracy on account of the action and misconduct on the part of Rickman. The jury of course, were authorized to find Cole guilty of fraud for his knowledge of the fraudulent character of the proceedings in the sale of the land; but they could not do so because of anything Rickman did without their knowledge or consent. The giving of the sixth prayer requested

by the plaintiff was erroneous as to Rickman. The matters therein set forth were not fraudulent as a conclusion of law, as his Honor instructed the jury, but were matters which ought to have been left to the jury for them to say what the intent of Rickman was under the evidence. After the deed from Rickman, administrator, to Long, Long committed certain injuries to the freehold which greatly impaired the value of the property. Upon the verdict that the land had been damaged by Long, since the sale to him by Rickman, to the amount of $250, his Honor entered up judgment of his own motion against Rickman for that amount. There was no allegation in the complaint that Rickman was responsible for this damage, nor was there (684) any evidence in the case that the damage to the property was the result of or connected with the fraud of Rickman and others. Long had been in possession of the property for a number of years under a deed from the plaintiff's father. Rickman had never been in possession of the land, and he had no connection with it, but only with the title. There was no evidence that he aided or abetted Long in committing waste upon the property. He was only charged by the plaintiff with a fraudulent conspiracy with others to sell and pass title to the property to perfect the title of Long and Cole.

New trial.

DOUGLAS, J., concurring in result only: I concur in the granting generally of a new trial with some reluctance. I do not think that Rickman is responsible for the damages awarded in this action, because the plaintiff has not lost title to her land. If she had lost her land as a result of Rickman's misconduct, then I think Rickman would be liable.

On the other hand, I do not see how the jury could have been misled by the form of the fourth issue, which was as follows: "Did P. H. Guice, one of the defendants in this action, take title to the land in controversy from G. H. P. Cole with notice of the rights of the plaintiff, Mary E. Morrow, in said land?" The Court seems to think that the jury might not know what rights were referred to. It means, of course, the rights which the plaintiff is asserting in this action. There is nothing else to which it could refer. If the plaintiff had any rights in the land at the time Guice bought, and if he then had any notice, either actual or constructive, of such rights, he bought subject thereto. The opinion of the Court says that Guice was entitled to the issue he tendered, as follows: "If the sale was fraudulent on the part of Long, Cole, and Rickman, did Guice take his deed with knowledge of (685) same?" To my mind this is clearly error. It was not necessary that Guice should know of his own knowledge that the proceedings were fraudulent. It would be enough if he had sufficient informa-

tion to put him upon notice, which would hold him liable, not only for such knowledge as he already possessed, but also for such further knowledge as he might have acquired by proper investigation. It is true, the Court says that "the word 'notice' would have been a more *appropriate* word than 'knowledge'"; but these words have different meanings, and "notice" was the only word that could properly have been used. As the issue tendered by the defendant was erroneous *per se,* there can be no error in its refusal.

The opinion says that Guice "might have come to the conclusion, as he *had a right to do,* that the claims and rights of the plaintiff had been disposed of by the sale of the defendant Rickman, administrator." This cannot be so. The illegality of that proceeding is the basis of this action, and if Guice had the legal right to come to any such conclusion without further investigation, it would seem unnecessary to submit any issue to the jury as to him.

There is some important evidence that seems to have been overlooked by the Court in its opinion. There is not only testimony tending to prove that Guice knew that the land descended to the plaintiff as sole heir at law of her mother, but he himself testifies that he was told by Dr. Cole, from whom he bought, that "there had been some trouble about the title," but that he made no investigation whatever, as Dr. Cole told him that it was all right and he (Cole) would stand between him and all danger. Knowing that the plaintiff had inherited the land, it would seem that he might have asked her if she still made any claim to it.

WALKER, J., concurs in the opinion of DOUGLAS, J.

---

(686)

FISHER v. OWENS.

(Filed 19 May, 1903.)

1. Deeds—Sheriff's Deeds—Seal—Ejectment.

A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title.

2. Reformation of Instruments—Deeds—Sheriff's Deeds.

In ejectment a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint.

ACTION by W. C. Fisher against W. J. Owens and others, heard by *Moore, J.,* and a jury, at November Term, 1901, of TRANSYLVANIA. From a judgment for the defendants, the plaintiff appealed.

H. G. Ewart for plaintiff.
No counsel for defendant.

WALKER, J. This action was brought by the plaintiff to recover damages for cutting timber and removing the same from the land described in the complaint, which the plaintiff alleged belonged to him, and also to enjoin defendants from cutting and removing any more timber from the said lands.

In order to show title to the premises, plaintiff introduced a grant from the State to Jonathan Zachary, issued in 1852, a deed from Jonathan Zachary to J. M. Zachary and a deed from J. M. Zachary to Thomas Steen. The grant and the two deeds contained the same description. Plaintiff then introduced in evidence a paper-writing purporting to be a deed from the sheriff of Transylvania County to himself, dated 8 May, 1895, but acknowledged and recorded on 30 November, 1901.

The plaintiff alleged that this deed covered the land in dispute. There was no seal affixed to the name of the sheriff. The defendant objected to the introduction of this deed, but the court overruled the
(687) objection and stated that the deed would be admitted "for what it is worth," and held that it was sufficient to vest the title in the plaintiff, even if it covered the land. The plaintiff thereupon proposed to prove by the sheriff that the seal was omitted by inadvertence and mistake, and that he was willing then and there to affix the seal. The sheriff's term of office had expired, but he was collecting taxes in arrears under a special act of the General Assembly. The defendants objected to the evidence proposed to be introduced by the plaintiff, and also to the affixing the seal of the sheriff to the deed, and the objection having been sustained, the plaintiff excepted. The plaintiff introduced evidence for the purpose of showing that he had been in adverse possession of the land, which was called the Steen tract; but we think that, upon a careful examination of the evidence, the plaintiff failed to show any sufficient possession of the land in dispute to give him a standing in court as against the defendants.

Even if the sheriff's deed could be regarded as color of title, plaintiff did not introduce any evidence of adverse possession under it. The paper, called the sheriff's deed, was dated 8 May, 1895, and this action was commenced on 7 June, 1901, or six years and one month after the said paper-writing, so that plaintiff not only failed to show adverse possession, but if he had shown that he had been in adverse possession of the land, it could not have continued for a sufficient length of time to have ripened his color of title into a good and perfect title.

Plaintiff assigns as error the refusal of the court to admit evidence that the plaintiff was in possession of the Steen tract, and the refusal of the court to admit the evidence of T. B. Reed and the boundary survey made by him. We have searched the records and can find no basis for these assignments of error. It appears that the evidence of T. B. Reed was admitted. It is fully set forth in the case, (688) and so far as appears there was no objection to it, and no ruling upon it or any part of it adverse to the plaintiff, except as to its sufficiency to show adverse possession. It seems that the court admitted all of the testimony offered by the plaintiff except that which is hereinafter mentioned, and reserved its decision as to the legal effect or sufficiency of the evidence to establish plaintiff's case.

In passing upon the questions raised by the exceptions and assignments of error, we must necessarily be confined to what appears in the case, and as there is nothing that we have been able to find which indicates that any such rulings as those set out in the assignments of error now being considered were made by the court, these exceptions must be overruled.

The decision of the case, therefore, must turn upon the correctness of the ruling of the court in regard to the paper-writing signed by the sheriff. This paper-writing cannot operate as a deed, because it had no seal, a seal being essential to its validity. This very question has been considered and decided by this Court with reference to a paper-writing in all respects like the one before us. *Patterson v. Galliher,* 122 N. C., 511; *Strain v. Fitzgerald,* 128 N. C., 396. The counsel for the plaintiff, conceding this to be law, contends that the seal was omitted by inadvertence and mistake and that the sheriff should have been allowed to affix his seal to the paper *nunc pro tunc.* A sufficient answer to this contention is that no such equity is set up in the complaint, and it cannot be considered without being specially pleaded in some way. *Patterson v. Galliher, supra.* In one of the cases cited by the learned counsel for the plaintiff, it is said: "It has been settled upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law has been (689) omitted by accident or mistake, a court of equity, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed or by restraining the setting up of the want of it to defeat a recovery at law." *Inhabitants v. Stebbins,* 109 U. S., 341. It will be seen, therefore, that if the plaintiff has

any equity for the reformation of the deed which the court will enforce under the facts and circumstances of this case (*Patterson v. Galliher, supra*), he must obtain relief by a direct proceeding, and not in this collateral way. If the court had the power to require the seal to be affixed in this case, the exercise of the power was within its sound discretion. If the deed had been reformed by affixing the seal, under a judgment of the court in a case properly constituted for that purpose, and it related back to the day of its date, instead of taking effect at the time it became a perfect deed, the plaintiff would still be required to locate the land and show that the timber had been cut from a part of it, which he has failed to do in this case. The evidence in this respect was too indefinite and uncertain to be submitted to the jury. *Hulse v. Brantley,* 110 N. C., 134; *Ruffin v. Overby,* 105 N. C., 78. In no view of the case, therefore, was the plaintiff entitled to recover, and the court was right in sustaining the motion to dismiss.

No error.

Cited: Locklear v. Bullard, 133 N. C., 263; *Howell v. Hurley,* 170 N. C., 800.

---

(690)

DOGGETT v. HARDIN.

(Filed 19 May, 1903.)

Ejectment—Possession—Evidence—Nonsuit—Practice.

Where the plaintiff in ejectment offers no evidence tending to show that defendant was in possession at the time of the commencement of the action, a judgment of nonsuit should be granted.

ACTION by E. H. Doggett and others against P. H. Hardin and others, heard by *Jones, J.,* at March Term, 1903, of RUTHERFORD. From a judgment of nonsuit, the plaintiffs appealed.

Eaves & Rucker for plaintiffs.

McBrayer & Justice for defendants.

DOUGLAS, J. This is an action apparently for the recovery of land, with damages resulting from its unlawful detention, although the exact nature of the relief demanded and, indeed, of the plaintiff's claim, does not clearly appear in the pleadings. However, we will treat it as an action in the nature of ejectment, which in its origin and essential features is a possessory action. It is true, this form of action has been

long since adopted as the usual method of determining the *title* to land, but from its very nature it will not lie against one not in possession. This is equally true whether the action is under The Code or at common law. Viewed simply as an action under The Code for the recovery of real property, it is evident that the land cannot be recovered from one who is neither in actual nor constructive possession. As there was no evidence tending to show that the defendants were in possession at the time of the bringing of this action, the motion for nonsuit was properly allowed.

Affirmed.

Cited: Wilson v. Wilson, 174 N. C., 758.

ORR v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 26 May, 1903.)

1. Negligence—Master and Servant—Contributory Negligence.

Where the negligence of an employer is a continuing one, as the failure to furnish safe appliances in general use, there can be no contributory negligence by the employee which discharges the liability of the employer.

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

An employee will not be held to have assumed the risk in undertaking to perform a dangerous work unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety.

ACTION by J. S. L. Orr against the Southern Bell Telephone and Telegraph Company and others, heard by *Coble, J.,* and a jury, at October Term, 1902, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Jones & Tillett for plaintiff.
Maxwell & Keerans for defendants.

DOUGLAS, J. This case was before us at February Term, 1902, and is reported in 130 N. C., 627. The essential facts are sufficiently stated in that opinion, and the principles of law therein decided, as pertaining to the facts of this case, remain the law of the case. This Court

then said, in setting aside a judgment of nonsuit: "But we do think it was the duty of the *defendant* to furnish the plaintiff with the proper tools and appliances with which to do this dangerous work, and that it was not the duty of the *plaintiff* to furnish them." As the Court then held that it was error in the court below to nonsuit the plaintiff, it would have been equal error to have done so now. This disposes of two of the plaintiff's exceptions.

Two other exceptions were to the refusal of the court to direct the jury that if they believed the evidence they should find the
(692) first and third issues in favor of the defendant. Owing to the nature of the evidence, these prayers were properly refused. The usual issues were submitted: (1) As to the negligence of the defendant; (2) the contributory negligence of the plaintiff; (3) assumption of risk; and (4) damages. They were all found in favor of the plaintiff under instructions in which we see no error.

There are no exceptions as to the admission or exclusion of testimony, but all relate to the motions to nonsuit and prayers given or refused. Those relating to the respective duties of the plaintiff and defendant to carry such tools as were needed are settled by the former opinion. It was the duty of the master to furnish such tools, and as this was a personal duty, it could not be delegated to a fellow-servant so as to relieve the master. The mere fact of such delegation would create a a vice-principal to that extent. *Chesson v. Lumber Co.*, 118 N. C., 59; *Wright v. R. R.*, 123 N. C., 280; *Bolden v. R. R.*, 123 N. C., 614.

The order to take the tools was not addressed to the plaintiff individually, but to all the hands collectively. If the plaintiff had been told what particular tools he should personally take, and his injury had resulted from his failure to carry such tools, the case would be different. The mere fact of his attempting to do the work without such tools was not in itself an assumption of the resulting risk, and this was practically held in our former opinion. Holding to the contrary would in practical effect nullify our decisions requiring the master to furnish proper tools, as in all cases the negligence of the defendant would be then neutralized by the plaintiff's implied assumption of the risk. The failure of the master to furnish reasonably safe machinery and proper tools is regarded as continuing negligence, which becomes the proximate cause of the injury. This is one of the basic
(693) principles in the important cases of *Greenlee v. R. R.*, 122 N. C., 977, 41 L. R. A., 399, 65 Am. St., 734, and *Troxler v. R. R.*, 124 N. C., 189, 44 L. R. A., 313, 70 Am. St., 580. In the latter case, which, although later in point of time, is perhaps the leading opinion upon the subject, having been more fully considered and con-

curred in by a unanimous Court, it is said: "Where the negligence of the defendant 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. This has been repeatedly held. *Norton v. R. R.*, 122 N. C., 911; *McLamb v. R. R.*, 122 N. C., at p. 873; *Cone v. R. R.*, 81 N. Y., 206, 37 Am. Rep., 491. The failure to provide necessary appliances is the *causa causans.*" It is contended that even if the plaintiff was not guilty of contributory negligence, he knew that the tools were not at hand, and assumed the risk of taking down the pole without them. It was argued that this was a simple operation, equivalent to sending a man to cut down a tree, the danger of which could easily be determined by any one. If we thought so, this would end the case, but taking down a telegraph or telephone pole is a distinct and dangerous operation. The pole is neither cut down nor permitted to fall, as that would probably destroy it and its attachments. It is dug up and let down by degrees so as to protect it from injury. The danger lies in the great leverage of a long and heavy pole, to counteract which the resisting force must be applied near the upper end. This can be done only by spikes and "dead men," or something equivalent thereto. The former are small poles with sharp spikes in one end. Dead men are like crutches, on which the telegraph pole that is being lowered is permitted to rest while the (694) men are changing their positions and taking a fresh hold.

In cases where the defendant fails to perform its duty in furnishing safe and suitable appliances, the plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety. This is in analogy to the rule laid down in the following cases: *Hinshaw v. R. R.*, 118 N. C., 1047; *Coley v. R. R.*, 129 N. C., 407, 37 L. R. A., 817; *Cogdell v. R. R.*, 129 N. C., 398; *Thomas v. R. R.*, 129 N. C., 395.

Referring again to the argument that the principle of this decision, if carried out to its fullest extent, would apply to the ordinary work upon a farm, we can only repeat what we have already said, that "We feel compelled to carry out a principle only to its necessary and logical results, and not to its farthest theoretical limit in disregard of other essential principles." *Chappell v. Ellis*, 123 N. C., 259, 263, 68 Am. St., 822. We do not mean to say that farmers have any greater rights or exemptions than other classes of our people; but simply that the character of their work does not require the same

degree of care as that of others engaged in more dangerous occupations. This principle is so recognized by the Supreme Court of the United States in *R. R. v. Mackey,* 127 U. S., 205, in sustaining the constitutionality of the Kansas Fellow-servant Act, where the Court says, on page 210: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular (695) necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

This case was quoted and approved in *R. R. v. Herrick,* 127 U. S. 211; *R. R. v. Pontius,* 157 U. S., 209, and *R. R. v. Matthews,* 165 U. S., 1. The judgment of the court below is

Affirmed.

Cited: Hicks v. Mfg. Co., 138 N. C., 330; *Pressly v. Yarn Mills, ib.,* 436; *Rushing v. R. R.,* 149 N. C., 160; *Reid v. Rees,* 155 N. C., 233; *Young v. Fiber Co.,* 159 N. C., 382; *Mincey v. R. R.,* 161 N. C., 471; *Lynch v. R. R.,* 164 N. C., 251, 252; *Walters v. Lumber Co.,* 165 N. C., 392; *Lloyd v. R. R.,* 166 N. C., 33; *Steele v. Grant,* 166 N. C., 648; *Deligny v. Furniture Co.,* 170 N. C., 202; *Yarborough v. Geer,* 171 N. C., 337; *Hines v. Lumber Co.,* 174 N. C., 296; *Buchanan v. Furniture Co.,* 178 N. C., 644.

BRAY v. ROPER LUMBER COMPANY.

(Filed 26 May, 1903.)

Evidence—Witnesses—Contract.

Where a contract for the sale of lumber provides that it shall be graded according to the rules of a certain association, a witness who states that he is not familiar with such rules should not be allowed to testify as to the grade of the lumber.

ACTION by Ella V. Bray against the John L. Roper Lumber Company, heard by *Winston, J.,* and a jury, at December (Special) Term, 1902, of CURRITUCK. From a judgment for the plaintiff, the defendant appealed.

E. F. Aydlett for plaintiff.

Pruden & Pruden, Shepherd & Shepherd, and W. M. Bond for defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant an alleged balance upon a contract to furnish lumber by the plaintiff to the defendant. The contract, after setting forth the dimensions and quality of the lumber, contained the following:

"Defective boards by reason of too many large (limb) knots, (696) unsound knots, red heart badly stained, or other defects making them unmerchantable by the inspection laws of the North Carolina Pine Association, to be treated as culls, except when decayed (rotten) to the extent of rendering them unfit for use. No allowance will be made for lumber thus rejected."

The inspection rules of the North Carolina Pine Association, according to the contract between the parties, furnished a description and meaning of the word used in the lumber business, "culls"; and yet it appears on the trial that P. M. Bray, a witness for the plaintiff, was allowed to state, over the objection of the defendant, what class of lumber was embraced in the word "culls," although he admitted that he did not know the rules of the North Carolina Pine Association. It nowhere appears in the case on appeal that the rules of the association were introduced in evidence. The testimony of Bray on the matter of what were "culls" ought not to have been received. We are clear on this point; but at the same time the case on appeal presents some confusion of statements. For instance, the witness Bray said: "I do not know the rules of the North Carolina Pine Association." But he went on to say in that immediate connection: "Logs will pass as merchantable under these rules that will not plane out; must be badly stained. There is nothing in the rules about stained or culls. A No. 1 board, stained, reduces the grade, but does not make it a 'cull' unless badly stained." The witness by his testimony unequivocally stated that he did not know the inspection rules of the North Carolina Pine Association, and yet he speaks of their contents.

The confusion is increased when we turn to the instruction of his Honor to the jury on that question, where he said: "In measuring and inspecting this lumber, the rule of the North Carolina Pine Association was to obtain; whatever that rule called for was to control them and is to control you. Whatever that rule put in the class of (697) *culls* must go there, whether of knots, or stains, or other defects. If applying the North Carolina Pine Association rule puts more of the timber as *culls* than the plaintiff expected, then the rule must still be enforced," etc. The case as made up seems to treat the inspection rules of the North Carolina Pine Association as the standard of the measurement of lumber, and yet the rules, as we have said, were not

introduced as evidence; and the witness Bray, though allowed to testify about the standard of measurement contained in the rules, stated that he did not know what the rules were. On the point, however, that we have discussed we are clear that the testimony of Bray was inadmissible as the case is presented to us.

Error.

HARRIS v. DAVENPORT.

(Filed 26 May, 1903.)

1. Limitations of Actions—Nonsuit—Dismissal—The Code, Sec. 166.

A dismissal of an action for the want of jurisdiction of the parties is similar to a nonsuit, and another action may be commenced within one year thereafter.

2. Limitations of Actions—Executors and Administrators—Debt of Decedents—Filing of Claim—The Code, Sec. 164.

The commencement of an action by an administrator for the sale of the lands for assets with which to pay a debt to himself is a sufficient filing and admitting of the claim so as to prevent the running of the statute of limitations.

3. Lis Pendens—Notice.

A petition to sell land for assets amounts to notice to purchaser under a proceeding by heirs for sale for partition.

4. Costs—Appeal—Record—Case on Appeal.

When an appellee directs a clerk to send up certain evidence, not included in the case on appeal and not necessary for the determination of the appeal, the costs thereof will be taxed against him.

(698) ACTION by I. A. Harris, administrator, against D. D. Davenport and others, heard by *Justice, J.*, and a jury, at March Term, 1902, of BUNCOMBE. From a judgment for the plaintiff, the defendants appealed.

Jones & Jones for plaintiff.
Charles A. Moore for defendants.

MONTGOMERY, J. There are two questions involved in this appeal; one is, whether or not the claim of the plaintiff as a creditor of his intestate is barred by the statute of limitations, and the other is whether the doctrine of *lis pendens* is applicable to the purchaser of

the land at a sale made by order of the Superior Court of Transylvania County. The defendants, except Charles A. Moore, are nonresidents of this State, and the defendants M. A. Davenport, T. M. West, Emily C. Thompson, C. P. Reese, Jane Miles, B. F. West, and Mary Bearden, are the heirs at law of the plaintiff's intestate. At the time of the death of plaintiff's intestate, 1 June, 1888, she was indebted to the plaintiff for medical services and board, as found by the referee. On 8 September, 1888, the plaintiff qualified as administrator of the intestate and on 10 December following instituted a special proceeding in the Superior Court of Transylvania County to sell the real estate of the intestate to make assets for the payment of debts. Judgment was had in that proceeding, the land was sold and the sale confirmed. But afterwards, in July, 1893, the judgments of sale and confirmation were declared by the Superior Court to be irregular and void, for the reason that the summons had not been served according to law. On 1 January, 1894, the plaintiff commenced this proceeding for the same purpose as that commenced in 1888. On 7 October, 1893, the defendants in the present proceeding, Charles A. Moore having (699) acquired by purchase from the other defendants one-fourth interest in the lands, brought in the Superior Court of Transylvania County a special proceeding for the sale of the land for partition among the owners, and a sale was made to P. S. King under the regular order of the court and confirmed on 16 February, 1894. By consent of the parties, an order was entered in the present proceeding referring all matters in issue between the parties to Frank Carter, Esq., with directions that he take and state the evidence, and report the same with his findings of fact and conclusions of law thereon to the court. The referee heard the case and made report to the court on 19 February, 1901. The findings of fact by the referee need not be noticed here, for the reason that none of the exceptions thereto were founded upon the averment that they were made without evidence to support them. The referee held as matters of law:

1. That the estate of the intestate was indebted to the plaintiff I. A. Harris in the sum of $303, with interest from 1 June, 1888.

2. That the judgment ordering a sale of the land for partition in the proceeding by the heirs at law and Charles A. Moore, and the purchase by King, were void, and that if King acquired any interest in the land at that sale, the same was subject to the right of sale by the plaintiff as administrator to make assets for the payment of the debts of the intestate.

3. That King was not a *bona fide* purchaser for value and without notice.

4. That the present proceeding, commenced on 1 January, 1894, constituted *lis pendens* in the cause, and King when he purchased the land described in the plaintiff's petition did so with notice of the special proceeding to sell the land for the payment of debts.

5. That Charles A. Moore took title of so much of the land,
(700) or the net proceeds of the sale thereof when sold by the administrator to make assets to pay debts, that might remain or belong to the said estate after the payment of the debts of the intestate and the costs and charges of the administration.

6. That Charles A. Moore was not a *bona fide* purchaser for value and without notice of any portion of said land as against the right of the administrator to sell the same for the purpose of making assets to pay the debts of his intestate and the costs and charges of administration.

7. That the claim of the plaintiff I. A. Harris, administrator of the intestate, was not barred by the statute of limitations.

All of the exceptions of law filed by the defendants to the report of the referee were overruled at the March Term, 1902, of the Superior Court of Buncombe County, to which county it had been removed by consent, and an order of sale instructing the plaintiff as administrator to sell the land described in the petition to make assets to pay debts and the costs and charges of administration, including the referee's allowance.

The referee found that the debt due from the intestate to the plaintiff was for board of the intestate and medical attention and drugs furnished to her within twelve months just preceding her death. We think the three years' statute of limitations (The Code, sec. 155) set up by the defendants cannot avail them. Within six months after the death of the intestate, the plaintiff had qualified as her administrator, and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. It is true, as we have said, that the proceedings in that case, including the judgment of confirmation of the sale, were set aside and declared void, for the reason that there had been no proper service of summons on the defendants; but it is also true that within a year he had
(701) brought another special proceeding for the same purpose. The action was dismissed for want of jurisdiction of the parties, and that has been held as a nonsuit of the plaintiff under section 166 of The Code. *Straus v. Beardsley,* 79 N. C., 59; *Dalton v. Webster,* 82 N. C., 279. The action of the administrator creditor, in commencing the proceeding to sell the land of the intestate to pay his debts was equivalent to the filing with himself of his claim and his admitting the same to be due, and falls under the provisions of section 164 of The

Code. In such a case the statute of limitations ceases to run either in favor of the personal representative or the heir at law. *Woodlief v. Bragg,* 108 N. C., 571. It is unnecessary to discuss the question of the right of the nonresident defendants to plead the statute of limitations.

In the petition of the plaintiff in the present proceeding the lands sought to be subjected to the payment of the intestate's debts were particularly described, and the petition was filed in the proper office before the day when King purchased the land under the proceedings by the defendants in this case (the plaintiff in that) for a sale of the land for partition. King's purchase, therefore, was with notice of the present proceeding, and the petition in the present proceeding from the time it was filed was a notice to the plaintiff—*lis pendens. Collingwood v. Brown,* 106 N. C., 362; *Arrington v. Arrington,* 114 N. C., 151.

It appears that the plaintiff's attorneys addressed a letter to the clerk of the Superior Court, asking him to send up to this Court, as a part of the case on appeal, the entire testimony of the witnesses before the referee, Garrison, I. A. Harris, Kitty E. Harris, W. B. Duckworth, and M. J. Orr. The defendants objected, but the evidence was sent up. The matter was not embraced in the case on appeal as made up by his Honor, and was not necessary in any aspect of the case, and the cost of printing the same and the cost of making the (702) copies by the clerk and all other costs attending that matter must be taxed against the plaintiff and not against the defendants.

Affirmed.

Cited: Jones v. Williams, 155 N. C., 184; *Bradshaw v. Bank,* 172 N. C., 634; *Lumber Co. v. Privette,* 179 N. C., 3.

HAYES v. UNITED STATES FIRE INSURANCE COMPANY.

(Filed 26 May, 1903.)

1. Insurance—Fire Insurance—Policy—Mortgages.

Where the insured fails to state that the property was mortgaged, when in fact it was mortgaged, the policy providing that the contract of insurance would be void if the insured property was mortgaged, invalidates the policy, though the omission was made without the intent to deceive.

2. Insurance—Fire Insurance—Foreclosure of Mortgages—Policy.

The commencement of foreclosure against insured property terminates the policy, there being in the policy a provision to that effect.

3. Insurance—Fire Insurance—Adjustment of Loss—Waiver.

An investigation of a loss by the insurer does not waive a breach of a condition by the insured, the policy providing that such investigation shall not operate as a waiver.

4. Pleadings—Complaint—Allegations—Insurance—Waiver.

A complaint averring an adjustment of the amount of loss under a fire insurance policy does not amount to an allegation of waiver so as to require the defendant negatively to aver that such conduct was not a waiver of its defenses.

DOUGLAS, J., dissenting.

ACTION by W. A. Hayes and wife against the United States Fire Insurance Company, heard by *McNeill, J.*, and a jury, at September Term, 1902, of GUILFORD. From a judgment of nonsuit, the plaintiffs appealed.

(703) *John A. Barringer for plaintiffs.*
Charles M. Stedman for defendant.

CLARK, C. J. On 16 October, 1900, the male plaintiff insured his barn and contents for one year in the sum of $700. In the application it was stated that the title to the property was unincumbered, and it was stipulated in the policy that "the entire policy should be void if the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein," or "be other than the unconditional and sole ownership," or "if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," etc. It appeared from the evidence offered by the plaintiffs that the plaintiffs had, on 1 August, 1899, taken a conveyance of the tract of land on which the barn stood, to themselves jointly, for the recited consideration of $4,500, and on the same day had executed a mortgage to the vendor to secure said sum of $4,500, payable in nine installments of $500, with interest, and that on 25 October, 1900 (nine days after the policy was taken out), the property was advertised for sale, under a power of sale in the mortgage, when only one installment of $500 had been paid, and it was sold 3 December, 1900. In the meantime, the fire occurred on 1 December. After the fire, the male plaintiff endorsed on the policy an assignment of his interest therein to his wife, the other plaintiff herein.

The male plaintiff testified in his cross-examination that the agent of the company "made no inquiry of me as to the title to the land or barn. I had no intention to deceive the company by withholding the fact that there was a mortgage on the land. I did not omit to state that there was an encumbrance on the property from any sinister motive." But the omission was as to a matter most material (704) to the risk. The policy stipulated that it should be void "if the interest of the insured in the property be not truly stated herein," or if there was concealment of "any material fact or circumstance concerning this insurance or the subject thereof." Yet this was done, and the testimony of the male plaintiff, that he "did not intend to deceive the company by withholding the fact that there was a mortgage on the land," is no defense. It was a most material fact, and if made known to the company would doubtless have prevented the insurance. Again, when the property was advertised for sale under the mortgage soon after the insurance (25 October), this terminated the insurance by the agreement in the policy, and the insured in good faith should at once have gone to the agent of the insurer and applied for cancellation of the policy and the return of a ratable proportion of the premium.

The plaintiff, however, relies upon the fact that the agent of the company went out to investigate the loss, and determined the amount of damages from the fire to be $679. But whatever inference of waiver might otherwise be drawn from such circumstances is negatived, not only by a stipulation in the policy that such investigation, in case of loss, should not be deemed a waiver of any objection to the liability of the company under the policy, but before making this investigation the insured and the agent of the company entered into a written agreement that such investigation and investment should "not waive or invalidate any of the conditions of the policy," or "any rights whatever of either of the parties," but was merely to avoid unnecessary delay to the plaintiff, and should not be taken in anywise as an acknowledgment of liability on the part of the company. This agreement was reasonable, and the consideration, saving delay to the plaintiff, is not only apparent, but is recited in the agreement itself. The complaint, while averring an adjustment of the amount of loss, does not (705) allege that this constituted a waiver, and the defendant was not required to negatively aver that such conduct was not a waiver of its defenses.

Upon the facts shown in evidence by the plaintiffs, the court properly directed a judgment as of nonsuit under the statute.

No error.

DOUGLAS, J., dissents.

Cited: *Gerringer v. Ins. Co.*, 133 N. C., 412; *Weddington v. Ins. Co.*, 141 N. C., 239, 243; *Modlin v. Ins. Co.*, 151 N. C., 41, 43, 44; *McIntosh v. Ins. Co.*, 152 N. C., 53; *Lancaster v. Ins. Co.*, 153 N. C., 288; *Watson v. Ins. Co.*, 159 N. C., 640; *Roper v. Ins. Co.*, 161 N. C., 155.

DALE v. SOUTHERN RAILWAY COMPANY.

(Filed 26 May, 1903.)

1. Trespass—Damages—Injury to Property—Harmless Error.

In an action for damages for trespass on realty, the refusal of the trial court to instruct that there was no evidence of any damage prior to the commencement of the action, is harmless error, the jury having found only nominal damages.

2. Landlord and Tenant—Parties—Trespass—Injury to Property—Laws 1895, Ch. 224—Lease.

A lessee may sue for injuries to his leasehold without making the lessor a party.

3. Trespass—Injury to Property—Damages—Laws 1895, Ch. 224.

In an action for damages for trespass on realty, a lessee is entitled to damages accruing up to the trial.

ACTION by M. L. Dale against the Southern Railway Company and others, heard by *Hoke, J.*, and a jury, at October Term, 1902, of BURKE. From a judgment for the plaintiff, the defendants appealed.

Avery & Ervin for plaintiff.
George F. Bason and S. J. Ervin for plaintiffs.

(706) DOUGLAS, J. This was an action for damages to his leasehold alleged to have been sustained by the plaintiff on account of a trespass committed by the defendant in filling up a ditch while engaged in changing the grade of its roadbed near Silver Creek, in Burke County. This ditch or branch was a natural water-course. The action was instituted on 3 March, 1902, by the plaintiff, who alleged that he was a tenant in possession of the land under a lease for a term of two years from and after 1 January, 1902, and that by reason of the obstruction of a ditch by the defendant in the winter of 1901 and 1902, the flow of the water from the leased premises was prevented, and the crops for the years 1902 and 1903 would be greatly lessened and reduced in amount, the plaintiff tenant being entitled under his contract

of lease to one-third of the grain and one-half of the hay raised on said land. The landlord was not a party to the action. The defendant contended (1) That there were no damages as alleged; (2) that the work was done by Oliver & Co., independent contractors, and that if any damage was done, the said contractors were alone responsible therefor; (3) that, in any event, no damage could be had against the defendant company accruing after the commencement of the action in March, 1902. The following were the issues and answers thereto:

1. Did the defendant, the Southern Railway Company, wrongfully and unlawfully trespass upon the premises and estates of the plaintiff, causing damage to the same? Yes.

2. What damage has the plaintiff suffered by the wrong and injury to time of action commenced? Five cents.

3. What is the entire damage the plaintiff has sustained by the wrong and injury? $250.

The first exception was to the refusal of the court to grant a new trial. As we see no error in the conduct of the trial, this motion was properly refused. (707)

The contention of the defendant in the court below, that the contractors, Oliver & Co., were alone responsible for the alleged injury, seems to have been abandoned in this Court, as it was neither pressed in the argument nor alluded to in the defendant's brief. In any event, it is unavailing, as Parsons, the defendant's witness and engineer in charge, testified that "the entire work was under the supervision of the Southern Railway engineer and done as he directed." As there was no evidence to the contrary, the plea of avoidance, whose burden was on the defendant, could not have been sustained.

The only exceptions discussed in the defendant's brief are the third, fourth, sixth, eighth, and ninth. The sixth exception is to the refusal of the court to give the following prayer: "There is no evidence tending to show that the plaintiff sustained any damage prior to 3 March, 1902, and you should therefore answer the third issue No." This instruction was properly refused, as the trespass would of itself have entitled the plaintiff to nominal damages. As the jury found only nominal damages, five cents, the defendant has no cause to complain. The other exceptions all depend directly or indirectly on the right of the plaintiff to recover for damages accruing after the commencement of the action.

The defendant's brief seems to rely principally upon the *dissenting* opinion in *Beach v. R. R.*, 120 N. C., 498. While that dissenting opinion contains some well-stated propositions of law, it does not sustain the defendant's contention. Even if it did, it could scarcely be expected to outweigh the opinion of the Court.

The defendant further contended in the argument that the plaintiff could not maintain his action without the joinder of the tenant in fee. We see no merit in either contention. Laws 1895, ch. 224, provide that in cases like that at bar "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover (708) by reason of the trespass upon his property." The words "party aggrieved" clearly refer only to the plaintiff in the action. The object of the law is to prevent a multiplicity of suits by him, and not to deprive him of his lawful remedy, or to render a resort thereto both difficult and hazardous. He has suffered substantial damages to his crops and his leasehold, which are entirely severable from those of his landlord. Why should he be compelled to make every one a party to the action who may have some vested or contingent interest in the fee, when his claim is in no way adverse to them? The principle that the landlord and tenant may bring separate actions for injuries to their respective interests has been recognized by this Court at its present term. *Williams v. Canal Co.,* 130 N. C., 746; *Norris v. Canal Co., ante,* 182.

As the statute requires that all damages to which the plaintiff is entitled by virtue of the alleged trespass shall be assessed in this action, they must necessarily include all those accruing up to the trial. *Beach v. R. R.,* 120 N. C., 498; *Lassiter v. R. R.,* 126 N. C., 509; *Mullen v. Canal Co.,* 130 N. C., 496; *Rice v. R. R.,* 130 N. C., 375.

We do not see any substantial difference in the allowance of permanent damages between cases where the subsequent damage naturally follows the previous injury and those cases where recurring damages would necessarily result from a continuing trespass were it not for the acquisition of an easement. In both cases we think the statute contemplates the assessment of the entire damages. In the case at bar the plaintiff testifies that "The rock that did damage in ditches along the railroad was not put there till after the suit was brought." If this were an independent injury it might not be cognizable in the present action, but it seems but one of many similar acts constituting a continuing trespass, connected with the same general work upon the roadbed of the defendant, and contributing to the same common (709) damage. We think, therefore, that being part of the same general transaction complained of, it comes within the purview of the statute.

The judgment of the court below is

Affirmed.

HOWARD v. SOUTHERN RAILWAY COMPANY.

(Filed 26 May, 1903.)

Negligence—Contributory Negligence—Master and Servant—Railroads.

Where an employee of a railroad company rides on the steps of a shanty-car against the rules of the company, which rules he had seen, and is injured, the company is not liable, there being room for him inside the car and his duty not requiring him to be on the steps.

PETITION to rehear this case, reported in 131 N. C., 829. Petition dismissed.

W. C. Feimster and Armfield & Turner for petitioner.
L. L. Witherspoon and S. J. Ervin in opposition.

CONNOR, J. This cause was decided at the last term (131 N. C., 829) and disposed of by a *per curiam* opinion. Upon a petition to rehear, the case was argued and full and exhaustive briefs filed by counsel. We have carefully considered the record and the briefs and are of the opinion that the case was properly decided at the last term of the Court.

Upon the plaintiff's evidence it appeared that he was an employee of the defendant and was traveling from Salisbury to Gold Hill on a freight train, consisting of six or more box cars and some shanty-cars; that he was sitting on the steps of one of the shanty-cars with his feet on the bottom step of the car; that the defendant's servants had piled wood upon the side of the track about three feet high. (710) There were benches inside the shanty-car for the hands to sit upon, and there was no suggestion that it was necessary for the plaintiff to sit upon the platform. It also appeared that the company's rules against riding on the platform of passenger trains had been seen by the plaintiff. It appears that the plaintiff was sitting upon the steps for the purpose of seeing the country through which they were passing; his knees projected a few inches beyond the shanty-car. The engine passed the cordwood safely, and the bottom of the box car was high enough to pass over the wood without touching it. It struck the step upon which the plaintiff was sitting. There was evidence that the plaintiff and other employees of the defendant were in the habit of riding on the shanty-cars and on the platform and on the top of the cars or wherever they pleased. His Honor being of the opinion that upon plaintiff's own testimony he was not entitled to recover, the plaintiff in deference thereto submitted to a nonsuit.

There can be no doubt in regard to the duty of the defendant to furnish its employees a safe place in which to travel to and from their

place of employment, and it is clear upon the plaintiff's testimony that the defendant had furnished a car with sufficient room and accommodation for the plaintiff and the other hands. There was no necessity for the plaintiff to sit upon the steps of the car, nor was he there in the line, or the performance, of any duty. Certainly, he was not entitled to demand any higher degree of care upon the part of the defendant than if he had been a passenger. The passenger who needlessly exposes himself against the rules of the company and is injured under the circumstances testified to by the plaintiff would not be entitled to recover; and this, upon the familiar principle that if one voluntarily puts himself in a place of danger and is injured in consequence thereof, he cannot claim damages. This principle is sustained by numer-
(711) ous authorities. The plaintiff relies upon *Lindsay v. R. R., ante,* 59. In that case it was the duty of the plaintiff to be upon the top of the car, and the defendant, in permitting the rope to hang over the car, was clearly guilty of negligence. It was not one of those risks which the plaintiff assumed by taking employment.

Without pursuing the subject further, we think his Honor's ruling is correct. *R. R. v. Jones,* 95 U. S., 439. The petition to rehear must be dismissed.

Cited: Redman v. R. R., 150 N. C., 404.

MAYNARD v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 26 May, 1903.)

1. Insurance—Life Insurance—Executors and Administrators—Assignment.

The administrator of a debtor on whose life a creditor has taken insurance cannot contest the validity of the policy or its assignment by the creditors to a third party.

2. Burden of Proof—Interpleader—Intervenor—Insurance—The Code, Sec. 189.

In an action on an insurance policy, an intervenor who claims the insurance has the burden of establishing his right thereto.

ACTION by C. G. Maynard against the Life Insurance Company of Virginia and McRackan, heard by *W. R. Allen, J.,* and a jury, at February Term, 1903, of ALAMANCE. From a judgment for the plaintiff, the defendant McRackan appealed.

Boone, Bryant & Biggs for plaintiff.
Womack & Hayes and E. S. Parker, Jr., for defendant.

CLARK, C. J. In June, 1870, Mills M. Walker being indebted to Eli Murray in the sum of $5,000, the latter took out a policy of insurance on the life of said Walker in the sum of $5,000 (712) payable to his heirs, executors, and assigns, and paid the premiums thereon till 1876, when he took in lieu a paid-up policy for $1,214 payable to himself, heirs, executors, and assigns at the death of said Walker. Murray died in 1876 and this policy was sold by his administrator, together with other choses in action of the estate, and was bought by plaintiff. On the death of Walker in 1902 the plaintiff filed proper proofs of death. The administrator of Walker notified the insurance company that he demanded payment of said policy and forbade payment to plaintiff. The plaintiff then brought action against the insurance company, averring the above facts in his complaint. The defendant insurance company filed no answer and controverted in no way the validity of the plaintiff's claim, but filed, as provided by The Code, sec. 189, an affidavit as to the above-stated action taken by the administrator of Walker, asked that he be made a party and that it be allowed to pay into court the amount of said policy ($1,214), and be discharged from further liability. This motion was granted and the money was paid into court, the administrator of Walker was substituted as party defendant and the clerk was directed to hold the fund "to await the final determination of this action between the plaintiff and the administrator of Walker." The answer of the administrator averred no payment by Walker, or by any one for him, of any of the premiums on said policy, or repayment of any premium paid by Murray, and the jury found that the debt due by Walker to Murray had never been paid.

The defenses set up by the administrator of Walker attacked the validity of the policy and the assignment thereof to the plaintiff. But these were defenses which could only be set up, if at all, by the insurance company. *Johnson v. Knights of Honor,* 53 Ark., 255, 8 L. R. A., 732. If the policy was not valid, there would be no fund to litigate over; and if the assignment was invalid it in no wise concerned the administrator of Walker. *Burbage v. Windley,* (713) 108 N. C., at p. 363; 12 L. R. A., 409.

The insurance company was satisfied that it legally owed the $1,214 to the owner of the policy, and, though the original defendant in the action, it has not denied that the holder and assignee thereof, the plaintiff, is the owner. The administrator of Walker has shown no possible claim upon the fund or interest in or title thereto, and cannot be heard to object to the payment thereof to the assignee and holder of the policy. Though the order making Walker's administrator a party

uses the word "substitute," the legal effect of such order is to make him an interpleader (The Code, sec. 189), and in such cases the burden is always on him. *Wallace v. Robeson,* 100 N. C., 206; *Redman v. Ray,* 123 N. C., 502; *Cotton Mills v. Weil,* 129 N. C., 452. An interpleader is entitled to but one issue, "Does the fund belong to him?" The alleged invalidity of the plaintiff's claim, as against the insurance company, is no concern of his. *Bank v. Furniture Co.,* 120 N. C., and cases cited at bottom of page 477. The payment of the fund into court by the insurance company, in the suit by the plaintiff, without denying the plaintiff's complaint, is a payment for the plaintiff's use, unless the court should find that the intervenor has the better title, and he has shown none.

The plaintiff shows the policy and its assignment to himself; the insurance company admits its liability on the policy, denies no allegation of the complaint, and pays the money into court. The intervenor (Walker's administrator) shows no interest whatever in the fund, and has no right to object to the validity of a claim which the insurance company has admitted, or to assert the invalidity of the assignment of the policy to the plaintiff, for that cannot possibly concern him. (714) The plaintiff cites us to many authorities to sustain the validity of the policy and of its assignment. Kerr on Insurance, 680, and cases there cited; *Steinback v. Diepenbrock,* 158 N. Y., 24 L. R. A., 417, 70 Am. St., 424; *Chamberlain v. Butler* (Neb.), 54 L. R. A., 338; *Ins. Co. v. Allen,* 138 Mass., 24, 52 Am. St., 245, and many others; but we are not called upon to consider these points, since, as above stated, those matters can only be raised by the insurer. The claim of the intervenor has the merit of novelty—if that be a merit. He has shown no legal right and no equity. In adjudging payment of the fund by the clerk to the plaintiff and payment of costs by the intervening defendant, there was

No error.

Cited: McKeel v. Holloman, 163 N. C., 135.

FLEMING v. SOUTHERN RAILWAY COMPANY.

(Filed 26 May, 1903.)

1. Instructions—Rehearings—Railroads—Negligence—Trial.

In an action by an employee of a railroad company for injuries, an instruction appearing in the original record as embodying two separate and distinct propositions of law is held on a rehearing of the case to constitute in fact but one instruction, and is not misleading.

2. Rehearings—New Trial—Supreme Court—Exceptions and Objections.

Where a new trial is granted without passing upon certain exceptions, and upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court, the personnel of the same having been partially changed, orders in this case a reargument of the exceptions not passed upon, without a petition for the same being filed.

MONTGOMERY, J., dissenting.

PETITION to rehear this case, reported in 131 N. C., 485. Petition granted.

G. B. Nicholson for petitioner.
L. C. Caldwell in opposition.

(715)

CONNOR, J. This was a petition to rehear. But one question is presented by the petition. In the trial below the plaintiff having alleged that he was injured by reason of the use of a defective coupler on the defendant's train, the defendant, among other defenses, set up and introduced in evidence a paper-writing marked "Exhibit A," being a release of all actions and right of actions which accrued to him by reason of the alleged injury. The plaintiff, replying by way of avoidance of the effect of this release, alleged that it had been obtained by fraud and deceit, and was therefore void. The defendant also introduced a paper-writing marked "Exhibit B," being a contract signed by the plaintiff upon his entrance into the service of the defendant by which he bound himself to observe the rules of the company in respect to the coupling of the cars, etc., and contracted to assume all risks incident to his employment, etc. Appropriate issues were submitted to the jury in regard to the alleged negligence, contributory negligence, execution of the release and its validity. The issues were found in favor of the plaintiff, and on appeal to this Court the ruling of the court below on the various matters in controversy was affirmed, except his Honor's charge in response to certain special instructions hereinafter set out, asked by the plaintiff.

An examination of the original record shows instructions asked, numbered from 1 to 7 inclusive. After instruction marked 7 is the following: "6. 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 (716) conductor on the defendant's train ordered him to make the

coupling, you are instructed that the conductor had the power to waive or abrogate the said contract." (The above instruction was given, and the defendant excepted.)

"The Legislature has enacted that any contract or agreement, express or implied, 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. 'And it seems,' says the Supreme Court, 'that the Legislature intended to put an end to all such intentions (contentions) by saying in the first section of the act that he shall have a right of action for injury caused by such defective machinery, and providing in the second section that he cannot waive that right by contract, express or implied.'" (The above instruction was given and the defendant excepted.)

The Court in *Fleming v. R. R.*, 131 N. C., 485, treated this instruction as two separate and distinct propositions. We can readily understand how this impression was made upon the court by the fact that his Honor separated the prayer by inserting about the center the words "The above instruction given and the defendant excepted," and at the end of the prayer repeated this language. The petition to rehear states that the prayer was single and connected, and that it was a mistake to treat it as two prayers for separate instructions. Upon careful examination of the record, we concur with the petitioner. We think that it was, as given, but one instruction and related to but one subject. The plaintiff's counsel by an oversight numbered the prayer 6, when it should have been numbered 8. The Court in its opinion speaks of it as "8 and 9." His Honor had in a series of instructions directed the attention of the jury to the controversy in regard to the execution of the release and the allegation of fraud therein made by the plaintiff. Exhibit B related to the subject of rules of the
(717) company, the contract of the plaintiff to obey them, and the assumption of risk, etc. It was entirely separate and distinct from the instructions given in regard to Exhibit A, the release. The Court was of the opinion that "the language was too broad and was calculated (not to say intended) to and may have misled the jury and directed their minds to the release and discharge set up by the defendant in its answer." The instruction read as relating to a single subject, we think, upon a careful consideration, being expressly directed to "B," and it could not have reasonably been understood to refer to the release "A." The language, "If you find by the greater weight of evidence in this case that the plaintiff signed the paper 'B' and agreed not to couple the cars except with a stick," etc., and the express and direct reference to the act of the Legislature in regard to such contracts, which the jury must have understood had no reference whatever to

the release, directed their attention to the contract called "Exhibit B" and not to the release called "Exhibit A." His Honor, with his accustomed care, instructed the jury upon every issue and phase of the testimony. The entire charge, when considered as a whole, could not have misled the jury in regard to Exhibits A and B. The Court in concluding its opinion said: "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."

We think that the petition should be allowed for the reasons given; but as the Court ordered a new trial without passing upon several exceptions of the defendant, we have concluded that upon the questions raised by these exceptions not passed upon the defendant is entitled to have the ruling of this Court.

As the personnel of the Court has been partially changed since the argument and decision, we direct a reargument of the exceptions not passed upon. The rule of the Court in regard to rehearings requires a petition to rehear to be filed by either of the parties desiring such rehearing, but the peculiar status of this case entitles the defendant to be heard by the Court as now constituted. (718)

The petition is allowed and the cause is set down for argument upon such exceptions as were not passed upon, at the regular call of the docket at the next term of this Court. The clerk will direct a copy of this order to counsel for plaintiff and defendant. The petitioner will recover the costs.

Petition allowed.

MONTGOMERY, J., dissenting: I find myself embarrassed in expressing my ideas in this matter, for the reason that in the opinion of the Court all of the members except myself concur in a view of a part of the record and of the treatment of it by the plaintiff's counsel, which I think is not the correct view, and one which I cannot adopt. The case on appeal and the brief of the plaintiff's attorneys are now before me on my table. The plaintiff requested the court to give a number of prayers for special instructions to the jury. Down to and including the seventh, there is no confusion. The next one of the prayers was numbered "sixth" and was in these words: "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 find, further, that the conductor on plaintiff's train ordered him to make the coupling, you are instructed that the conductor had the power

to waive or abrogate the said contract." Then follow these words in parenthesis: "The above instruction was given, and defendant (719) excepted." That instruction, though numbered "sixth," as we have said, in the case made out by his Honor, followed number 7, and ought to have been numbered 8 in the original record. The plaintiff's counsel did not make the mistake in numbering the special prayers for instruction asked by the plaintiff. They saw the mistake made by the judge in making up the case in numbering the plaintiff's special prayers, and treated the second one numbered "sixth" as the eighth; for in their brief they say: "In support of the eighth instruction, and to show that it was proper and that the exception to it (by the defendant) is without foundation, we invite the attention of the Court to the following authorities: *Mason v. R. R.*, 111 N. C., 494, 18 L. R. A., 845, 32 Am. St., 814; *R. R. v. Ross*, 112 U. S., 377; *Chambers v. R. R.*, 91 N. C., 475"—and those authorities cited show that the instruction which I quoted above was referred to in what the plaintiff's attorneys, in their brief, called the *"eighth"* instruction, but which was numbered "sixth" by his Honor in making up the case. In the case on appeal the next of the plaintiff's special prayers is in these words: "The Legislature has enacted that any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of an action which he may have against a 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 intentions (contentions) 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, expressed or implied.'" At the end of that request for instructions these words appear in parenthesis: "The above instruction was given, and defendant excepted." The plaintiff's attorneys in their brief treat that as the *ninth* special prayer of the plaintiff in these words: "The ninth instruction is a summary of the fellow-servant act and of the (720) decision of this Court in *Coley v. R. R.*, 128 N. C., 534, 57 L. R. A., 817, and was entirely proper, and his Honor committed no error in giving it." It can be seen by an inspection of the record now before me that his Honor below, and not the plaintiff's counsel, in making up the case, numbered the prayer, following seven, *"sixth."* His Honor made the error and should have numbered it eight, and the next succeeding one nine. The plaintiff's counsel in their brief, as we have said, saw the judge's error, and in their brief treated these two exceptions as eight and nine. They were not one instruction, but were clearly two, and about two entirely different matters involving different questions of law. The eighth concerned the power of a con-

ductor to waive a rule of the company when it was the duty of the plaintiff to obey the order, as in *Mason's case* referred to in the brief of the plaintiff's counsel; and the ninth concerned the effect of the fellow-servant law passed in 1897, five years after the decision in *Mason v. R. R.*, 111 N. C., 482. My views on the merits of the case are to be found in the opinion written by myself for a unanimous Court, 131 N. C., 476. I think the petition should be dismissed.

(721)

LYMAN v. SOUTHERN RAILWAY COMPANY.

(Filed 2 June, 1903.)

1. Evidence—Witnesses—Hearsay Evidence—Res Gestæ—Warehouseman.

In an action against a warehouseman to recover damages for loss of goods by fire, the statement of persons some time after the fire had started, as to its origin, is not competent, it not being a part of the *res gestæ*.

2. Evidence—Witnesses—Opinion and Evidence—Warehouseman.

In an action against a warehouseman to recover damages for the loss of goods by fire, a witness cannot testify, judging from the condition of the warehouse, how long the fire had been burning when the fire company arrived, the fire not having originated in the warehouse.

3. Evidence — Declarations — Principal and Agent — Warehouseman—Railroads.

In an action against a warehouseman to recover damages for the loss of goods by fire, the declarations of an agent made after the fire are not admissible.

4. Warehouseman—Negligence—Damages—Railroads.

In an action against a warehouseman to recover damages for the loss of goods by fire, the evidence is not sufficient to show negligence on the part of the railroad warehouseman.

DOUGLAS, J., dissenting.

ACTION by T. B. Lyman against the Southern Railway Company, heard by *Justice, J.*, at March Term, 1902, of BUNCOMBE. From a judgment for the defendant, the plaintiff appealed.

F. W. Thomas and Luther & Wells for plaintiff.
Tucker & Murphy and A. B. Andrews, Jr., for defendant.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of the value of certain personal property in the warehouse
(722) of the defendant at Asheville, N. C., destroyed by fire on 27 October, 1894. "The plaintiff did not contend that the defendant was liable as a common carrier, but sought to hold it liable as warehouseman." The material facts, proved by the plaintiff and for the purpose of the decision of the case taken to be true, are:

The plaintiff delivered to the defendant at Raleigh, N. C., on 12 October, 1894, the property (destroyed as above stated) for shipment to Asheville, N. C., being a marble bust of the plaintiff's father, of the value of $400, a pedestal for the bust, a table and an ebony chair. The goods arrived safely at Asheville and were kept in the defendant's warehouse with the understanding that the plaintiff would pay the company for storing them for him. When he applied for the property he was told by the defendant's agent that it had been destroyed by the fire which burned the warehouse on the morning of 27 October, 1894. The plaintiff showed by several witnesses that they were members of the fire company and when they reached the scene of the fire the north end of the warehouse and several cars near the warehouse were burning. The defendant's agent cautioned the firemen to be careful, saying that there were explosives—did not say where they were. Witnesses heard two or three small explosions, but did not know where they were. The cars were burning 25 or 30 yards from the depot—heard an explosion outside. The firemen put two streams of water on the fire. There was a strong wind blowing up the river. The fire company got to the fire fifteen or twenty minutes after the alarm was sounded. Fire spread to the cars on the track. There were explosions 75 feet from where they were at work. The nearest car was 50 feet from the depot. The fire company was efficient. There was a hydrant within 200 feet of the depot. The warehouse was nearly burned up before the explosion. It is about one mile from the fire department
(723) to the depot. The fire had not reached the warehouse when the fire company got there; fire in cars at the time, and a strong wind blowing towards the warehouse; there was an explosion in one car after the fire company got there, but it did not deter the firemen. The railroad company had no apparatus about its warehouse for extinguishing fire or turning water on it; the warehouse could have been saved if it had not been for the wind; fire was first discovered in the building near the warehouse, connected with the warehouse by a shed. The defendant had some barrels in the warehouse which were supposed to be kept full of water, with buckets connected; there was no evidence that water was in those barrels at the time, nor hose and

other apparatus usually kept in hotels and other large buildings. There were water connections close to the warehouse.

The defendant demurred to the evidence and moved to nonsuit the plaintiff. The motion was allowed, and the plaintiff excepted and appealed.

The witness Gennett said that he heard some men talking about the fire at the time, but did not know or remember who they were. The plaintiff asked the witness to state what these men said about the fire and its origin. The defendant objected; objection sustained, and plaintiff excepted. The question was clearly incompetent. The fire had been burning some fifteen or twenty minutes when the witness got there. Any statement made after that interval by persons unknown to the witness could not be part of the *res gestæ,* and it was not otherwise competent. The exception cannot be sustained.

Jesse Patton was asked, "How long, judging from the condition of the warehouse when the fire company got there, had the fire been burning?" Upon the defendant's objection the question was ruled out, and the plaintiff excepted. The question was not competent. (724) The fire did not originate in the warehouse, and its condition at the time the witness reached there was no evidence as to the time the fire begun. The witness proceeded without objection to describe the condition of the warehouse when he got there. The ruling of his Honor was correct.

The plaintiff proposed to ask same witness in regard to declarations of Clark, the defendant's agent, made a few days after the fire. This was upon objection excluded. It is well settled that the declarations of an agent made after the transaction are not admissible. *Southerland v. R. R.,* 106 N. C., 105.

It is conceded that the defendant held the goods destroyed as warehouseman. Ever since the case of *Coggs v. Bernard* (Lord Raymond, 909), Smith L. C., 354, which Mr. Smith says "is one of the most celebrated cases ever decided in Westminster Hall, and justly so, since the elaborate judgment of *Lord Holt* contains the first well-ordered exposition of the English law of bailments," the measure of duty owing by bailees in regard to the several kinds of bailment has been settled. The only duty devolving upon the courts has been to apply the principles announced by *Lord Holt* to the facts in the cases as they arise. "As to the responsibility of the present bailee (warehouseman), ordinary or average diligence is required. This is such care and diligence as prudent persons of the same class are wont to exercise towards such property, or in the management of their own property under like circumstances. For failure to exercise this degree of care and diligence the bailee must respond." Smith L. C., vol. 1 (9 Ed.),

414; Jones on Bailments, 97; Hale on Bailments and Carriers, 238. "The burden of proof is on the plaintiff to show negligence." *Ibid.*, 239. The fact that the goods are destroyed by fire raises no (725) presumption of negligence on the part of the bailee.

This Court in *Neal v. R. R.*, 53 N. C., 482, by *Manly, J.*, says: "Ordinary care is what is required, and this is defined by a recent elementary treatise (Story on Bailments, sec. 41) to be 'that which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" *Turrentine v. R. R.*, 106 N. C., 375, 6 Am. St., 602; *Daniel v. R. R.*, 117 N. C., 603.

Applying these principles to the facts in this case, we concur in the ruling of his Honor. The only suggestion of negligence is that there was in the warehouse, or in some cars near by, some explosives which rendered it dangerous for the firemen to go into or near enough to the warehouse to stop the fire. It does not appear what the explosives were, where they were, or how long they had been in or near the warehouse. One of the plaintiff's witnesses says that they would have saved the warehouse but for the strong wind; another, that the "fire company was efficient." There is no testimony tending to show that the explosives caused the fire. The nearest approach to evidence as to the location of the explosives was that there was an "explosion in one car soon after the fire company got there, but did not deter the firemen." There was a hydrant within 200 feet of the fire; another witness said there were two hydrants near the warehouse. The firemen put two streams of water on the fire. Without pursuing the discussion, we are of the opinion that the judgment was correct and must be

Affirmed.

DOUGLAS, J., dissenting.

Cited: Morgan v. Benefit Soc., 167 N. C., 265; *Plummer v. R. R.*, 176 N. C., 280.

(726)

HIGDON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 2 June, 1903.)

Telegraphs—Negligence—Delivery—Delay—Proximate Cause—Contributory Negligence.

In an action against a telegraph company to recover damages for a delay in delivering a message, where the plaintiff, on receiving the delayed message announcing the death of his mother, at a time when

the only train by which he could have reached his mother's residence and attended the funeral was scheduled to leave immediately, telephoned to the railroad station and, on being erroneously informed that the train was on time, made no effort to take it, which he could have done if he had been correctly informed that it was two hours and a half late, the telegraph company, in an action for negligence in delivering the message, was entitled to an instruction that, if plaintiff was misinformed as to the time when the train left, then the negligence of the defendant, if any, was not the proximate cause of plaintiff's injury, and no damage could be assessed on account of plaintiff's failure to reach the funeral.

DOUGLAS, J., dissenting.

ACTION by R. W. Higdon against the Western Union Telegraph Company, heard by *Coble, J.*, and a jury, at October Term, 1902, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Burwell & Cansler for plaintiff.
Jones & Tillett and F. H. Busbee & Son for defendant.

MONTGOMERY, J. The telegram, in which the death of the plaintiff's mother and the time and place of her burial were announced, was delivered to the plaintiff in Charlotte, N. C., at 8:30 a. m. The only train which could have been taken to the place of interment at the hour appointed left Charlotte, by schedule time, at 8:30 a. m.—the same hour of the receipt of the telegram. The plaintiff testified that the trains were frequently late, and that one could not rely on (727) trains being on time. He further said that he asked his partner in business (Pierce) to inquire by telephone at the Southern station, if the train to Atlanta was on time, and on being informed by his partner that he had received an answer that the train was on time, he abandoned any purpose to attend funeral. There was evidence, uncontradicted, that the train was two hours and a half late on that morning. Under all the evidence, it seems clear that it was the plaintiff's duty to have inquired as to the hours of the running of that train. He felt that it was incumbent on him to do so. He did not make inquiry himself, but got another to do so for him. The evidence does not disclose of whom the inquiry was made by Pierce, and the answer to it, if the uncontradicted evidence was to be believed, conveyed incorrect information. That was evidence of negligence on the part of the plaintiff's agent, and, in law, of his own. On this point the defendant asked the following instruction:

"If the jury find from the evidence that the only train upon which the plaintiff could have gone to attend his mother's funeral left Char-

lotte more than two hours after the receipt of the telegram announcing her death, and if the jury further find that the plaintiff, in order to ascertain whether he could take the train, relied upon telephone communication, and if by the negligence of any other person, either his partner, who telephoned, or the person to whom he telephoned, the plaintiff was misinformed as to the time when the train left, then the jury are instructed that the negligence of the defendant, if any there was, was not the proximate cause of the plaintiff's injury, and the jury, in answering the sixth issue, are directed not to assess any damages on account of plaintiff's failure to reach the funeral."

His Honor gave in substance an instruction like that requested by defendant, but it contained also a statement that any negligence of the defendant might be also considered in connection with the infor-
(728) mation received by Pierce as to the movement of the train. We think the defendant was entitled to the instruction in the form in which it was requested. The defendant's negligence in its failure to deliver the telegram was not connected with the train service and the duty of the plaintiff to make proper inquiry concerning the same. In analogy to our ruling here, *Meadows v. Telegraph Co., ante,* 40, may be referred to. The Court there said: "Had the message been delivered after negligent delay by defendant, but still in time for plaintiff to have caught the train, and he failed to do so, this would have been contributory negligence." In the present case there was evidence undisputed tending to show that the defendant's negligence in not delivering the telegram was not the proximate cause of the plaintiff's failure to attend his mother's funeral, and the defendant was entitled to an instruction disconnected with its own negligence on that evidence.

New trial.

WALKER, J., did not sit.

DOUGLAS, J., dissenting: The opinion of the Court seems to be based entirely upon the contributory negligence of the plaintiff, with the burden of proof as to that issue resting, of course, upon the defendant. The plaintiff received the telegram at exactly the time when his train was scheduled to leave, and at once asked his partner to inquire by telephone at the *Southern station* if the train to Atlanta was on time. He was answered that it was on time. What more would a man of reasonable prudence have done? Was it contributory negligence *per se* to depend upon a railroad schedule or upon an answer from a rail-
(729) road office? Surely, railroad negligence has not gone so far as to raise such a legal presumption.

The defendant asked for an instruction which practically charged the plaintiff out of court, and which I think was too favorable to the

defendant, even with the qualification added by his Honor, to the effect that "any negligence of the defendant (plaintiff) might be also considered in connection with the information received by Pierce as to the movement of the train" (quoting from opinion). I think the qualification was entirely correct. In applying the rule of "the prudent man," we must consider the condition of the plaintiff, with his knowledge and sources of information. In his distress, and having perhaps some necessary arrangements to make, he asked his partner to telephone to the Southern station. Although not stated in the record, it is evident that Pierce did as requested, and that the answer came from the station. What more would ordinary prudence have dictated? It is practically admitted in the opinion that the defendant was negligent. In view of its own negligence and the obvious nature of the telegram, how easy and reasonable it would have been for the defendant to have sent one of its messenger boys to find out whether the train was on time, and to have notified the plaintiff.

In *Hollowell v. Ins. Co.*, 126 N. C., 398, the plaintiff had been in the habit of paying his premium by sending a check to the defendant by mail. One of these checks did not reach the defendant before the day of forfeiture. This Court held that the defendant could not cancel the policy upon proof that the plaintiff deposited the letter containing the check in the post-office in time to reach the defendant in due course of mail before the hour of forfeiture. The Court says on page 404: "A remittance by mail or other method is at the risk of the debtor. . . . But the regularity of the mail, a public agency, is such that it is not negligence to rely upon it, especially when such method of transmission has been previously the course of dealings between the (730) parties, and there was no express revocation of it." It would seem difficult to entirely separate the regularity of the mails from the regularity of the trains that carry the mails.

Cited: Helms v. Telegraph Co., 143 N. C., 395; *Penn v. Telegraph Co.*, 169 N. C., 315.

COX v. WALL.

(Filed 6 June, 1903.)

1. Bankruptcy—Assignment for the Benefit of Creditors—Trusts—Creditors.
A trustee in bankruptcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, provided any creditor of the bank would be entitled to the same.

2. Fraudulent Conveyances—Assignments for the Benefit of Creditors—Burden of Proof—The Code, Secs. 1545, 1546, 1547—Onus Probandi—Notice.
The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice.

DOUGLAS, J., dissenting.

ACTION by Walter O. Cox against Wall & Huske, heard by *Shaw, J.*, and a jury, at December Term, 1902, of FORSYTH. From a judgment for the defendants, the plaintiff appealed.

Lindsay Patterson, L. M. Swink and A. H. Eller for plaintiff.

Glenn, Manly & Hendren, Watson, Buxton & Watson and E. E. Gray for defendants.

WALKER, J. This action was brought by the plaintiff, who was trustee in bankruptcy of W. H. Gilbert, to set aside a conveyance by Gilbert of a stock of merchandise, which the plaintiff alleges was made in
(731) violation of the provisions of the bankrupt act against fraudulent conveyances, and also in fraud of his creditors, and which is therefore condemned both by the bankrupt law and our statutes. The evidence in the case was voluminous and we will not attempt to set it out or review it in detail, as it will be quite sufficient for a decision of this appeal, in the view we take of the case, to refer to one of the prayers for instruction which the plaintiff requested the court to give and which the court refused to give to the jury, and also to the charge of the court with reference to the subject-matter of that prayer. The issues submitted to the jury and the answers thereto were as follows:

1. Was the conveyance of the stock of goods from W. H. Gilbert to Wall & Huske made with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them? Yes.

2. Was the sale of the goods to Wall & Huske by Gilbert made with the intent on the part of the said Gilbert to unlawfully prefer one or more of his creditors, as alleged in the complaint? No.

3. Did Wall & Huske purchase said stock of goods in good faith and for a present fair consideration? Yes.

4. Did the payment of Gilbert to Wall & Huske of the debt due by him to said Wall & Huske constitute an unlawful preference? No.

The plaintiff in apt time tendered an issue as follows: Did either of the defendants, J. D. Wall or D. W. Huske, have knowledge or notice of such fraudulent intent on the part of the defendant Gilbert? The court refused to submit the issue, and the plaintiff excepted.

At the close of the evidence the defendants agreed that the jury should answer the first issue "Yes." With reference to the third issue submitted by the court, the plaintiff requested the court to charge the jury that, as the conveyance was admitted to have been made by Gilbert with intent to hinder, delay, and defraud his creditors, the (732) burden was on the defendants to show not only that they purchased for value, but without notice of the said intent to defraud. The court not only refused to give this instruction, but on the contrary charged the jury that even if the conveyance was made with a fraudulent intent, yet if the jury found that the defendants paid a present fair consideration for the goods, the plaintiff must show by the preponderance of the evidence that the defendants were not purchasers in good faith—that is, that the defendants either participated in Gilbert's fraudulent or unlawful intent, or that they had notice thereof at the time of the purchase.

We will not stop to consider whether there is any essential or substantial difference between the third issue submitted by the court and the issue tendered by the plaintiffs in lieu thereof—that is, whether there is any difference in legal contemplation between a purchase without notice of the fraudulent intent of the debtor in conveying away his property, when a valuable consideration has been paid, and a purchase in good faith and for a present fair consideration. We shall treat the two issues as if they are in law substantially the same.

It is provided in the Bankrupt Act, sec. 67*e*, that fraudulent transfers of property made by an insolvent debtor at any time within four months prior to the filing of the petition against him, which are null and void under the law of the State in which the property is situated, shall be void under said act against his creditors, if he be adjudged a bankrupt, and shall pass to the trustee in bankruptcy, and all conveyances and transfers made within said time with intent to hinder, delay, or defraud creditors shall likewise be void, except as to purchasers in good faith and for a present fair consideration, and all property so conveyed shall pass to his trustee. By section 70*a* of the act it is (733) provided that the trustee of the estate of a bankrupt shall be vested by operation of law with the title to "all property transferred by him in fraud of his creditors," and by section 70*e* it is provided that the trustee may avoid any transfer by the bankrupt of his property which

any creditor of such bankrupt might have avoided, and may recover the property so transferred from the person to whom it was transferred, "unless he be a *bona fide* holder for value prior to the date of the adjudication."

The plaintiff, therefore, is entitled to have the conveyance set aside and to recover the property transferred by Gilbert with an intent admittedly fraudulent, provided any creditor of Gilbert would be entitled to the same relief.

The provisions of the statute of 13 Elizabeth, with some modifications, have been enacted into law in this State and will be found in The Code, sec. 1545. By that section all conveyances made with intent to hinder, delay, or defraud creditors are declared to be utterly void and of no effect; then follows section 1546, which contains substantially the provision of 27 Elizabeth against conveyances made with intent to defraud purchasers. By section 1547, voluntary conveyances are protected when the donor retains property sufficient and available for the satisfaction of his existing debts, but the indebtedness of the donor is declared to be evidence from which an intent to defraud may be inferred. These sections are followed by section 1548, by which it is provided as follows: "Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, *bona fide* made, upon and for consideration, to any person not having notice of such fraud."

We have recited these different provisions of the law in regard to fraudulent conveyances with the view of showing the order of
(734) their enactment and the purpose of the Legislature that section 1548 should constitute an independent provision, operating as a proviso to the other sections, and further for the purpose of showing that the matters therein stated were intended to be strictly of a defensive character, and are required to be averred and proved by the party who relies on their existence in order to validate a conveyance which the law has declared to be void, because made with a fraudulent intent. The rule is of general application that matters contained in a proviso, or constituting an exception to something which precedes, must be pleaded and proved by him who would take advantage of it. *Wadsworth v. Stewart,* 97 N. C., 116; *Gorman v. Bellamy,* 82 N. C., 496. When a deed is made with a fraudulent intent the law condemns it and pronounces it void, and it remains void, of course, until it is shown for some reason to be valid. Nothing else appearing, it is void, and he who claims under it must aver and prove whatever is necessary to sustain its validity. The burden is on the purchaser, therefore, to show under the statute that he purchased not only for value, but without notice.

It is said that the burden of proof by the decisions in some other jurisdictions does not rest on the purchaser to show anything, save that he paid a fair price, and that this being shown, the burden is shifted and the plaintiff must show a want of notice. We will not undertake to examine the decisions of other States, for it seems to us that it would be vain and useless to do so, as the question must be decided by the law as contained in our statutes and as declared in the decisions of this Court.

It is also suggested that the rule requiring the plaintiff to take the burden of proving notice, when the purchaser or defendant has shown that a fair consideration was paid for the property, has been laid down by this Court in *Peeler v. Peeler,* 109 N. C., 628, and that there is no authority here to the contrary. We do not think that the question was presented in the case of *Peeler v. Peeler.* That case in- (735) volved the validity of a conveyance made by a husband to his wife, and the Court held that from the relation of the parties the law raised a presumption of fraud without any proof of fraud by the plaintiff, and that the burden was upon the wife to show that she paid value for the property conveyed to her by her husband, and when she had done this the burden shifted to the plaintiff—not to show that she purchased with notice, but to show that her husband had an actual intent to defraud. There was not an exception in the case that related to the burden of proof, nor does the Court refer to it in its opinion. It appears from the charge to the jury, which is set out on page 629, that the burden was placed upon the defendant, and the judgment of the court below was affirmed. The case is not in point, and we think that there are authorities in this State which state the rule under our statute to be that the burden is upon the purchaser to prove not only a valuable consideration, but want of notice. In *Young v. Lathrop,* 67 N. C., 63, 12 Am. Rep., 603, the Court held that section 1548 was a proviso to the preceding sections of the chapter, and *Pearson, C. J.*, in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the *bona fides* and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title of the *bona fide* purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being 'impeached and made void'" (p. 72). This shows that the Court was of the opinion that by section 1548 the purchaser is required to aver and prove affirmatively that he comes within the terms of section 1548 in order to take his case out of the operation of the pre- (736) ceding sections. Why should this not be so? It is conceded that

he must show that he bought for value; but the statute provides not only that he must have bought for value, but also without notice, and makes both a valuable consideration and want of notice essential to the validity of his title. If, therefore, he is required to prove one of the essential elements of a good title, as against the creditor who has shown that the deed was void because it was fraudulent, why not the other? It will not do to say that the law will not impute wrong or evil to any one and will not therefore presume that his purchase was not *bona fide* in the absence of proof to the contrary, because this would contravene the express provision of the statute which declares that the deed shall be utterly void and of no effect unless it appears that the title had been acquired by a *bona fide* purchaser for value and without notice of the fraud. In the original statute of 13 Elizabeth and in our act of 1715, what is now section 1548 of The Code was a proviso to the preceding sections of those statutes in regard to fraudulent conveyances. In *Eigenbrun v. Smith,* 98 N. C., 215, this Court says: "The rule is that the purchaser, knowing of the judgment, must purchase with the view and purpose to defeat the creditor's execution; and if he does it with that purpose it is fraudulent, notwithstanding he may give a *full* price. The question of fraud depends upon the motive. The purchase must be *bona fide* as well as upon good consideration. This was the rule as declared by *Lord Mansfield* upon repeated occasions."

In *Tredwell v. Graham,* 88 N. C., 214, this Court through *Ruffin, J.,* says: "As said by *Pearson, C. J.,* in *Cansler v. Cobb,* 77 N. C., 30, when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for
(737) a valuable consideration and without notice of the fraudulent intent on the part of the grantor."

In *Davis v. Council,* 92 N. C., 730, it is said by the Court, through *Smith, C. J.:* "The proposition itself is an imperfect statement of the principle of law, as it omits the material qualification, that such purchaser should not have had notice of the fraudulent character of the title of the party from which he derives his," citing The Code, sec. 1548. In *Odom v. Riddick,* 104 N. C., 521, 7 L. R. A., 118, 17 Am. St., 686, it is said that "A purchaser for value from one whose deed is declared by the jury to be fraudulent and void gets a good title if he has no notice of the fraud in his vendor's deed."

Bigelow, referring to this subject, says: "But it may still be thought necessary to inquire whether the plaintiff himself has really sustained the burden of proof, so as to require the defendant to come to the support of his defense by merely showing fraud. It may be asked if the plaintiff ought not to go further and, though he has made a case of fraud in the grantor, offer some definite evidence of notice, or, what for the

present purpose is the same thing, that the conveyance to the defendant was voluntary. The answer of the authorities, though not without here and there a discordant note, is that evidence of the fraud is enough, and this whether the case be one of fraud on creditors or fraud on a vendor; such is the better answer in those States in which in cases of fraud upon creditors notice to the purchaser is sufficient to defeat his title." 1 Big. Fraud, p. 131.

But we think the question is directly passed upon and settled in two cases by this Court: In *Saunders v. Lee,* 101 N. C., 7, the Court says: "In *McGahee v. Sneed,* 21 N. C., 333, it is held that when a purchaser from a fraudulent grantee seeks relief on the ground that he is an innocent purchaser without notice, he must deny notice; and so he must in an answer when he sets up the same defense to the bill of an impeaching creditor"; and *Gaston, J.,* delivering the opinion, (738) after thus stating the rule, adds: "The want of notice is an essential part of his equity in the one case and of his defense in the other, and it is a general rule in pleading that whatever is essential to the right of the party must be averred by him."

It would appear from these cases that whatever must exist in order to protect the title must be averred and proved by him who holds that title. The burden is with him. But not so when it is sought to convert one into a trustee because he bought with notice. In the former case, the title is deemed to be bad until it is shown to be good; in the latter case the title is presumed to be good until it is shown to be bad by him who would assail it.

In *Wade v. Saunders,* 70 N. C., 275, *Pearson, C. J.,* for the Court, says: "The finding of the jury 'that the deed executed by Aaron Saunders to his son Jesse Saunders was not *bona fide,* but was fraudulent and done with purpose to defraud his creditors,' disposes of the other points made in the case on the part of the defendants; for how can Romulus F. Saunders, who claims under Jesse, the fraudulent donee, stand upon fairer ground than he does, except as a purchaser for valuable consideration and without notice of the fraud attempted to be done by the said Jesse and his father, the defendant Aaron? There was no evidence of his being an *innocent purchaser.*" In the same case (plaintiff's appeal), p. 279, *Pearson, C. J.,* for the Court says: "We have not been able to see the force of his Honor's reasoning in regard to the legal effect of the deeds of Jesse to Romulus Saunders, or how the legal effect of the deeds could be at all affected by the fact that the 'existence of this *prima facie* title had been brought to the notice of the court by the plaintiffs themselves.' Had the plaintiffs demanded judgment that these two deeds be canceled in order to remove a cloud from the title, then Romulus F. Saunders would have been a necessary party, (739)

and although the deed from Aaron to Jesse was deemed void, still Romulus would be allowed to protect his title by showing that he was a *bona fide* purchaser for valuable consideration, without notice of the fraud that vitiates the deed to Jesse; but the *onus probandi* would have been on him, and *prima facie* his title would be affected by the same infirmity."

The plea that the defendant is a purchaser for value and without notice is in the nature of a plea of confession and avoidance, and the matter in avoidance is to be proved by the party pleading it. If it be said that the purchaser in that case will be required to prove a negative, the answer is that, though somewhat negative in form, it is an affirmative plea in substance; and besides, it is peculiarly within the purchaser's knowledge whether he had notice or not of the fraud, and he can now testify in his own behalf. We think this view of the case is sustained by authority. In *Boone v. Childs,* 10 Peters, 210, it is said: "But still this will not be done on mere averment or allegation; the protection of such *bona fide* purchaser is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. It must be established affirmatively by the defendant, independently of his oath. . . . Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out." In *Jewett v. May,* 7 Johns., ch. 65, 11 Am. Dec., 401, (740) the Court lays down the following rule: "To support the plea of a *bona fide* purchaser without notice, the defendant must aver and prove, not only that he had no notice of the plaintiff's rights before his purchase, but that he had *actually paid the money* before such notice." In *Weber v. Rothchild,* 15 Oregon, 390, 3 Am. St., 162, it is said: "Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value without notice of this property, but he has offered no evidence whatever on those issues. The plea of a *bona fide* purchaser for value, as here alleged, is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it. Another rule of law equally elementary, which is frequently

applied in such cases, is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact." The case just cited quotes with approval *Tredwell v. Graham*, 88 N. C., 208. In *Young v. Schofield*, 132 Mo., it is said: "Inasmuch as the averment or defense of being 'an innocent purchaser' is an *affirmative* allegation or plea, so must the evidence offered in its support be of the like nature; as the allegation must be *affirmatively pleaded*, so also must it *affirmatively be proved;* the *onus* lies on the pleader." In *Edwards v. R. R.*, 82 Mo. App., 101, the Court says: "A question is made here as to where the burden of proof was on the question of the plaintiff's being an innocent purchaser without notice of the prior unrecorded deed. Ordinarily, the burden would be on the party whose case depends on his innocence and lack of notice. Here the plaintiff's claim of title being by a subsequent deed, is invalid, unless he can establish that he was an innocent purchaser."

We do not cite these authorities as controlling upon us in the (741) interpretation of our statute, but as stating and applying the general rule in regard to pleading and proof that he who would avail himself of a fact which is necessary to protect his right or title must aver and prove the fact.

The solution of this question depends somewhat upon the phraseology of the statute against fraudulent conveyances, and the decisions of the courts of other States, and any rule which may be supposed to have prevailed at common law cannot be safely followed, as our statute is not in all respects like the statutes of other States or in strict accordance with the common-law principle. The rules of evidence, including the burden of proof, to be applied in the trial of a case are a part of the law of the remedy, and will be supplied by the *lex fori*, especially when the cause of action is founded upon a local statute. We must follow our own decisions upon the subject.

In *Jones v. Simpson*, 116 U. S., 615, to which we have been referred, the Court followed, as it was bound to do, the decisions of the Supreme Court of Kansas in construing the statute of that State, which by its very terms implied that the burden of proof should rest upon the creditor or the party attacking the conveyance. The Court was not called upon to state the rule as to the burden of proof, except as it had been settled by the courts of that State in construing its statutes. In *Bamburger v. Schoolfield*, 160 U. S., 149, what is said by the Court with reference to the burden of proof does not relate to the notice of the fraud, but to the fraud itself, and of course the burden to establish the latter was placed upon the contesting creditor. In *Reiger v. Davis*, 67 N. C., 185; *Lassiter v. Davis*, 64 N. C., 498, and the class of cases of which they are the leading representatives, the question as to the burden of proof was

not involved. The Court decides in those cases merely that the fraudulent conveyance is void unless it appears that the vendee was not
(742) a party to the fraud, or purchased without any notice of the fraudulent intent. *Devries v. Phillips,* 63 N. C., 53.

There was error in placing the burden of proof as to notice upon the plaintiff, for which a new trial is awarded.

New trial.

DOUGLAS, J., dissenting: From reason and authority, it seems to me that the learned judge below was right in saying that when the purchaser has shown that he has paid a fair price for the goods, the burden then shifts back to the plaintiff to show that the purchaser had knowledge of the fraudulent intent of the vendor. The mere fact that a fair price is paid is in itself the strongest evidence of good faith. It may be said that the vendee knows whether or not he knew of the vendor's fraudulent intent, and that he can disprove such knowledge by his own testimony. This is the only way such a negative can be proved; but is it any easier for the vendee to prove his want of knowledge than for the plaintiff to prove his knowledge? That the vendee had knowledge might be proved by one witness, but a thousand witnesses could not prove that he had no knowledge. All that they could prove would be that they did not give him any information to put him on notice, and that he had no knowledge *as far as they knew.*

Suppose the vendee should die, ought the widow and orphan child to be deprived of the property, the full value of which had been honestly paid, on the unsupported admission of a self-confessed swindler that he had sold the property with the intent to thereafter fraudulently misapply the proceeds? Who could swear of his own knowledge that the deceased vendee had no knowledge of such intent? Do we not effectually deprive a man of his right when we deprive him of all opportunity of asserting that right? It may be said again that "hard cases
(743) are the quicksands of the law"; but that celebrated expression of *Chief Justice Pearson* is no authority for creating quicksands. The few remaining hours of the term give me no time for the examination and citation of authorities, and so I must content myself with a single statement of my personal views.

Cited: Morgan v. Bostic, post, 749; *Bank v. Hollingsworth,* 135 N. C., 582; *Crockett v. Bray,* 151 N. C., 619; *Hobbs v. Cashwell,* 152 N. C., 189; *Eddleman v. Lentz,* 158 N. C., 74; *Pennell v. Robinson,* 164 N. C., 260; *Smathers v. Hotel Co.,* 168 N. C., 71; *Bank v. Pack,* 178 N. C., 391.

MORGAN v. BOSTIC.

(Filed 6 June, 1903)

1. Fraudulent Conveyances—Deeds—Burden of Proof—Onus Probandi—The Code, Secs. 1545, 1546, 1547—Notice—Vendor and Purchaser.

The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice.

2. Lis Pendens—Notice of Pendency—Pleadings—Complaint—Notice—Vendor and Purchaser—The Code, Sec. 229.

A purchaser of land for value after the filing of a *lis pendens*, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title.

ACTION by J. P. Morgan and others against J. B. Bostic and others, heard by *Councill, J.*, and a jury, at September Term, 1902, of BUNCOMBE. From a judgment for the plaintiffs, the defendants appealed.

Merrimon & Merrimon and Tucker & Murphy for plaintiffs.
Frank Carter and T. H. Cobb for defendants.

CONNOR, J. This action was brought by the plaintiffs, creditors of the defendant J. B. Bostic, against him and the defendants Miller and Weaver, for the purpose of having the two last named declared trustees for the benefit of plaintiffs in respect to the title of cer- (744) tain real estate. Summons was issued 3 March, 1898, and served on defendants the same day. The plaintiffs the same day filed in the office of the clerk of the Superior Court of Buncombe County a notice of *lis pendens* in proper form, containing a sufficient description of the land sought to be subjected and the purpose for which the action was brought, the land being situate in Buncombe County. The original complaint was filed in the office of the clerk of the Superior Court of Buncombe County, 15 February, 1899. An answer was filed by the defendants denying the material allegations of the complaint. At April Term, 1902, of said court, plaintiffs secured an order making C. H. Yeatman party defendant. Summons was duly issued and served upon Yeatman 16 May, 1902. Plaintiffs filed an amended complaint alleging that the defendant Bostic was the beneficial owner of the land described in the complaint, the legal title being in one C. S. Baylis of New York. That Bostic became entitled to the said land in a trade made between Baylis and himself, but, being insolvent, the legal title remained in Baylis with the understanding that he was to convey the

same to such person as Bostic might direct. That this arrangement was made by the said Bostic with intent to prevent his creditors from reaching the said land—to hinder, delay, and defraud them in the collection of their debts. That the said land was worth about $5,000. That thereafter the said Bostic entered into an agreement with the defendants Weaver and Miller, in the name of the J. B. Bostic Company, a corporation organized by the said Bostic, by which he agreed to sell the said land to the defendants Weaver and Miller for $1,250, and to have a deed made therefor by the said Baylis, and with the further agreement that after the $1,250 was paid back to Weaver and Miller from the sale of the land, the balance of the proceeds would be equally divided between the Bostic Company and Weaver and Miller. That,
(745) pursuant to said arrangement, the said Baylis conveyed the said land, known as the "Bede Smith farm," to said defendants; that this arrangement was made and the deed executed with intent to hinder, delay, defeat, and defraud the creditors of Bostic, and the defendants Weaver and Miller had notice thereof; that thereafter, on 18 October, 1898, the defendants Weaver and Miller conveyed the land to C. H. Yeatman for the consideration, as recited in the deed, of $3,000, and Yeatman had notice at the time of the execution of the deed of the pendency of said action by the *lis pendens* filed therein; that on the same day, to wit, 18 October, 1898, the said Yeatman conveyed to Weaver and Miller certain lots in the city of Asheville for the recited consideration of $3,000.

The plaintiffs allege that by reason of these facts they were entitled to have Yeatman declared a trustee for their benefit.

The defendants denied the material allegations in the complaint, and for a further defense alleged that the defendants Weaver and Miller purchased the land from the J. B. Bostic Company, a corporation, and that the deed was made to them by Baylis; that at the time of the purchase neither of them knew that Bostic individually had any interest in the land, and they and all of them denied expressly that he had any such interest. They further denied that the defendants or either of them had any knowledge of the insolvency of Bostic; that their purchase of the land was in good faith and for full value.

There was testimony tending to show that some time during 1897, Bostic, being insolvent, negotiated a trade with Baylis, and as a part of the consideration and pay for his services in the matter he was to have the title to the Bede Smith farm; that the title was to remain in Baylis, to be conveyed to such person as Bostic might name. It
(746) further appeared that some time during 1895 Bostic secured a charter for and organized a corporation under the name of "J. B. Bostic Company"; that one hundred shares of stock were sub-

Bostic; thirty-five by J. B. Bostic, thirty by G. P. Bostic; that J. B. scribed for, of which fifteen were taken by J. B. Bostic, trustee for G. P. Bostic was elected manager of the corporation at a salary of $1,800 per year. The contract with Baylis was made by the J. B. Bostic Company, and the contract with Weaver and Miller was made by the said company; that the defendant Bostic was the manager of the corporation, and sold the land to the defendants Weaver and Miller, who paid $1,250 therefor. There was evidence tending to show that the value of the land was in excess of this amount. The defendant Yeatman swore that he had no knowledge or notice of the pendency of this suit at the time he bought the land and took title thereto. The plaintiffs contended that the organization of the J. B. Bostic Company was had with the intent to cover up the property of J. B. Bostic and remove it from the reach of his creditors, and that it was a fraudulent contrivance for that purpose. The defendants denied that they had any notice or knowledge thereof, and allege that they are *bona fide* purchasers for value. The court submitted the following issues to the jury:

1. Did the defendant J. B. Bostic cause to be executed to his codefendants, Weaver and Miller, the deed set out in the complaint? Yes.

2. Did the J. B. Bostic Company cause to be executed to the defendants Weaver and Miller the deed set out in the complaint?

3. Was the deed executed with the intent to hinder, delay, defeat, and defraud the creditors of J. B. Bostic?. Yes.

4. Were the defendants Weaver and Miller *bona fide* purchasers of the land described in said deed for value and without notice of or participation in any fraud, if there was any, on the part of (747) J. B. Bostic or J. B. Bostic Company, to hinder, delay, defeat, and defraud the creditors of said J. B. Bostic? No.

Upon the coming in of the verdict the court rendered judgment declaring that the defendants Weaver and Miller took title to the land in trust for the creditors of Bostic, and that Yeatman purchased with notice of the pendency of this action and was fixed with knowledge thereof and held the title to the said land upon the same trust. There were numerous requests for instruction by both the plaintiff and defendant, many of them becoming immaterial by reason of the finding of the jury upon the first issue. Among other instructions given the jury, his Honor charged them at the request of the defendants "that the burden of proof is upon the plaintiffs to satisfy the jury that J. B. Bostic caused C. S. Baylis to execute the deed described in the complaint with intent to hinder, delay, defeat, and defraud the creditors of the said J. B. Bostic," and unless they did so satisfy them, they should answer the third issue "No." He also charged the jury that the burden of the first issue was upon the plaintiffs. Upon the fourth issue he

charged the jury that the burden was upon the defendants Weaver and Miller to show that at the time they purchased this land they did it in good faith without notice of any purpose of Bostic to hinder, delay, defeat, and defraud his creditors, and that they purchased it for value; that if they did satisfy the jury that at the time they purchased the land they knew of it and its condition, and that they exercised their best judgment in ascertaining what the land was really worth, and after doing so they considered it not worth more than $1,250, allowing to themselves what would be a reasonable margin to be made upon the land as an investment, they would be purchasers for value within the meaning of the law; that in order to protect themselves against a prior
(748) donor or creditor they must prove a fair consideration; that the court adopted in this connection the language used by the Supreme Court in *Worthy v. Caddell*"—which had been read to the jury and commented upon.

We are of opinion that his Honor correctly instructed the jury in regard to the burden of proof. It is well established by decisions of this Court that if one executes a deed or enters into an arrangement for the purpose of defrauding his creditors, the grantee will take the title to the land conveyed subject to the claims of the creditors of his grantor unless he shall show by a preponderance of evidence that he purchased for full value and without notice of the fraudulent purpose and intent on the part of his grantor.

Section 1545 of The Code declares "that all deeds and other conveyances which might be contrived and devised of fraud with the purpose to delay, hinder, and defraud creditors and others of their just and lawful actions and debts, shall be deemed and taken to be utterly void and of no effect. . . ." Section 1548 declares that nothing contained in the preceding section shall be construed to impeach or make void any conveyance . . . *bona fide* made, and upon and for good consideration, to any person not having notice of such fraud. This section has been frequently construed, and it would seem to be settled that, if one would take advantage of the provision in favor of *bona fide* purchasers for value without notice, he must allege and prove such facts as will bring him within the exception. In *Wade v. Saunders,* 70 N. C., 270, *Pearson, C. J.,* says: "The finding of the jury 'that the deed executed by Aaron Saunders to his son, Jesse Saunders, was not *bona fide,* but was fraudulent and done with the purpose to defraud his creditors,' disposes of the other points made in the case on the part of the defendants; for how can Romulus F. Saunders, who claims under Jesse,
(749) the fraudulent donee, stand upon fairer ground than he does, except as a purchaser for valuable consideration and without notice of the fraud attempted to be done by the said Jesse and his father,

the defendant Aaron? There was no evidence of his being an *innocent purchaser.*" In the same case, upon the appeal by the plaintiffs, the Chief Justice says: "Romulus would be allowed to protect his title by showing that he was a *bona fide* purchaser for valuable consideration, without notice of the fraud which vitiates the deed to Jesse, but the *onus probandi* would be on him, and *prima facie* his title would be affected by the same infirmity." In *Tredwell v. Graham,* 88 N. C., 208, *Ruffin, J.,* says: "When a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration and without notice of a fraudulent intent on the part of his grantor." *Saunders v. Lee,* 101 N. C., 2. See *Cox v. Wall, ante,* 730.

We think that upon the whole record his Honor's instructions to the jury are sustained by the authorities.

There is, however, a question presented in the appeal in which we concur with the defendants. There is no evidence that Yeatman had any other notice than such as was given by the filing of the *lis pendens.* No issue was submitted to the jury in that respect, and we do not think it necessary that an issue should have been submitted. The facts in reference to Yeatman's connection with the transaction are undisputed and present the question, for the first time in this Court, whether *lis pendens* should be filed at the time of filing the complaint. The Code, sec. 229, provides: "In an action affecting the title to real property, the plaintiff—at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff or a defendant, when he sets up an affirmative cause of action in his answer and demands substantive re- (750) lief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property—may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby. . . . From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby."

This section was first considered in *Todd v. Outlaw,* 79 N. C., 235, in which *Bynum, J.,* says: "The defendant again insists that the plaintiffs had notice by *lis pendens,* in that they purchased during the pendency of an action by Bond against Vernoy to foreclose the mortgage upon the land now in controversy. The principle of *lis pendens* is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his

interest. . . . But the law of *lis pendens* has been greatly modified and restricted by the Code of Civil Procedure, sec. 90 (229). That section provides that in an action affecting the title to real property, the plaintiff at the time of filing his complaint or any time afterwards," etc.

Referring to the decision in *Badger v. Daniel,* 77 N. C., 251; *Rollins v. Henry,* 78 N. C., 342, the learned justice said that while he is of the opinion that the policy of the law would be better carried out by following the English and New York construction, this Court has adopted a different construction by its decisions, from which he does not feel at liberty to dissent. It is there held that when the action is pending in the county where the property is situated, it has the force and effect of *lis pendens* and dispenses with the statutory requirements, or rather
(751) that the statute does not apply to such cases.

There can be no question that if the plaintiffs had filed their complaint setting forth a description of the property and the purpose of the action, at the time of the issuing of the summons or at any time prior to the purchase by Yeatman, the pendency of the action would have been notice to the world, and he would have taken title subject to the decree made in the cause. *Baird v. Baird,* 62 N. C., 317; *Dancy v. Duncan,* 96 N. C., 111, in which *Smith, C. J.,* says: "No change in the rule is brought about by the statute prescribing how notice of a *lis pendens* shall be given (The Code, sec. 229) when the transaction is in one and the same county, as in the present case, and notice is furnished in the record in the pending action."

In *Spencer v. Credle,* 102 N. C., 68, 78, *Avery, J.,* says: "While strangers to the record are not affected with constructive notice of the pendency of an action involving the title to land lying in a county *other than that in which the action is pending unless the notice required under section 229 of The Code has been given,* even purchasers for a valuable consideration are affected with notice of an action brought in the *county where the land lies, if the pleadings describe it with reasonable certainty, and take title subject to the final decree rendered in the action.* A different rule has been adopted in some other States where the same statute has been passed, but the law has been settled in this State by the cases of *Todd v. Outlaw,* 79 N. C., 235, and *Badger v. Daniel,* 77 N. C., 251."

In *Collingwood v. Brown,* 106 N. C., 362, *Shepherd, J.,* discusses the construction of section 229 and the authorities both in this and other States, saying: "We are of the opinion, however, that, as to real property, there is but one rule of *lis pendens* in North Carolina, and that the provisions of The Code, sec. 229, are a substitute for the common-
(752) law rule. When the Court held in the cases cited that it was not necessary to file a formal notice of *lis pendens when the action was pending in the county in which the land was situated,* we do not

understand that it intimated that two rules of *lis pendens,* varying in their extent and operation, prevailed in this State. . . . This consistency can be secured by holding, as we do, that where the action is brought in the *county where the land is situated* and the pleadings contain 'the names of the parties, the object of the action and the description of the property to be affected in that county,' this is a substantial compliance with The Code, sec. 229, as to the filing of notice, and puts in operation all of the provisions of the statute. There is no incongruity in thus holding, as the statute simply provides that the notice shall be filed with the clerk, and the place of filing would naturally be with the *pleadings* in the action."

All of these cases hold that, if the plaintiff would bind purchasers *pendente lite* of lands lying in other counties than that in which the suit is pending, he must file a notice of *lis pendens* in each of such counties. The language of the statute is explicit in requiring such notice to be filed "at the time of filing the complaint, or at any time afterwards," this Court holding that the filing of the complaint containing sufficient description of the property operates as a *lis pendens* in respect to land lying in the county in which the action is pending.

In *Arrington v. Arrington,* 114 N. C., 151, 159, *Shepherd, C. J.,* says: "The rule of *lis pendens,* while founded upon principles of public policy and absolutely necessary to give effect to the decrees of the courts, is nevertheless in many instances very harsh in its operation, and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris.*" For a long time suits in equity were deemed commenced for the purpose of affecting purchasers *pendente lite* from the issuing of the subpœna. This rule was so harsh and unjust in its operation that "in the year 1705 it was provided by (753) an English statute (4 Anne, ch. 16, sec. 22) that no subpœna should issue out of a court of equity until after bill filed, except in case of bill for injunctions to stay waste or to stay suits at law commenced." Since that enactment, the general rule, both in law and in equity, in the absence of notice of pendency or equivalent statutes declaring a different date, that the facts necessary to notice by *lis pendens* must be of record by the filing of the bill, petition, complaint or equivalent pleading, and jurisdiction obtained by service of process over the defendant from whom the interest is acquired *pendente lite,* before *lis pendens* will commence." 21 A. & E., 609, 610. "A notice filed before the filing of the complaint will become operative when the complaint is filed, and is an absolute nullity only during the intervening period." *Ibid.,* 615.

In *Stern v. McConnell,* 35 N. Y., 104, *Hunt, J.,* traces the amendments to the statutes in New York. Prior to 1859 the *lis pendens* could be filed at the commencement of the action. By an amendment made

in that year, the time of filing was changed to the time of filing the complaint—as in our Code, sec. 229. The Court says: "So marked a change cannot be disregarded. It is evident that the Legislature intended to prescribe a different time or a different occurrence as the regulating point for filing the notice." Bennett on Lis Pendens, sec. 72.

The plaintiffs do not charge that Yeatman had any other notice than that afforded by the filing of the *lis pendens* at the time the summons issued. They concede that he is a purchaser for value, averring that he conveyed to the defendants Weaver and Miller other real estate as a part of the consideration. Yeatman swears that at the time he purchased and took title he had no notice or knowledge of the pend-
(754) ency of the action or infirmity in the title of his grantors. We are therefore of the opinion that he, having purchased prior to the filing of the complaint, is not affected by the *lis pendens*. The judgment of the court below is erroneous in declaring that he holds the title to the land subject to any trust which attached to it in the hands of Weaver and Miller. We do not decide upon the suggestion in plaintiff's brief that they may follow the land conveyed to Weaver and Miller by Yeatman. The judgment so far as it affects the defendant Yeatman must be reversed.

The parties will take such final action in the case as they may be advised. It was not necessary for the defendant Yeatman to ask for any issue in regard to the *lis pendens;* the facts appear in the record. The plaintiffs sought to charge the land in his hands by the *lis pendens*. As we have seen, not having complied with the statute, they cannot do so. There is

Error.

Cited: Timber Co. v. Wilson, 151 N. C., 157; *Jones v. Williams,* 155 N. C., 184; *Smathers v. Hotel Co.,* 168 N. C., 71; *Bank v. Pack,* 178 N. C., 391.

---

(755)

LEE v. BAIRD.

(Filed 6 June, 1903)

1. Wills—Construction—"Children."

Where a testator bequeaths certain property to V for her life and at her death to be sold and divided equally among all of the children of the testator, grandchildren whose parents were dead at the time of the execution of the will take nothing under this provision.

2. Wills—Construction—"Heirs."

Where a will provides that certain property shall be sold and the proceeds divided amongst the heirs of the testator, grandchildren of the testator take *per stirpes*.

3. Wills—Construction—Advancements—"Heirs."

Where a will provides that the heirs of the testator shall account for advancements, grandchildren need not account for advancements made to their parents, as they take as purchasers and not as distributees.

ACTION by J. B. Lee and others against J. R. Baird and others, heard by *Councill, J.*, at September Term, 1902, of BUNCOMBE.

Mrs. Eliza T. Baird, late of the county of Buncombe, widow, on 23 January, 1884, executed her last will and testament. The portions thereof material to the decision of this case are:

"Item 2. I bequeath unto my daughter, Vickie Baird, all my household and kitchen furniture, to be hers forever, and I bequeath to Vickie during her lifetime my Forest Hill property; and at her death to be sold and divided equally among all of my children.

"Item 4. The balance of the Marr Swamp place to be sold to pay my son Joseph the expenses of the lawsuit on section 9, and if the amount received is more than enough to pay the expenses of the lawsuit, the remainder to be divided among all my children.

"Item 5. I request my executors to sell my lots in Asheville and my interest in the Craggy Mountain land and divide the (756) money among all my heirs.

"Item 7. I request my executors to require of my heirs who have received advancements during the life of my husband or myself to present to them an itemized statement of such advancements before they shall receive any payment of the property directed to be sold in my will; and if any of my heirs have received no advancements, to pay to them a sum sufficient to make them all equal, and if any remainder, to divide the amount amongst all of my heirs. And if any of my heirs die before my death, leaving heirs, the children of such deceased parent or parents shall receive jointly the share coming to their parent or parents—the share he or they would have received if he or they had been living at the date of my death."

At the date of the execution of said will Mrs. Baird had seven living children. A daughter, Mrs. M. J. Lee, died 5 October, 1878, leaving surviving six children. The testatrix had, when she made said will, numerous other grandchildren, children of living children. Victoria A. Baird, mentioned in item 2 of the will, died 20 March, 1897, leaving no children. At the date of said will T. J. Lee, the husband of M. J. Lee and father of said children, was and yet is a man of fine business ability,

prosperous and wealthy, who provided well for his children. His wife had received from the testatrix large sums by way of advancements exceeding in all $3,000 and amounting to more than the advancements which were made by the testatrix to any of her other children prior to her death. The testatrix knew these facts at the time of making her will and when she died. She was a woman of education and financial capacity and in full possession of her faculties. From a judgment for the plaintiffs, the defendants appealed.

(757) *Merrimon & Merrimon for plaintiffs.*
T. H. Cobb and F. A. Sondly for defendants.

CONNOR, J., after stating the case: This action is brought by the plaintiffs, five of the six children of Mrs. M. J. Lee, against the executors, and children of Mrs. Baird, for the purpose of having the said will construed and for an account of the proceeds of the property directed to be sold, and other relief. His Honor, upon the facts found as above stated, adjudged that the property mentioned in the second item, to wit, the Forest Hill property, and that mentioned in items 4 and 5 of said will became and was by the provisions of said will converted into personal property upon the death of the said testatrix and was to be distributed as such by the executors named in the will in accordance with the provisions of the seventh item of the will. That by the provisions of the seventh item it became the duty of the executors to require all of the heirs of the testatrix, by whom in said item and said will is meant those who would be entitled to the proceeds of the sales of the said real property under the statute of distributions of the State of North Carolina, to render an account of advancements, and that the said plaintiffs are entitled to receive from the proceeds of the said property so much as would come to them or each of them upon the basis of a per capita distribution. From this judgment the defendants appealed.

Plaintiffs contend, first, that the real property directed to be sold was converted into personalty by the provisions of the will; second, that the word "children" in the will includes the plaintiffs, who are grandchildren; third, that the word "heirs" is to be construed in the same way. The defendants, on the contrary, contend that the words "all of my children" exclude the plaintiffs from any participation in the proceeds of the Forest Hill property, and that the word "heirs," as used
(758) in the other items of the will, shall be construed to mean children, thereby excluding the plaintiffs from any share in the property mentioned in item 5.

In our efforts to adopt a construction of the will of Mrs. Baird, consistent with the rules laid down by the courts to guide them in such cases,

we have encountered many and almost insurmountable difficulties. Either construction suggested by counsel for the respective parties, while supported by well-considered arguments and briefs, presents contradictions and leads to results difficult to reconcile with parts of the will. We have given the case anxious and careful consideration. The conclusion to which we have finally arrived is not free from difficulty, and much could be said in support of one or more other views.

The first question presented is what meaning we shall attach, or we shall assume that the testatrix attached, to the word "children" as used in the second and fifth items of her will. The first proposition laid down by Sir James Wigram in his Rules for the Interpretation of Wills is: "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." *Lord Cranworth* in *Hicks v. Sallitt,* 3 De G. M. and Gor., 782, 18 Jar. 915, says: "Where a testator uses a word which has a well-known ordinary acceptation it must appear very certain that he has stated on the face of the will that he uses it in another sense before the ordinary sense can be interfered with. In order to alter the meaning of a word it must appear not that the testator *might* have meant it in a different sense, but that he *must* have meant it in a different sense, and this can only be shown by pointing out some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense." It (759) is also an elementary rule "that every possible effort should be made by the Court to reconcile the clauses seemingly repugnant and to give effect to the whole will; for the presumption is that the testator meant something by every sentence and word in his will, and no court is justified in rejecting any portion of it until it is positively assured that the portion which it rejects cannot be reconciled with the general intention of the testator as expressed in some other portion of the will; and even when the general rule of repugnancy is applied of necessity and the latter of the two inconsistent clauses is permitted to prevail over the former, it is a settled rule that the earlier of the two clauses will not be disturbed or rejected any further than is absolutely necessary to carry out the presumed intention of the testator as shown in the whole clause" Underhill on Wills, sec. 359.

Certainly, the use of the words "all of my children" by the testatrix is free from ambiguity, and the uniform current of authority in this and other courts sustains the proposition that they will not be construed to include grandchildren unless from necessity, which occurs when the

will would be inoperative unless the sense of the word "children" were extended beyond its natural import and when the testator has clearly shown by other words that he did not use the term "children" in the ordinary actual meaning of the word, but in a more extensive sense; that this construction can only arise from a clear intention or necessary implication, as where there are no children, but are grandchildren, or where the term children is further explained by a limitation over in default of issue. This Court in *Denny v. Closse,* 39 N. C., 102, says: "The intention of the testator is the governing rule in the construction of wills, upon the principle that the law accords to every man the right to dispose of his property after his death as he shall please. If, therefore, his intention can be ascertained from the will and it contravenes (760) no rule of law, that intention shall be carried into effect. It sometimes becomes very difficult to ascertain what is the true meaning of the will; and the courts have been compelled to adopt various rules as indicating the will of the testator, which in such cases will be observed. . . . It is manifest that the testator well understood the meaning of the words he used, and that he varied them as occasion required to meet his wishes in the disposition of his property. The objects of his bounty were his own children, and he had a legal right to dispose of his property as he desired. We have examined the authorities to which our attention has been directed; there is nothing in them to change the view we have taken of the case. They only provide that the word 'children' may, under peculiar circumstances, mean grandchildren, as when the meaning of the testator is uncertain and the bequest must fail unless such construction be given. That is not the case here." *Ruffin, C. J.,* in *Ward v. Sutton,* 40 N. C., 421, says: "Every word is to be retained and a sensible meaning put on it if possible so as to effectuate the apparent intent, and, if it be necessary to the sense, words and even sentences may be transposed. . . . The gifts being to children, the general rule is that where there are persons who answer that description, grandchildren cannot take under it." *Battle, J.,* in *Mordecai v. Boylan,* 59 N. C., 336. says: "The testator clearly shows by his will that he understood the distinction between children and grandchildren. The general rule, therefore, must prevail, that in the division of the residue directed to be made among his children the testator's grandchildren and great grandchildren cannot be included." The same view is taken in *Boylan v. Boylan,* 62 N. C., 160.

In *Carson v. Carson,* 62 N. C., 58, it is settled that where there are gifts in a will to children, grandchildren cannot take when there are any persons answering to the description of children. Upon the (761) same principle a power conferred upon a person to dispose of a fund among children will not authorize a disposition of a part

of the fund to grandchildren, at least while there are any children who can take it."

A careful examination of our own Reports, with the aid of very excellent briefs of counsel, fails to disclose a single case in which the term "children" has been held to include grandchildren. An examination of the authorities shows that this Court is in harmony with the courts of other States and of England. *Walworth, Ch.,* in *Mowatt v. Carow,* 7 Paige Ch., 339, 32 Am. Dec., 641, says: "The word 'children' in common parlance does not include grandchildren or any others than the immediate descendants in the first degree of the person named as the ancestor; but it may include them where there are no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making a will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown by the use of other words that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or stepchildren." Redfield on Wills, p. 16 (3 Ed.).

"The word children when used in a will does not ordinarily include grandchildren, but grandchildren and great-grandchildren may take under this word if necessary to accomplish the testator's intention." *Scott v. Nelson,* 3 Porter (Ala.), 452, 29 Am. Dec., 266. It is a well-settled rule of construction in this State as well as elsewhere that the word 'children' in a will does not include grandchildren unless it appears from the context to have been so intended by the testator, or such meaning is necessary to carry out his manifest intent." *Castner's Appeal,* 88 Pa. St., 491. *Moncure, P.,* in *Moon v. Stone,* 19 Gratt. (Va.), 328, uses the following language: "But whatever may be our con- (762) jecture on that subject, we cannot give effect to any supposed intention which is not expressed by the words of the will. We sit here not to make wills for testators, but to expound them. And we must give effect to every will as it is written by the testator, provided it be legal, however strange and capricious it may seem to have been. . . . Here is an express loan to his daughter Sallie during her natural life. This is plain language, and standing by itself cannot be misunderstood. What is there in the will to change its natural meaning? Only the word 'children,' which twice follows it in the same clause. Now, this word children is just as plain as the loan for life previously given. Its meaning is, issue in the first degree."

In *Reeves v. Brimen,* 4 Vesey, 697, the Master of Rolls says: "As to the principal point, it is a rule of construction that every word of a will must have a meaning imputed to it if it is capable of a meaning without a violation of the general intent or of any other provision in the

will with which it may appear inconsistent. Children may mean grandchildren when there can be no other construction; but not otherwise." The same plinciple is applied in *Hone v. VanSchaik,* 3 N. W., 538; *Ewing v. Handley,* 4 Litt. (Ky.), 346, 14 Am. Dec., 140. In *Estate of Hunt,* 133 Pa. St., 260, 19 Am. St., 640, *Grear, J.,* after stating the rule, says: "With us it has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms." *Presley v. Davis,* 7 Rich, Eq. (S. C.), 105, 62 Am. Dec., 396.

In *Parkman v. Bowden,* 1 Sum., 359, *Judge Story* says: "Although in its primary sense the word 'children' is a *descriptio personari* who are to take, there is not the slightest difficulty in giving it the other sense when the structure of the devise requires it." The learned judge was not discussing the question as to whether the word "children"
(763) would include grandchildren, but was dealing with a limitation in a deed, for he says: "So that in the present case there is an evident necessity of construing the word 'children' to mean issue or heirs of the body. If so, they are words of limitation and not of purchase." So, also, is the point decided in *Wild's case,* 3 Coke Rep., 288.

It is contended, however, that by reference to the said clause of the will it is apparent that the testatrix intended by the use of the word "children" to include her grandchildren, because she therein provides that "My heirs who have received advancements during the life of my husband or myself are to present an itemized statement of such advances before they shall receive any payment of the property directed to be sold in my will; and if any of my heirs have received no advancements, to pay to them a sum sufficient to make them all equal, and if any remainder, to divide the amount amongst all of my heirs. And if any of my heirs die before my death, leaving heirs, the children of such deceased parent or parents shall receive jointly the share coming to their parent or parents—the share he or they would have received if he or they had been living at the date of my death." That this language indicates a purpose on the part of the testatrix to have an equal division of all her property "directed to be sold" between her children and the children of those who have predeceased her. It will be observed that in the fifth item of the will she directs a sale by the executors of her lot in Asheville and her interest in the Craggy Mountain land and a division of the money "among all my heirs." We thus see that she has used the word "heirs" in the fifth and seventh items of her will, and the words "all my children" in the second and fourth items. Mrs. Lee died before the execution of the will, leaving the plaintiffs as her children.
(764) This fact, of course, was known to the testatrix. The testatrix had other grandchildren, being the children of her living children. If it be true, as contended, that no reasonable construction can be

placed upon the entire will consistent with the general intention and purpose of the testatrix otherwise than by construing the word "children" to mean grandchildren, and this general intent is so manifest as to exclude all reasonable doubt, then that construction must be placed upon the will as contended by the plaintiffs. It appears by the deposition of John R. Baird, one of the executors, that the Forest Hill property referred to in item 2 is worth about $13,000. It is conceded that Mrs. Lee had been advanced $3,100. There is no suggestion as to the value of the property referred to in item 4, or what amount, if any, would remain after paying the expenses of the lawsuit referred to. It will be observed, also, that the Forest Hill property is given to Vickie Baird for life, "and at her death to be sold and divided equally among all my children." While it may be that the executors would upon the death of Vickie be authorized to sell the property for the purpose of division, no express duty is imposed upon them in that respect, and it is very doubtful whether they have the power to sell; whereas, in item 5 the language is: "I *request* my executors to sell," etc. Referring to item 7, the language is: "The property directed to be sold in my will." It may well be that it was the property referred to in item 5 given by the testatrix to "all my heirs," which was referred to in item 7. This construction would exclude the language of item 7 from any reference to items 2 and 4. But it is said that the testatrix makes reference to any of her heirs who might "die before my death leaving heirs," etc. It is difficult to understand how she could have referred by this language to Mrs. Lee, who had been dead six years before testatrix made her will. Keeping in view the principle that we must, if possible, ascertain and effectuate the intention of the testator, and that in doing so we must keep in (765) view the primary rule of construction, that every word and clause of the will shall be given force and effect, and the further rule that words be construed in their primary and original sense, we conclude that the testatrix did not intend her grandchildren to share in the proceeds of her Forest Hill property; that she did intend them to share in the proceeds of the lots in Asheville and the Craggy Mountain land, she using in respect to that property the words "among all my heirs." Adopting this view, item 5 is to be read in connection with item 7, whereas items 2 and 4 are not included in the provisions of item 7.

Having thus disposed of the proceeds of the Forest Hill property, we proceed to ascertain the rights of the plaintiff and defendant in respect to all property mentioned in item 5. The direction to sell operates as an equitable conversion and the property or proceeds thereof pass to the beneficiaries as personalty. *Mills v. Harris,* 104 N. C., 626; *Benbow v. Moore,* 114 N. C., 263. Therefore, the word "heirs" must be under-

stood and construed to describe those persons who would take as distributees. This would, of course, include the plaintiffs.

We cannot consistently with the principle which we have announced adopt the argument of the defendant and construe the word "heirs" in the fifth and seventh clauses as synonymous with "children," thereby excluding the plaintiffs from all participation in the proceeds of the Asheville lots and the Craggy Mountain lands. The testatrix, by the same process of reasoning which we have followed in regard to the use of the word "children" must have understood that the word "heirs" was more comprehensive than "children," and used the words "all of my heirs" as including those who would have taken the property if she had died intestate. There are some difficulties presented in treating the word "heirs" in a strictly legal sense. The property passes to
(766) the children and grandchildren as personalty, and they take the proceeds. "It is too well settled to need citation of many authorities for its support that the term 'heirs,' when used with reference to those to whom personal estate is given, means those who take by law, or under the statute of distributions." *Burgin v. Patton,* 58 N. C., 425; *Brothers v. Cartwright,* 55 N. C., 113; 64 Am. Dec., 563.

We are next required to ascertain the basis upon which the distribution is to be made. "It is well settled as a general rule that if a testator gives an estate to be divided between A and B and the heirs of C, and the latter has several children, the division will be *per capita;* but if there be anything in the will indicative of an intention that the devisees or legatees shall take as families, the general rule will not apply, and the property will be divided *per stirpes,* and not *per capita.*" *Burgin v. Patton,* 58 N. C., 426, citing *Ward v. Stowe,* 17 N. C., 509, 27 Am. Dec., 238. Among the cases cited as falling within the exception to the general rule are *Martin v. Gould,* 17 N. C., 306; *Spivey v. Spivey,* 37 N. C., 100; *Henderson v. Womack,* 41 N. C., 437. In *Bivens v. Phifer,* 47 N. C., 436, *Battle, J.,* referring to the language of *Lord Langdale* in *Martin v. Drinkwater,* 2 Beav., 216, says: "I consider the rule as settled that you are at liberty to prove the circumstances of the testator so far as to enable the Court to place itself in the situation of the testator at the time of making his will; but you are not at liberty to prove either his motives or intentions." *Lowe v. Carter,* 55 N. C., 377, at p. 386. *Battle, J.,* in *Bivens v. Phifer,* 47 N. C., 436, says: "In construing his will in order to ascertain what that provision is intended to be, we have a right to look at the condition of his estate as it is found to be at the time when the will was made." Availing ourselves of this prin-
(767) ciple and of the admissions in the record in respect to the condition of Mrs. Baird's family known to her, and reading items 5 and 7 together, it would be difficult to suppose that she intended to give

her grandchildren, the children of Mrs. Lee, nearly one-half of the proceeds of the property, especially in view of the fact that the father of these children was a man of large means and in a prosperous condition. There is an evident purpose expressed in item 7 to have equality in regard to the property directed to be sold. We are, therefore, of the opinion that the case falls within the exception to the general rule and that the children of Mrs. Lee take the portion of the proceeds of the property directed to be sold which their mother would have taken if living. Are they to account for advancements made to their mother? The general rule is that in case of intestacy grandchildren must account for advancements made to their father or mother, but not gifts made to themselves. The children of Mrs. Lee take under the will as purchasers and not as distributees. The statute of distributions is only invoked for the purpose of ascertaining the basis or principle upon which the division is to be made. It will be noted that it is "my heirs who have received advancements during the life of my husband," etc. Treating the word "heirs" as describing the persons who are to take, the children of Mrs. Lee have received no advancements. This, of course, was well known to Mrs. Baird, and it was equally well known that, their mother being dead, the word "heirs" could not refer to her. As she has excluded the children of Mrs. Lee from any interest in the Forest Hill and Marr Swamp places by the use of the word "children," we may reasonably infer that she was induced to do so because of the advancements made to their mother, and that she did not intend that her children should account for these advancements in the distribution of the other property, because she must have known that to have done so would practically disinherit them. It is said that she was a woman of intelligence, business capacity, and gave her (768) affairs careful and faithful consideration. Her property disposed of, other than that specifically devised, consisted of her Forest Hill property, the town lots, the Craggy Mountain property, and Marr Swamp. She must have known something of the value of her property, and, of course, was fully cognizant of the condition of her family, number of children, etc., and we cannot attribute to her the purpose to include the grandchildren in the distribution of the proceeds of the property mentioned in item 5 and, by requiring them to account for the amount advanced their mother, practically disinherit them. In the statement made by the executor the town lots and Craggy Mountain property sold for and is estimated to be worth $7,900. Mrs. Lee, the mother of the children, received $3,100; therefore, to call upon them to account for this would be to disinherit them. This would be equally true if the Pea Ridge property, given to Mrs. Richard, and the 640 acres given to R. W. Baird, be treated as advancements, as seems to have been done in

the estimate made by the executors. We think, however, that this property could not be treated as advancements under the language of item 7. The term "advancement" as used by Mrs. Baird must be understood to have been used in its ordinary and legal sense, and not to include property devised in her will. This view is strengthened by the language, "who have received advancements during the life of my husband or myself." We therefore conclude that the plaintiffs are not to account for the advancements received by their mother—this by reason of the language of the will. The result of our anxious consideration and careful investigation of the case in the light of the authorities we have been able to find to aid us is that the plaintiffs take no interest in the Forest Hill property or in any balance that may remain of the Marr
(769) Swamp property; that they are entitled to share in the proceeds of the Asheville lots and the Craggy Mountain property, taking the same share which their mother would have taken if living; that they are not accountable for advancements. We do not understand that any controversy is made in respect to the rights of the plaintiffs in the share of the property which passed to Victoria Baird, under item 5 of the will. If she died intestate, their rights are fixed by the canons of descent and the statute of distributions.

A judgment will be drawn in accordance with the decision of this Court as herein set out. The costs will be paid by the executors out of the funds in their hands.

Modified.

Cited: *S. c.*, 134 N. C., 411; *Bradshaw v. Stansberry,* 164 N. C., 356; *Everett v. Griffin,* 174 N. C., 108, 109; *Taylor v. Taylor, ib.,* 538; *Mitchell v. Parks,* 180 N. C., 636.

FISHER v. WESTERN CAROLINA BANK.

(Filed 6 June, 1903)

1. Assignments for the Benefit of Creditors—Liens—Corporations—The Code, Sec. 685—Banks and Banking.

The commencement of a suit by creditors for themselves and all other creditors to set aside a fraudulent deed of assignment by a bank does not create a lien in their favor, where it does not increase the assets of the corporation.

2. Assignments for the Benefit of Creditors—Corporations—The Code, Sec. 685—Banks and Banking.

An action brought by creditors of a bank within sixty days of the filing of an assignment for the benefit of creditors, to recover their debts, avoids such an assignment.

ACTION by Thomas Fisher and others against the Western Carolina Bank and others, heard by *Councill, J.*, and a jury, at September Term, 1902, of BUNCOMBE.

From a judgment denying plaintiffs a prior lien on the assets (772) of the defendant, the plaintiffs appealed.

F. A. Sondley, Whitson & Keith, Haywood Parker, Frank Carter, and Tucker & Murphy for plaintiffs.

Charles E. Jones, Merrimon & Merrimon, and Merrick & Barnard for defendants.

CONNOR, J. Plaintiffs, relying upon the doctrine announced by this Court in *Hancock v. Wooten,* 107 N. C., 9, 11 L. R. A., 466, contend that the action brought by them for the purpose of attacking and avoiding the deed of assignment made by the defendant bank and subjecting the property to the payment of the debts of the bank, acquired a lien or preference in respect to the property and the assets of the bank over other creditors. The distinction between a general creditor's bill brought in behalf of all the creditors of an insolvent corporation or the estate of a deceased person or to enforce the execution of a trust and administer the fund, and a "judgment creditor's bill" brought "for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like," is discussed and pointed out by *Mr. Justice Shepherd* in *Hancock's case.* It having been held in *Bank v. Harris,* 84 N. C., 206, that under our judicial system, by which legal and equitable remedies are administered by the same court and in one form of action, there was no longer any necessity for the creditor to obtain a judgment before bringing his action in the nature of a bill in equity to invalidate (773) fraudulent assignments, etc., the term "judgment creditor's bill" is not strictly accurate as applied to our system of procedure. Formerly, the judgment creditor having, either by docketing his judgment or running out his execution, acquired a lien or legal preference in respect to lands or other legal assets, became entitled upon final decree to the preservation and enforcement of such liens as he had acquired. By filing his bill for the purpose of reaching and bringing within the jurisdiction of the court equitable or nonleviable assets, he acquired an equi-

table lien, or, as sometimes said, his bill was treated as an equitable *fi. fa. Shepherd, J.*, referring to the effect of the change in the procedure, says: "The result of the decision is to render the proceeding still more efficacious, as we think that by its institution it creates a preference by way of an equitable lien, whether the interest sought to be subjected be legal or equitable." By reason of this decision of our Court much of the very interesting discussion and learning found in the works on equity jurisprudence and the English and American Chancery Reports is of but little practical value in the decision of this case. When the plaintiffs issued the summons in this action they had no lien or rights other than general creditors, nor did the plaintiffs in the case of Battery Park Bank against defendant bank have any such lien. The record presents the question, therefore, whether the plaintiff's claim for a preference or equitable lien comes within the principle of *Hancock v. Wooten,* 107 N. C., 9.

The assignment was made on 12 October, 1897, and recorded at 9:30 o'clock a. m., on the same day. The summons in the action of Fisher and others (who were named) "and all other creditors of the Western Carolina Bank who may choose to come in and make themselves parties to this action" against the Western Carolina Bank, Lewis Maddux, and

L. P. McLeod, was issued and received by the sheriff on the same (774) day and served on 16 October, 1897. The complaint was filed 13 October, 1897, at 11:50 a. m. The complaint sets out the material allegations in regard to the incorporation, etc., and the indebtedness of the bank to the plaintiffs. The 19th allegation avers "That, as the plaintiffs are informed and believe, said deed of trust or voluntary assignment is fraudulent and void in law as to these plaintiffs, and was executed by defendant with intent to hinder, delay, and defraud the plaintiffs and other creditors of the defendant bank." They demand judgment that they recover the amounts of their debts; that a receiver be appointed; that the deed of trust be declared void, etc. On the same day, 12 October, the Battery Park Bank in its own behalf and all other creditors, issued summons against the Western Carolina Bank. This summons was served 12 October, 1897. On the same day the plaintiff Battery Park Bank, by its cashier, filed an affidavit setting forth the indebtedness of the defendant bank, its insolvency, etc., and stating that it was entitled to have a receiver appointed pursuant to section 668 of The Code. On 13 October, 1897, at 11:30 p. m., *Norwood, J.*, made an order in said case appointing temporary receivers. Thereafter permanent receivers were appointed. The complaint in the action brought by the Battery Park Bank was filed 25 October, 1897, alleging the insolvency of the bank and its indebtedness to the plaintiff and demanding judgment for its debt and such other and further relief in the premises

as it may be entitled to. In this action an order was made at the return term consolidating all of the actions brought against the defendant bank without prejudice to the rights of any of said suitors to establish a prior lien on the assets of the defendant bank in the hands of said receivers, if by law they have acquired such preference by such independent suits or by claimants of the bank having become parties thereto. The defendant bank filed its answer, denying any fraudulent purpose or intent in the execution of the deed of (775) assignment. The cause was brought to trial at the September Term of court. The verdict of the jury fixed the indebtedness of the several plaintiffs and found that the deed of assignment was made with intent to hinder, delay, and defraud plaintiffs and other creditors of the defendant bank.

The general principle governing the rights of creditors in the distribution of assets, set forth in *Hancock v. Wooten,* 107 N. C., 9, gives us but little aid in the decision of this case, by reason of the provisions of our statute, The Code, sec. 685. The authorities all concur in holding that unless prevented by some statute a corporation as a natural person may convey its property for the benefit of its creditors, giving preference, and the creditors may by reducing their claims to judgments acquire liens which will be preserved and protected in proceedings instituted for winding up its affairs in case of insolvency. *Cotton Mills v. Cotton Mills,* 116 N. C., 647; Clark and Marshall on Private Corporations, sec. 768, vol. 3, p. 2331. "The appointment of a receiver does not divest the property of prior existing liens, but affects only the manner and time of their enforcement. While the property is in the possession of receivers the right to enforce the liens is suspended, because the property is in the custody and control of the court." Beach on Receivers, 194. In this case the two actions were commenced by the issuing of the summons simultaneously. The order appointing the receiver was made subsequent by about twelve hours to the filing of the complaint in the action of Fisher and others, but prior by three days to the service of the summons on the defendant bank in that action. The title of the receiver relates to the date of his appointment. "The courts have now, as a rule, come to the conclusion that the title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be per- (776) formed and the receiver remains out of possession pending such performance." Beach on Receivers, 209; *Worth v. Bank,* 122 N. C., 397; *Pelletier v. Lumber Co.,* 123 N. C., 596, 68 Am. St., 837; *Bank v. Bank,* 127 N. C., 432. The action is commenced by issuing the summons. The Code, sec. 199. It would seem to follow that neither party has any priority by reason of the time of beginning their action. It

may be that for the purpose of fixing the time when any rights of priority or liens attached, the day of service of the summons, when the party is brought into court, would be the proper time. In the view which we take of this case, however, it is not necessary to decide this question, and we leave it open. The plaintiffs base their claim to a lien upon the ground that their action was, as in *Hancock v. Wooten,* 107 N. C., 9, brought for the purpose of vacating a fraudulent assignment and subjecting property put beyond the reach of the creditor, thus bringing it within the definition of a judgment creditor's bill as distinguished from a general creditor's bill. The preferential lien given by courts of equity in such cases is based upon the reason assigned by *Chancellor Walworth* in *Edmuston v. Lyde,* 1 Paige, 637; 19 Am. Dec., 454, cited by the Court in *Hancock's case:* "On further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful determination should in the end be obliged to divide the avails thereof with those who have slept upon their rights or have intentionally kept back that they might profit by his exertions." It was as a reward for his diligence that he was permitted to take the fruits of his recovery. The justice of this rule was strikingly illustrated by the facts in *Hancock v. Wooten;* there the beneficiary under the fraudulent assignment was actively defending the assignment, and after the successful litigation in which the jury found the assignment fraudulent he sought to share in the assets thus
(777) brought within the jurisdiction of the court. As was said by the Court, referring to the defendant Wooten, "He and the plaintiff had been fighting at arm's length, each endeavoring to establish a priority over the other. The plaintiffs have been victorious, and the deed having been declared fraudulent and void as to them, their preference must be recognized and the claim of the losing party postponed." The difficulty with which the plaintiffs are met in bringing themselves within this principle is found in the fact that either of the actions brought on 12 October must necessarily have resulted in the avoidance of the deed of assignment. In no possible point of view could the deed have been valid as against the creditors of the defendant bank after the institution of the suits, or either of them, within the sixty days. The Code, sec. 685, expressly declares: "Any conveyance of this property, whether absolutely or upon condition, shall be void and of no effect as to creditors of said corporation existing prior to or at the time of the execution of the said deed and as to torts committed by such corporation, its agents or employees, prior to or at the execution of the said deed, provided said creditors or persons injured or their representatives shall commence proceeding or action to enforce their claims against said corporation within sixty days after the registration of said deed, as re-

quired by law." This section of The Code immediately upon the commencement of either of the actions avoided the deed of assignment, and there was no necessity for litigating the question as to the intent with which it was made. This Court, referring to the effect of section 685 upon conveyances by corporations, in *Langston v. Improvement Co.*, 120 N. C., 132, says: "This being so, the real estate of defendant corporation remained liable to plaintiff's debt, notwithstanding the mortgage of defendant corporation to Moye. Section 685 of The (778) Code, which section has been construed in *Coal Co. v. Electric Light Co.*, 118 N. C., 232. But there is error in the judgment which declares a lien on the property of the corporation. Section 685 of The Code does not authorize the declaration of the lien, but only puts the mortgage out of the way of plaintiff's collecting his debt and leaves the property in the same condition so far as the debt is concerned as if no mortgage had been made." This Court has decided in *Bank v. Bank*, 127 N. C., 432, that the deed of assignment made by the defendant bank is void as to creditors bringing their action within sixty days after registration, and that no lien is created by the bringing of action. This would seem to be decisive of the plaintiff's contention and to fully sustain the judgment of the court below. Both suits are brought in behalf of the plaintiffs and of all other creditors. It will be observed that section 685 does not require that an action be brought for the purpose of setting aside or vacating the assignment, but that it becomes void and of no effect immediately upon the bringing of an action by the creditor to "enforce his claim." Hence it was unnecessary for the plaintiffs in their action to make any reference to or ask any judgment in respect to the deed of assignment. The finding of the jury in regard to the intent with which the deed was made was immaterial and did not in any respect affect the rights of the creditors. The plaintiffs, therefore, not having by their diligence removed any obstructions to legal remedies or brought into the common fund for distribution any property or assets, do not bring themselves within the principle of *Hancock v. Wooten*, and are not entitled to any lien or preference. His Honor properly adjudged that the deed was void as to the creditors. This left the fund in the hands of the receivers to be distributed under the direction of the court among the creditors. The question in respect to judgment lien was passed upon and settled by this Court in the case of *Bank v.* (779) *Bank*, 127 N. C., 432.

The judgment of the court below is

Affirmed.

Cited: *Withrell v. Murphy*, 154 N. C., 90; *Roberts v. Mfg. Co.*, 169 N. C., 33; *West v. Laughinghouse*, 174 N. C., 219.

HENDERSON v. DURHAM TRACTION COMPANY.

(Filed 6 June, 1903)

1. Street Railroads—Negligence—Statutes—Suspension of Statutes.

The failure of a street railway company to use fenders in front of its cars, if required by statute or ordinance, is evidence of negligence.

2. Street Railroads—Statutes—Suspension of Statutes—Corporation Commission—Laws 1901, Ch. 743, Sec. 2.

A statute which requires all street railway companies to put fenders in front of cars, and provides that the Corporation Commission may "make exemptions," does not authorize an exemption of all the street railway companies, as this amounts to a suspension of the statute.

ACTION by Talmage Henderson against the Durham Traction Company, heard by *W. R. Allen, J.*, and a jury, at January Term, 1903, of DURHAM. From a judgment for the defendant, the plaintiff appealed.

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

CONNOR, J. This action was brought by the plaintiff, an infant suing by his next friend, for damages alleged to have been sustained by reason of personal injuries suffered by being struck by the defendant's street car in the city of Durham.

The complaint alleges that on or about 30 July, 1902, the plaintiff was passing from his employer's place of business to the south
(780) side of Main Street, where the defendant has a double track about five feet apart; that about 9 o'clock p. m. a car was going westward on the northern track and another car was going eastward on the southern track, and he came out of the drug store to cross the street just as the car going westward was passing the door, and stopped for it to go by, and this car kept him from seeing the eastbound car; that he was ignorant of the approach of that car, and as he stepped from the southern one of the double tracks he was struck by the eastbound car, knocked down upon the track, caught under the car and dragged the distance of twenty yards or more, and was seriously injured. The complaint alleges that the defendant was negligent in three respects:

1. That at the time of the approach of the car which injured the plaintiff, the motorman negligently and carelessly failed to sound the gong.

2. That at the time of the injury complained of, the defendant had negligently and carelessly failed to properly equip its car, which struck and injured the plaintiff, with approved safeguards and appliances

then in general use, in that it did not have a "fender" in front of said car, and if said car had been properly equipped with a "fender" the injury would not have occurred.

3. That if the defendant's motorman had been keeping a proper lookout, as reasonable and ordinary care required him to do, he could have discovered the plaintiff in time to have given warning, or stopped the car in time to save him from injury.

The defendant in its answer denied each and every allegation charging negligence, and alleged that the plaintiff by his own carelessness and negligence contributed to the injury which he sustained. (781) The following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. Did the plaintiff by his negligence contribute to his injury?

3. If so, notwithstanding the negligence of the plaintiff, could the defendant by the exercise of ordinary care have avoided the injury?

4. What damage is the plaintiff entitled to recover?

Upon the conclusion of the testimony his Honor intimated that he would instruct the jury to answer the first issue "No." In deference thereto the plaintiff submitted to a judgment of nonsuit and appealed.

The plaintiff introduced James Rogers, who testified that he saw the accident, and it occurred on Main Street, between Fitzgerald's drug store and Five Points; that there are two street-car tracks on Main Street at the place of the accident, and the plaintiff was hurt by the car on the south track, the car going east. The witness was on the south side of Main Street, and when he first saw the plaintiff he (plaintiff) was coming out of the drug store on the north side of the street nearly opposite the witness, and started running across to the other side of the street; as he started across, he looked up and saw the car going west, and stopped for it to pass; this car going west made no stop, and, as it passed, the plaintiff started to cross the track, and the car going east caught him; he stepped behind the car going west. The witness does not think he could see the car going east because of the car going west. The two tracks are about five feet apart; the car that caught the plaintiff was not running very fast, that is, it was running at an ordinary rate of speed; when the car hit the boy the motorman was noticing the car going west—was not looking to the front, but at the car going west. The motorman on the car that struck the boy seemed to speed up a little, and "I halloed at the motorman and told him (782) that there was a boy under the car; then he stopped the car and asked me where the boy was, and I told him he was under the car; the boy was struck by the front of the car; there was no fender on the car. I could not see the boy at first; he was next to the front wheels with his

head against the wheels, his feet under the car towards the west and his body between the rails; his head was next to the wheel on the other rail and he was dragged about twenty yards. A fender is something in the front of a car like a cowcatcher, and runs within eight inches of the rails; from the rail to the bed of the car is about two feet. The boy seemed to be dead under the car, and there was some talk whether they would move the car. There was nothing to prevent the boy from seeing the cars when he started from the store. When he started across the street the cars were about twenty-five yards apart. This was not a street crossing. The boy started to run just as the car going west passed him, and had gotten to the middle of the track when the car going east struck him, and knocked him down. The cars had not quite passed each other when the boy was struck. It was about half-past 9 o'clock at night. It was a summer car and open. Trucks on the car do not come up to the front; the wheels are three or four feet from the front; there is a beam in front of the wheel, which is eight inches above the track, and this beam had passed over the boy when the car stopped. I heard the gong, but don't know on which car it was sounded."

The plaintiff testified that he got hurt, and has not been able to remember anything about how he got hurt; that he started running; the cars passed the store every day and night; he had seen them pass with a bright light, knew where they passed each other, and could see a car plainly at Five Points, but did not remember seeing the car that
(783) night, nor anything about what occurred. He testified to the extent of his injuries.

The defendant introduced W. N. Latta, who testified that he was motorman on the car that struck the boy; that the car was going east, and just as it passed the car going west the boy darted into the car at the front end; that the car was lighted up and had a headlight and was a summer car; gongs on both cars were ringing; the seats on the summer cars run entirely across and parties get on at the side, first on the running-board; the guard-beam in front of the wheel is about four and a half inches from the pavement. When the witness saw the boy, he applied brakes and stopped the car as soon as he could; it went about twenty feet before he could stop; it was up grade and was going from four to six miles an hour; the cars pass each other at that point from forty-eight to sixty times a day. Witness heard no one until after the car stopped; when the boy went under the car "he kinder squealed." It took from ten to twenty seconds to stop it; the sill of the car in front is about two feet five inches from the pavement; the boy did not go in front of the car or between the wheels until after he fell. Witness was looking in front and the boy was between the two tracks when he first saw him; witness was at the front end of the car, about four feet from the north side of

the car; no obstruction to him; was looking to the front; the boy struck the car about the end of the running-board; ran into it "like a bird between you and the sun"; the boy running would throw him under the car as the car was struck. The witness was looking in front and not at the other car passing; could not stop the car within twenty or thirty feet; the car was lighted and a headlight shining.

F. D. Markham, a witness for the plaintiff, testified that the beam is four inches in front of the wheel on the winter car; a street-car fender is something like a cowcatcher on an engine, and is so (784) shaped that if it catches anything it throws it up; it runs about ten inches above the track and extends three or four inches on each side and two or three feet in front of the car; it is shaped something like the fingers of a grain cradle.

The defendant introduced, after objection by the plaintiff, a certified copy of the proceedings of a petition and order in the record of the Corporation Commission of North Carolina, as follows: "In the matter of the hearing, 16 July, 1901, of the petition of the street railway companies of the State, asking to be exempt from the provisions of the act requiring city and street railway companies to use vestibule fronts and fenders on their cars, It was ordered as follows: Ordered that the petition of the street railway companies to be exempt from the provisions of the act be denied as to vestibules, and as to the requirements of fenders the further consideration of the same is continued, and said street railway companies are exempt from the provisions of the act as to fenders until ordered otherwise by the Commission."

In the view which we take of this case it is not necessary to pass upon the testimony. We are of the opinion that in one phase of the case the plaintiff was entitled to go to the jury. There is a conflict between the authorities, whether or not a failure on the part of a corporation to perform a duty imposed by public statute resulting in injury to another is negligence *per se,* or whether it is evidence of negligence. After a careful examination of a number of authorities we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence of negligence, to be submitted to the jury. "It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, (785) cannot result in a right of action, unless it is the proximate cause of the injury complained of by the plaintiff." Elliott on Railroads, sec. 711. This Court has held, in *Edwards v. R. R.,* 129 N. C., 78, that a rate of speed greater than that allowed by law is always at least evidence of negligence, and under certain circumstances may become negli-

gence *per se,* citing *R. R. v. Ives,* 144 U. S., 418, in which it is said: "Indeed, it has been held in many cases that the running of railway trains within the limits of a city at a greater rate of speed than is allowed by an ordinance of such city is negligence *per se.* But perhaps the better and more generally accepted rule is, that such an act on the part of the railway company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." This doctrine is supported by many well-considered cases and we think it based upon sound principles. In *Hanlon v. R. R.,* 129 Mass., 310, it was held that "a violation of the city ordinance would be evidence, but not conclusive evidence, of negligence." In *Knupefle v. Ice Co.,* 84 N. Y., 488, it was held that "The violation of an ordinance is mere evidence of negligence, but not necessarily negligence." It should be submitted to the jury in connection with other testimony upon the question of negligence. In *Meek v. R. R.* (Ohio), 13 A. & E. R. R. Cases, 646, the same doctrine is held, the Court using the following language: "While the violation of a law or ordinance is not *per se* conclusive proof of negligence that will render the company liable, yet it is competent to be considered with all of the other evidence in the case. The ordinance was enacted for the purpose of rendering the streets more safe and convenient for the public. It is a police regulation defining what is a legitimate use of the streets by the railroad company. It was *a com-*
(786) *mand to those* operating trains within the city limits, which it was their duty to obey, and a disobedience, either wilfully or negligently, is some evidence to be considered in determining the defendant's liability." The editor in his notes says that the weight of authority is to this effect.

This brings us to the question whether the failure to have a fender was a violation of the statute. Section 2, ch. 743, Laws 1901, provides: "That all city and street passenger railway companies be and are hereby required to use practical fenders in front of all passenger cars run, manipulated, or transported by them, and any company refusing or failing to comply with said requirement shall be subject to a fine of not less than $10 nor more than $100 for each day. The North Carolina Corporation Commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary." In the view which we take of the case, it does not become necessary to pass upon the constitutionality of that portion of the act which confers upon the Corporation Commission the power to make exemptions from its provisions. The question was not presented or referred to in the argument. The right of the Legislature to confer upon any other governmental agency the power

to exempt any persons or corporations from the operation of a statute, the violation of which is made a misdemeanor, is, to say the least, exceedingly doubtful. There is a marked difference between the power to make statutes of local application dependent upon a vote of the people and the power sought to be given the Corporation Commission in this instance. The statute here is complete, the duty is imposed, and the penalty for its violation fixed. A strict observance of the division of powers between the three coördinate departments of the Government is absolutely essential to the preservation and the harmonious working of our system of government. The Constitution con- (787) fers upon the Legislature alone all legislative authority, and declares that the power of suspending the laws without the consent of the people ought not to be exercised. An interesting discussion of this question may be found in *S. v. Fields,* 17 Mo., 529, 59 Am. Dec., 275, and *Slinger v. Henneman,* 38 Wis., 505. The extent of the power which might be conferred upon the Corporation Commission is set forth and discussed by *Shepherd, C. J.,* in *Express Co. v. R. R.,* 111 N. C., 463, 18 L. R. A., 393, 32 Am. St., 805.

Conceding for the purpose of this opinion only that the portion of the act in question is constitutional, we think by a proper construction of it the extent of the power conferred upon the Commission is one of *exemption* and not of *suspension.* The order made by the Commission exempts all street railway companies from the provisions of the act, as to the fenders, until otherwise ordered by the Commission, thus applying to all street railways in the State, and of course operating, if within the power of the Corporation Commission, to suspend the statute. This, we think, exceeds the power conferred by the statute, and is therefore invalid, thus leaving the act in force and the duty of the street railway companies to provide fenders as prescribed by the act. The failure to do so was evidence proper to be submitted to the jury upon the question of negligence and as to the proximate cause of the injury. If the jury should find as a fact that the failure to have the fender was the proximate cause of the injury, that is to say, that the plaintiff would not have been injured if the defendant had provided its cars with fenders, and that the plaintiff was not guilty of contributory negligence, or, if guilty, that the defendant had the last clear chance to prevent the injury, the plaintiff would be entitled to recover. The question presented by the testimony in regard to the relative rights and duties of street railway companies and travelers passing along and (788) across the streets is discussed in *Moore v. R. R.,* 128 N. C., 455. We simply decide, in this case, that the case should have been submitted to the jury under proper instructions. It is but just to the learned judge who tried the case to say that the question upon which this decision

is based was not presented or argued before him or in this Court. We have neither discussed nor passed upon the testimony bearing upon the second issue. His Honor having practically instructed the jury to find for the defendant upon the first issue, we confine our decision to his ruling in that respect. We must not be understood as expressing any opinion in regard to the other phases of the case. There must be a New trial.

Cited: *Cheek v. Lumber Co.*, 134 N. C., 230; *Rich v. Electric Co.*, 152 N. C., 692; *Smith v. R. R.*, 162 N. C., 33; *Ledbetter v. English*, 166 N. C., 128; *McNeill v. R. R.*, 167 N. C., 395; *Ingle v. Power Co.*, 172 N. C., 753; *Smith v. Electric R. R.*, 173 N. C., 492; *Lea v. Utilities Co.*, 175 N. C., 464; *Ware v. R. R., ib.*, 504.

RITCHIE v. FOWLER.

(Filed 6 June, 1903.)

1. Grants—Trusts—Cherokee Lands—Case on Appeal—The Code, Vol. 2, Ch. 11.

In an action to have a senior grantee declared a trustee for a junior grantee of public land, a bare statement in the case on appeal that the defendant claimed under the senior grantee does not authorize a decree that the defendants be declared trustees for the benefit of the plaintiffs.

2. Limitations of Actions—Grants—Trusts—The Code, Sec. 158.

The registration of a grant is constructive notice to a junior grantee that a senior grantee claims the land included in the grant, and an action to declare the senior grantee a trustee for the benefit of the junior grantee must be brought within ten years of said registration.

DOUGLAS, J., dissenting.

(789) ACTION by W. R. L. Ritchie against Frederick Fowler and others, heard by *Justice, J.*, and a jury, at November Term, 1902, of MACON. From a judgment for the plaintiff, the defendants appealed.

S. L. Kelly for plaintiff.
Kope Elias and Shepherd & Shepherd for defendants.

CLARK, C. J. One Howard entered, under the law as to Cherokee lands (The Code, vol. II, ch. 11), three tracts of land for 700 acres in

June, 1855, and two other tracts for 300 acres in June, 1853. The purchase money was thereafter duly paid. Subsequently (when, is not stated) these entries were duly surveyed, located, and bounded. In February, 1870, grants for the above five tracts were issued to the assignees of Howard and registered in Macon County, November, 1885, and said grantees conveyed to the plaintiff by deed duly registered.

In April, 1867, the same lands (as is admitted) were entered by one Herrin, who took out grants for the same in May, 1869, which were registered in Macon County in October, 1872. It is stated in the case on appeal that the defendants claim under Herrin, but it nowhere appears affirmatively that they have acquired Herrin's title. This is an action to have the defendants declared trustees for the plaintiff and to require them to convey to him such title and interest as they may claim. The defendants denied each allegation of the complaint and pleaded the ten years' statute of limitations and, further, that the entries under which the plaintiff claimed were lapsed and abandoned, and besides, that said entries were too vague and uncertain to give notice to a subsequent enterer or grantee. There was no possession shown by either party.

The only issue submitted was, "Is the plaintiff the equitable owner of the lands described in the complaint?" The defendants demurred to the evidence. The court instructed the jury, if they believed (790) the above evidence, to answer the issue "Yes." Verdict and judgment accordingly, and appeal.

The exception is not very clearly stated to have been to the overruling of the demurrer to the evidence and to the instruction to the jury, but we so understand it, and it was so treated on the argument.

It was error to sustain the demurrer, or to so instruct the jury, for it nowhere appears that Herrin's title had passed to the defendants. The bare statement that they "claimed under Herrin" did not authorize the decree that the defendants "are declared trustees for the benefit of the plaintiff" of all said lands, and directing a conveyance by them to him.

The registration of the Herrin grants in 1872 was constructive notice to the plaintiff and those under whom he claims, and in the absence of evidence showing that the statute did not run, by reason of coverture, infancy, etc., the plaintiff is barred by failure to take this action within ten years from October, 1872. The Code, sec. 158.

Neither the entries of Howard or of Herrin are set out in the proof, nor admitted. They are set out in the complaint, and if in the form there stated, the entries of both parties are void for vagueness and uncertainty; but the answer specifically denies every allegation in the complaint. *Kimsey v. Munday,* 112 N. C., 816, and *Gilchrist v. Middleton,* 108 N. C., 705, relied on by the plaintiff, only bear upon the question of

abandonment, as between the State and the enterer, and not upon the statute of limitations, between the junior grantee, who is seeking to convert the senior grantee into a trustee for his benefit and compel a conveyance.

New trial.

DOUGLAS, J., dissents.

Cited: *McAden v. Palmer,* 140 N. C., 259, 261; *Frazier v. Gibson, ib.,* 279; *Frazier v. Cherokee Indians,* 146 N. C., 480; *Phillips v. Lumber Co.,* 151 N. C., 521; *Johnson v. Lumber Co.,* 144 N. C., 718; *Anderson v. Meadows,* 159 N. C., 408; *Lynch v. Johnson,* 171 N. C., 615; *Waldo v. Wilson,* 173 N. C., 691.

(791)

PATTON v. COOPER.

(Filed 6 June, 1903.)

Judgments—Assignments—Payment—Notice—Mortgages.

Where a judgment against a principal and the sureties on a note is paid by the sureties, and an assignment thereof is made to a trustee for the benefit of the sureties, but by a mistake payment is entered on the judgment record, which is afterwards corrected by the entry thereon of the assignment, a person taking a mortgage on the property of the judgment debtor, after the assignment is entered on the record, takes with notice of the assignment.

ACTION by T. T. Patton and others against M. D. Cooper and others, heard by *Councill, J.,* at Fall Term, 1902, of TRANSYLVANIA.

Appeal from *Councill, J.,* Transylvania Superior Court. By consent, the judge found the facts, those material to this appeal being as follows: In November, 1896, the defendants M. D. Cooper and W. L. Aiken endorsed a note as sureties for the makers thereof, J. H. Zachary and M. G. Jones (the latter now deceased), payable to W. H. Faulkner twelve months after date. Said Faulkner soon after its execution endorsed said note to a bank, which, upon failure to pay the note at maturity, obtained judgment thereon against Zachary, Aiken, Cooper, and the administratrix of Cooper, in the Superior Court of Transylvania in April, 1898, and the judgment was duly docketed 19 April, 1898, for $357.57 and costs, of which $330 was principal money. The following entries appear on the judgment docket: "Received on this judgment from M. D. Cooper $186.20. This 27 October, 1898. W. B. Duckworth, Atty." "Received on this judgment $185.72 from W. L. Aiken. This 27

December, 1898. W. B. Duckworth, Atty. for plaintiff." (And at same time the clerk receipted for the costs.) "We hereby assign this judgment in case of State Bank of Commerce against Omega Jones, administratrix of M. G. Jones, J. R. Zachary *et al.*, to (792) Z. W. Nichols, as trustee, for collection for the benefit of M. D. Cooper and W. L. Aiken, without any recourse on us either in law or equity. This 23 February, 1899. State Bank of Commerce, per J. A. Maddry, Cashier." "Received of M. D. Cooper $3, being balance due on this judgment. This 18 March, 1899. W. B. Duckworth, Atty." On 25 August, 1899, appears on the docket an assignment by W. L. Aiken to M. D. Cooper of all his "right, title, and interest" in said judgment. Execution was issued October, 1899, again in November, 1899 (which was returned uncollected, homestead laid off, report of appraisers filed), and in June, 1900. The judge further finds as facts that "M. D. Cooper and W. L. Aiken paid said judgment to W. B. Duckworth, attorney for State Bank of Commerce, at the times and in the amounts shown by said record, with the distinct understanding and agreement with said Duckworth, attorney for said bank, and also with the officers of said bank, that said judgment should be assigned to a trustee for the use and benefit of said Cooper and Aiken as sureties, and that no part of the money paid by Cooper and Aiken on the said judgment has ever been repaid to them by Zachary or the administratrix of Jones (the makers of the note) or any one else."

In April, 1900, J. R. Zachary executed to the plaintiff T. T. Patton a mortgage for $1,133.35 on a certain tract of land of 13 acres in Transylvania County, and in the same month a trust deed to W. A. Smith, trustee for R. H. Lowndes (Zachary's wife joining in), to secure $825, money then borrowed, this last mortgage covering the homestead of said Zachary and other lands not included in the homestead. J. R. Zachary was seized in fee of all the lands embraced in both mortgages at the time of the docketing of aforesaid judgment and continuously since. Before taking said mortgage and trust deed, said Patton, Lowndes, and Smith caused the judgment docket to be examined (793) by counsel and aforesaid entries thereon were reported to them and they had full knowledge thereof, and their counsel advised them that the judgment was satisfied. The judge further finds that W. B. Duckworth, attorney for said bank, entered aforesaid receipts on the docket without the knowledge of Cooper and Aiken and without any intention of said Duckworth to discharge said judgment, but intending when the said judgment was paid in full to have the same transferred to a trustee for the benefit of said Cooper and Aiken, pursuant to his agreement. Neither the note, judgment, nor record disclose the fact that Cooper and Aiken endorsed the note as sureties, but such was the fact. Said

Cooper caused the execution issued in June, 1900, to be levied on the lands of J. R. Zachary not set apart as his homestead, and also on the excess of the homestead tract outside of the homestead, the lands so levied upon being embraced in aforesaid mortgage to Patton and trust deed to Smith, trustee for Lowndes. This action is brought to restrain a sale under aforesaid execution, and upon the facts found his Honor granted a perpetual injunction, from which order M. D. Cooper appealed.

No counsel for plaintiff.
George A. Shuford and W. J. Peele for defendant.

CLARK, C. J., after stating the facts: The receipts entered on docket 27 October and 27 December, 1898, unexplained, would have been a satisfaction of the judgment except as to the $3 afterwards paid and entered 18 March, 1899. But the subsequent purchasers, the mortgagees of the judgment debtor, who are the plaintiffs herein, were fixed with notice of any facts appearing further upon the judgment docket or of which they were put upon inquiry by such entries. Their mort-
(794) gage and trust deed were not taken till April, 1900, and they found, for they properly had the judgment docket searched, that on 23 February, 1899, the plaintiff in the judgment had assigned said judgment to Z. W. Nichols in trust for collection for the benefit of M. D. Cooper and W. L. Aiken without recourse. The judgment roll, if examined, would have shown that these were endorsers on the note upon which the judgment had been taken, and reasonable inquiry would have elicited the fact that they were sureties, that said assignment had been made to a trustee to keep the judgment lien alive for their benefit (*Rice v. Hearn,* 109 N. C., 150), and that the previous receipts entered on the docket by Duckworth, attorney for the plaintiff, had been made by inadvertence and contrary to the agreement made between the bank and said sureties, who were not responsible for Duckworth's erroneous entry. Had the plaintiffs herein been purchasers for value or mortgagees, with no other notice than said entries of payment, they would have taken a good title. But subsequent to such entries the assignment of the judgment by the bank to a trustee for the benefit of the sureties had been entered on the docket and they took with full knowledge and were thus put on inquiry as to the nature of the payment and the relation of Cooper and Aiken to the liability. *Peebles v. Gay,* 115 N. C., 38, 44 Am. St., 429. Upon the facts found the injunction should have been dissolved.

The judgment below is
Reversed.

(795)

JOHNSTON v. CASE.

(Filed 6 June, 1903.)

Deeds—Descriptions—Reference to Another Deed.

Where a deed recites that it conveys the land sold by a certain grantor to a certain grantee, the description of the land given in the deed referred to cannot be considered without proof that such deed was executed prior to the deed offered in evidence.

PETITION to rehear this case, reported in 131 N. C., 491.

Merrimon & Merrimon, Charles A. Moore, and George A. Shuford for petitioner.

Jones & Jones and S. H. Reed in opposition.

WALKER, J. This is a petition to rehear the above entitled case, which was decided at the last term, and is reported in 131 N. C., 491.

The plaintiffs, who have petitioned for the rehearing, assigned several errors in the former opinion and judgment of the Court, but we do not deem it necessary to consider but one of them, as the decision of the Court, by which a new trial was awarded, must be sustained upon the ground we now take with reference to that assignment of error.

It appears that the plaintiffs undertook to establish title to the land in controversy by showing that it had been mortgaged by one James Case, ancestor of the defendants, to William Case, and then they attempted to show that William Case in 1855 had conveyed the land by deed to W. L. Henry. This deed was not produced, and it was alleged to have been lost. Plaintiffs then introduced in evidence a paper-writing, signed by William Case, but not under seal, purporting to convey the land to W. L. Henry, which bore date as of 15 May, 1855, but was not proved and registered until 1887. There was annexed to and proved and registered with this deed a memorandum as follows: (796)

"The above is a duplicate of a deed heretofore executed by me to W. 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, as near as I can make it. (Signed) William Case."

The defendants objected to the introduction of this paper-writing; the objection was overruled, and they excepted.

The plaintiffs then introduced a deed from Jesse Sumner, sheriff, to George Brooks, under whom they claimed, and also evidence tending to show, as they contended, that they had been in adverse possession of the land for more than seven years under this deed, which was held by

this Court to be color of title. *Mfg. Co. v. Brooks,* 106 N. C., 107. The description of the land by metes and bounds in this deed was defective, but immediately after that description are these words: "Containing 100 acres, more or less, being the land sold by William Case to W. L. Henry," and the plaintiffs insisted that, by this reference, the description in the deed from William Case to W. L. Henry, if such a deed was ever made, constituted a part of the description of the land in the deed of Jesse Sumner, sheriff, to George Brooks, as much so as if the land had been described in the latter deed by the same metes and bounds contained in the former; and that the description would, in this way, be made definite and certain, and that the adverse possession of the plaintiffs and those under whom they claimed was held for a sufficient length of time, therefore, "under known and visible lines and boundaries and under colorable title," to ripen and perfect their title. In order to avoid the effect of the disabilities of defendants, or some of them, the plaintiffs contended that they had shown conveyances from James Case, ancestor of defendants, to William Case, and from the latter to
(797) W. L. Henry, and that W. L. Henry had held adverse possession, under the deed to him as color of title, for a length of time sufficient to ripen his title, but that he had subsequently lost his title by reason of the color of title and adverse possession of the plaintiffs and those under whom they claim. That as the statute commenced to run in the lifetime of James Case, the defendants, his heirs, are barred, though under disability, and that in order to show title in themselves it was competent for the plaintiffs to prove that the title of James Case was lost by him and the title to the land acquired by W. L. Henry by adverse possession under color, and that W. L. Henry, in turn, had lost his title and the title to the land was acquired by the plaintiffs by subsequent possession under color. It is further contended that it was not necessary to connect themselves with the title once held by W. L. Henry, but that they could show, as they had done, an independent title acquired by color and possession adverse to him. In other words, that they had acquired the title not under him, but independently of him, by their color and adverse possession. As we understand it, this is the contention of the plaintiffs, and they may be right in asserting that they could acquire title to the land in that way; but we do not now decide whether this is so or not, for, if they are right, a part of the evidence by which they sought to establish this title was not competent and should not have been admitted. We refer to the unsealed paper-writing purporting to be a copy of the alleged deed from William Case to W. L. Henry. It does not appear in the case when this paper-writing was executed. It is dated 15 May, 1885, which is said to be the date of the deed of which it is alleged to be a copy, but it was not proved and registered until

9 December, 1887. It is true that the deed concludes with the following words: "In testimony whereof, I have hereto set my hand and seal the day and year first above written," but it is evident that this was intended merely to make the paper conform to the supposed origi- (798) nal, both in tenor and date, and this purpose is clearly manifested in the memorandum annexed to the deed, which was introduced with it in evidence. The deed of Jesse Sumner, sheriff, to George Brooks was executed in 1869.

It must be conceded that the description in one deed may be referred to in another for the purpose of identifying and making more certain the lines and boundaries of the land which is intended to be conveyed (*Everitt v. Thomas,* 23 N. C., 252; *Reed v. Reed,* 93 N. C., 462; *Davidson v. Arledge,* 88 N. C., 326; *Hemphill v. Annis,* 119 N. C., 514), "provided," as is said in the last case cited, "the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it," and provided further, that the deed to which reference is made is produced at the trial. *Reed v. Reed, supra.* In our case, the original deed was not produced and, perhaps, could not be, as it is alleged to have been lost. It does not appear, as we have said, when the paper-writing from William Case to W. L. Henry, registered in 1887, was executed, and we do not think it was competent for the plaintiffs to prove the contents of the original by the unsworn declaration of William Case in the memorandum, that it was a copy of the original conveyance. Indeed, he does not even state that it is a true copy, but says: "This is a duplicate of the same tenor and date, as near as I can make it."

If the copy or substitute for the original deed had been executed before the date of the sheriff's deed to Brooks, there might be some ground upon which to base an argument that it could be used for the purpose of showing what land was meant by the following language in the sheriff's deed: "Containing 100 acres, more or less, being the land sold by William Case to W. L. Henry." *King v. Little,* 61 N. C., 484; *Little v. King,* 64 N. C., 361. But the burden would be upon the plaintiff to show that the paper alleged to be a substitute for the (799) original deed was executed before the date of the sheriff's deed. If it was not in existence at the date of the sheriff's deed, how could it be said to be the deed referred to therein?

It is unnecessary, in the view we have taken of the case, to consider the other assignments of error, except for the purpose of saying that the Court by inadvertence erroneously assumed at the last term that the plaintiffs had admitted in their reply to the answer that the title to the land was at one time in James Case, the ancestor of the defendants.

It appears by a careful examination of the pleadings that it was denied by the plaintiffs that James Case ever had any title to the land.

The case is now decided and the new trial awarded upon the single ground stated in this opinion and without any prejudice to the plaintiffs by reason of the other grounds set forth in the former opinion.

There was error in admitting the paper-writing alleged to have been made by William Case to W. L. Henry and registered in 1887, for the reason herein given, and the decision, at the last term, will stand subject to the qualification above stated.

Petition dismissed.

Cited: *Vick v. Tripp,* 153 N. C., 94.

(800)

FEATHERSTONE v. CARR.

(Filed 6 June, 1903.)

1. Injunctions—Motions—Motion in the Cause—Multiplicity of Actions—The Code, Sec. 1766.

A motion for an injunction to prevent a multiplicity of suits is properly made in the action pending, and a new action for that purpose would not be proper.

2. Injunctions—Multiplicity of Actions—The Code, Sec. 1766.

Where the record clearly shows that all matters in dispute between the parties can be settled in the pending action, and that the plaintiff will not be injured, an injunction to prevent a multiplicity of actions should be granted.

ACTION by A. A. Featherstone and wife against Patrick Carr and others, heard by *Councill, J.,* at November Term, 1902, of BUNCOMBE. From a judgment for the defendants, the plaintiffs appealed.

Locke Craig for plaintiffs.
Merrick & Barnard for defendants.

MONTGOMERY, J. It appears from the proceedings, and especially from the facts found by his Honor in his order for the injunction, that the plaintiffs, in a court of a justice of the peace, proceeded to have the defendants dispossessed of a certain storehouse in Asheville and to recover rents therefor, under section 1766 of The Code; that the defendants resisted the plaintiffs' demand, setting up an averred unexpired lease of the premises and disputing the amount of monthly rent as claimed by the plaintiffs; that a judgment was had for the plaintiffs in the

justice's court and an appeal taken by the defendants to the Superior Court of Buncombe County; that the plaintiffs, since the appeal was taken, have procured thirteen judgments for the rent due monthly, from which judgments the defendants appealed to the Superior Court; that the plaintiffs threatened to continue these monthly suits for (801) the rents and have issued executions upon some of the judgments. His Honor further finds as a fact that all the matters and things in dispute between the parties arose out of the same state of facts and depend upon the same principles of law and can be fully settled in one action. The defendants, upon affidavits, made a motion in the case on appeal in summary ejectment for an injunction to restrain the plaintiffs from prosecuting any further suits against the defendants for and on account of the rents and from issuing executions on the judgments, or either one of them, for rent; and his Honor granted the injunction. It appears further in the proceedings that upon the taking of the appeal in the proceeding of summary ejectment under 1772 of The Code the defendant executed a bond in the sum of $1,350 to secure the plaintiffs the rent and damages during the pendency of the appeal, and that afterwards by an order made in the Superior Court an additional bond for the same purpose in the sum of $1,200 was executed and filed by the defendants.

We can see no error in the course pursued by his Honor. It was proper for the defendant to have made the motion for the injunction in the case then pending in the Superior Court, and a new action for that purpose could not have been maintained. *Faison v. McIlwaine,* 72 N. C., 312; *Lord v. Beard,* 79 N. C., 5.

It clearly appears from the record that in the controversy pending between the parties all matters in dispute between them can be settled, and the plan adopted by the plaintiffs of a multiplicity of suits for the monthly payment of rents must be regarded, therefore, as vexatious, and equity will intervene by injunction process to prevent such litigation. The spirit of our present system of practice favors the adjustment and settlement of all matters in dispute between parties in one action as far as possible, and it discourages multiplicity of suits because of the vexatious delays and costs attendant upon them. *Sparger v.* (802) *Moore,* 117 N. C., 450. And besides, no harm could come to the plaintiffs through the issuing of the injunction, while the defendants would be subjected to inconvenience and probable loss if it were not granted, and in such cases it is proper for the injunction to be issued. *McCorkle v. Brem,* 76 N. C., 407; *R. R. v. Commissioners,* 108 N. C., 56. The plaintiffs cannot be hurt here. On the trial they can recover the rents due up to the trial and any damages which they have sustained by the detention of the property, and there are bonds on file in

the court in sufficient amount and approved as to security by the proper officers. Also, if those bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under section 1772 of The Code the Superior Court can require additional security. Not only is it within the jurisdiction and power of the Superior Courts to have the bonds in such cases increased or strengthened, but under their general powers in equity, outside of that statute or any other statute, they would have the right to take such action. Or in case of inability on the part of a suitor to strengthen or increase such security the court would have the power to appoint a receiver to take possession of the property under the direction of the court. *Kron v. Dennis,* 90 N. C., 327; *Lumber Co. v. Wallace,* 93 N. C., 22. We, in deference, will add that as the court docket is always under the control of the presiding judge and, as a general rule, to be regularly proceeded with, yet we have no doubt that upon such a case as this being called to his Honor's attention a speedy trial would ensue if there was danger of loss to plaintiff by delay.

No error.

Cited: *S. c.,* 134 N. C., 69; *Moore v. Harkins,* 179 N. C., 170.

---

(803)

REVELL v. THRASH.

(Filed 6 June, 1903.)

Principal and Surety—Release—Extension of Time—Interest.

The receipt of interest in advance from the principal debtor after maturity of the debt is *prima facie* evidence of an extension of time, and releases the surety.

ACTION by O. D. Revell against John M. Thrash, heard by *Justice, J.,* and a jury, at March Term, 1902, of BUNCOMBE. From a judgment for the defendant, the plaintiff appealed.

Tucker & Murphy and F. A. Sondley for plaintiff.
George A. Shuford and C. A. Moore for defendant.

MONTGOMERY, J. There is only one exception to evidence appearing in the case, and that exception the counsel of the appellant did not refer to in their three briefs or in their oral arguments; and it is therefore almost useless to write that the exception is not sustained. The only

question before the Court is whether there was any sufficient evidence—any evidence more than a scintilla—that the plaintiff appellant extended the time for the payment of the note as to W. M. Cocke, the principal, without the knowledge or consent of the defendant, who was a surety.

The contentions of the appellant were, first, that before a surety can be discharged or released because of time having been given to the principal debtor in which to pay his debt there must be an agreement between the creditor and the principal for the extension; second, that the period for which such extension was given must be fixed and definite, and that there was no evidence in this case tending to prove such facts; third, that receiving interest in advance without an *express* contract for extension does not release a surety; and, fourth, that an extension which does not indulge the principal beyond the time in which (804) a judgment could be obtained would not release a surety.

The plaintiff in his complaint duly verified alleged that on 11 September, 18—, $100 was paid on the note, and on 22 October, 1895, $150 and interest to 29 December, 1895, and that the credits were endorsed upon the back of the note. It appears from his testimony that the $100 was paid in 1893. In his testimony he stated that the $150 was paid on 27 October, 1895, and not on 22 October, as he alleged in his complaint and as the credit appears on the note. He further said in his testimony that in October, 1895, without mentioning the day as he alleged in his complaint, that Cocke, the principal, paid him $10, and said at the time, "I want to pay some interest," and that in the calculation he found it paid the interest to 29 December, 1895, and he so entered the credit. He further testified: "Note never extended; none asked; Cocke kept the interest paid up to 29 December, 1895. Cocke died in 1895." He further said that the defendant appellee knew nothing of the payments made by Cocke and did not consent to them.

Of course, a surety will not be discharged from his obligation in cases where he relies upon an extension of time given by the creditor to his principal debtor, unless it be shown that an agreement to that effect had been entered between the creditor and his principal debtor and without the knowledge or consent of the surety; but an agreement in so many words, *i. e.*, an express agreement to extend the time, is not necessary to satisfy the rule. The acts and conduct of the parties constituting the facts of the case might be shown from which the law would imply a sufficient agreement to extend. Daniel on Negotiable Instruments, sec. 1319. On this question a standard writer has said: "It is sufficient if a mutual understanding and intention to that effect are proved. If the parties act upon the terms of an implied agreement to (805) that effect it will be sufficient." Brandt on Suretyship, sec. 304.

The same principle is announced in *Hollingsworth v. Tomlinson,* 108 N. C., 245; *Chemical Co. v. Pegram,* 112 N. C., 614.

It is also true, as stated in plaintiff's second contention, the period of extension must be fixed and definite. But that is certain which can be made certain, and if the taking of interest in advance from the principal debtor without the knowledge or consent of the surety be *prima facie* evidence of an extension of time, and therefore a release of the surety unless rebutted, it seems to us there was evidence in this case fixing and marking the period of extension. It becomes necessary now, before considering further the law as contended for in the plaintiff's first and second contentions, to consider and pass upon the question whether the receipt of interest in advance from the principal debtor is evidence tending to show an agreement and contract for an extension of time. That question seems to be settled in the affirmative by the decisions of our Court and in the works of the text-writers. *Scott v. Harris,* 76 N. C., 205; *Sutton v. Walters,* 118 N. C., 495, and in *Hollingsworth v. Tomlinson,* 108 N. C., 245. Upon the same question, *Judge Shepherd,* for the Court, quoted an extract from Brandt on Suretyship (sec. 305) as follows: "The general rule is that the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which the interest has been paid, unless the right to sue be reserved by the agreement of the parties. The payment of the interest is not of itself a contract to delay, but is evidence of such contract; and while this evidence may be rebutted, yet, in the absence of any rebutting evidence, it becomes
(806) conclusive. To the same effect are Tiedeman on Com. Paper, sec. 424, and Daniel on Neg. Inst., sec. 1318.

Now let us consider the evidence in this case with the law on the subject. The note matured on 11 June, 1893. According to the appellant's evidence there was a payment of $100 11 September, 1893 (he said it was paid about six months after he bought it, which was ten years before he was testifying), and that he received $150 on 27 October, 1895, although the credit is entered on the note itself 22 October, 1895. He further testified that in October, without naming the day, he received $10. That $10 specifically does not appear as a credit endorsed on the note, but the plaintiff admitted that it was embraced in a credit on the bond in these words, "Interest paid to 29 December, 1895." He further testified that Cocke kept the interest paid up to 29 December, 1895. It is evident from looking at the credit on the note, from the complaint of the plaintiff and his own testimony, that an explanation is necessary as to the intention of the parties as to the $10 interest payment. Now, when the plaintiff appellant received this $10 payment from Cocke,

accompanied by the words, "I want to pay some interest," what was meant by the transaction? It was not a question of law; it was a question of intention of the parties under all the evidence in the case, and it was for the consideration of the jury. The $10 having been paid as interest and credited as interest according to the calculation of the plaintiff creditor, the interest was paid in advance and until 29 December, 1895. When that credit was received the time of extension was definitely fixed to be as long as the amount would pay the interest, provided the jury should find from all the evidence that an extension of time was the intention of all the parties. But the plaintiff contends in the last place that no harm or injury could or did come to the defendant if such extension of time did take place as is claimed by the defendant, for the reason that before judgment could have been taken by the defendant against Cocke, if the defendant had paid the plaintiff (807) the note and sued Cocke for money paid to his use, Cocke had died; and that if a judgment had been taken against Cocke's personal representative it would have given him no preference over Cocke's other creditors. In support of that proposition the plaintiff's counsel referred us to Daniel's Negotiable Instruments, sec. 1319. In that section the general proposition is laid down that "if the time be definite and unconditional, a day will suffice." The author, there, further says "the indulgence must be for a period longer than that which would be required by law for judgment to be obtained; otherwise, though upon a valid consideration, the surety will not be discharged." The author then cites, as authority for that position Story on Promissory Notes, sec. 415. That author says, there, that if the agreement for extension be of such a nature that the maker can by *law* (italics the writer's) obtain and entitle himself without the consent of the holder (as where the holder had been already discharged from the note in bankruptcy) there the agreement will not operate as a discharge of the endorsers; for the reason that the endorsers cannot under such circumstances be injured by the delay, or if injured, it is by operation of law and not dependent upon the act of the holder. Thus, for example, if pending a suit on the note against the maker the holder should agree to give time to the maker for payment thereof short of the time within which judgment should regularly be obtained against him, that would not be a discharge of the endorser." And that is the same example given by Daniel in section 1319. But to show that it was not the intention of the author to vary the rule that if the time be definite and unconditional the shortness of time is immaterial, so that it be for a day or more, is clearly evidenced by the last few lines of section 1319—"And the general rule above stated applies only (808) to cases where time has been given after suit brought, and does

not apply where time is given by contract before any action has been commenced."

In *Scott v. Fisher,* 110 N. C., 311, 28 Am. St., 688, this Court recognizes the principle that there must be a definite time fixed for the extension of credit, and holds that an agreement to extend the time for twenty to thirty days is definite as to twenty days, and therefore discharges the surety, citing Daniel on Negotiable Instruments, sec. 1319. In *Forbes v. Shepard,* 98 N. C., 111, the principal debtor paid to the creditor $25 for indulgence. The creditor tendered the money back to the debtor and commenced action on the same day of the receipt of the money against the principal debtor and the surety. The surety set up a release of himself because of this extension of time, and this Court said: "The effect of a contract of forbearance to sue for a fixed and limited period founded on a sufficient consideration with the principal, without reserving the right to proceed against the surety and made without his assent, is too well settled to be further discussed"; and further, "inasmuch as no indulgence was in fact given, as suit was brought on the very day when the money was paid, in disregard of the contract, it occurred to us that it was thus virtually annulled, and no disability imposed on the surety to his disadvantage. But the authorities are to the contrary, and it is held that the exoneration grows out of the agreement to forbear, and is not affected by the creditor's breach of it after it was made." In *Pipkin v. Bond,* 40 N. C., 91, the question before the Court was whether there was an indulgence to the principal with the knowledge or consent of the plaintiff; and whether that was done upon an agreement for forbearance "which legally or equitably put it out of the power of the creditors to enforce payment from the principal for some period." *Chief Justice Ruffin,* in delivering the opinion,
(809) quoted with approval the language of *Lord Eldon* in *Reese v. Barrington,* 2 Vesey, Jr., 545, where the same question was involved: "It is the most evident equity that the creditor should not carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor"; and the Chief Justice further quoted from *Lord Eldon* in the same case: "He could not try the cause of inquiring what mischief the forbearance might have done to the surety; for that would go into a vast variety of speculation upon which no sound principle could be built." The same view is expressed in Daniel on Negotiable Instruments, sec. 1313, where it is said: "The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured. Therefore, when there is a legal impossibility of injury the principle does not apply. This was decided to be the case where the maker of a note was a dis-

charged bankrupt, and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the endorser, because the latter could not by making payment have recourse against him. To discharge a surety by giving time to the principal, the creditor must put it out of his power for the time being to proceed against the principal."

In *Swire v. Redmon,* 1 Q. B. Div. 536 (1876), it is said: "In the immense majority of cases the act does not actually damage the surety of Shilling, yet the doctrine is so firmly established that only legislative enactment can change it."

No error.

Cited: Roberson v. Spain, 173 N. C., 24.

---

(810)

CONE v. HYATT.

(Filed 6 June, 1903.)

1. Mortgages—Trust Deeds—Foreclosure of Mortgages—Power of Sale—Limitations of Actions.

The power of sale in a deed of trust or mortgage is not barred by the statute of limitations, though an action for foreclosure thereon is barred.

2. Limitations of Actions—Defenses—Waiver.

The defense that a claim is barred by the statute of limitations may be waived by a failure to set it up.

3. Limitations of Actions—Mortgages—Negotiable Instruments.

Where a debt is made payable in two installments, maturing at different times, the creditor may elect to wait to sue till the second installment is due, and the statute of limitations will not begin to run until that time.

4. Limitations of Actions—Payments—Partial Extension of Time.

A partial payment of a note, in order to stop the running of the statute of limitations, must be made by some one authorized to make it.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by Moses C. Cone against J. L. Hyatt and others, heard by *Hoke, J.,* and a jury, at December Term, 1902, of YANCEY.

This action was brought by the plaintiff against the defendant to recover certain lands described in the pleadings. All of the parties

claimed under J. W. Young, who, with his wife, on 8 September, 1885, executed a deed of trust to C. E. Graham for the land to secure a debt due to the plaintiff of $1,800, which was evidenced by two notes, one for $800, payable in twelve months, and the other for $1,000, payable in eighteen months after said date, with power of sale to be exercised if the defendant failed to pay the said notes or any part thereof at maturity, the proceeds of sale to be applied to the payment of the notes, whether both are due at the time of sale or not. Young having
(811) failed to pay the said notes when they became due, and the debt remaining unpaid on 14 May, 1884, he executed on that date to said Graham another deed of trust conveying the same land and an additional tract, reciting the nonpayment of the notes and the agreement of the plaintiff to forbear the enforcement of the trust and allow Young one year from said date to pay one-half of the indebtedness, and, if one-half should be paid at the end of the year, then another year within which to pay the remaining part of the debt. It was further provided in the deed that if there should be default in the payment of one-half of the debt at the end of the first year, or if that one-half was paid at maturity and there should be default in the other half at maturity, then the trustee should be authorized to sell the land and apply the proceeds to the payment of said debt. Young failed to pay either one of the notes, and the trustee, some time before 16 December, 1900, advertised the land for sale on 14 January, 1901, and sold it on that day, under the power contained in the deed, to the plaintiff, and executed a deed to him. There was evidence tending to show that on 27 February, 1888, Young paid $100 on the debt, and on 16 December, 1900, the proceeds of the sale of part of the land, which was sold under the power, were applied to the debt by the trustee. The amount bid at the sale by the plaintiff was paid by him on 14 January, 1901, and also credited by the trustee on the debt, leaving a balance of $2,600 or more due the plaintiff on the notes.

The plaintiff requested the court to charge the jury that the right of the trustee to sell under the power was not barred by the statute of limitations until 4 May, 1901, and further that the plaintiff and trustee, if there was default in the payment of the first half of the debt, could elect to wait until the maturity of the second note before selling under the power; and they having elected to sell after the latter date, the
(812) statute did not begin to run until 4 May, 1891. The court refused the instruction, and charged the jury that upon the evidence the plaintiff was barred by the statute, and that they should answer "No" to the second and third issues, which were as follows: (2) Is the plaintiff the owner of the land sued for and described in the complaint? (3) Is the defendant in the wrongful possession of said land? The

jury answered the issues accordingly. The plaintiff in apt time excepted to the rulings and charge of the court, and appealed from the judgment rendered upon the verdict.

Justice & Pless for plaintiff.
J. S. Adams for defendants.

WALKER, J., after stating the case: We have held at this term in *Menzel v. Hinton, ante,* 660, that the statute of limitations does not apply to a power of sale contained in a mortgage or deed of trust, when the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale. The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute, it was held that "a proceeding to foreclose a mortgage by advertisement is not a suit; such a proceeding is merely the act of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court." *Hall v. Bartlett,* 9 Barb., 300. In *Williams v. Mullis,* 87 N. C., 159, it appeared that a sale had been made under an execution issued upon a judgment which was barred by the statute, and a motion was made to set aside the sale on this account. This Court held that the statute could not be availed of except by answer, and in the opinion of the Court, *Ashe, J.,* clearly sets forth the reason for the decision (813) in the following language: "If, then, the statute applies only to the remedy, it cannot operate to extinguish the judgment after the expiration of the ten years, until an action or proceeding in the nature of *scire facias* is brought to revive it, when the statutory bar may be set up by answer as a defense to the action; and this is the only mode prescribed in the Code of Civil Procedure by which a defendant can avail himself of such a defense." It is needless to pursue the discussion of this branch of the case any further, as the matter is fully examined and the principles which govern in such cases are fully set forth in *Menzel v. Hinton, supra.*

This ruling is perhaps sufficient to dispose of this appeal, but if the statute had applied to the case presented, it could do so only by analogy, that is, by treating the proceedings taken out of court by the trustee in the execution of the power as substantially the same as a suit or action to foreclose the trust; and if this is done the analogy must be complete, and the same principles which would apply to the suit or action should be extended throughout to the proceeding for the execution

of the power. The argument advanced to show that the statute does apply to the execution of the power by the trustee must proceed upon the assumption that there is such an analogy, for it must be conceded, in view of so many decisions by this and other courts which establish the proposition, that the debt is not extinguished by the running of the statute, and the latter affects only the remedy. The argument cannot be sustained upon the idea that the debt is gone, and there is nothing, therefore, to support or justify the execution of the power. This Court has said that the statute of limitations is a statute of repose. It suspends the remedy, but does not cancel the debt. *Capehart v. Dettrick,*
(814) 91 N. C., 351, 352.

If this supposed analogy between a proceeding to foreclose a deed of trust by advertisement and sale and a suit in court for that purpose does exist, and the principles which govern a suit in court, upon a cause of action which is barred, are applied to the facts of this case, we find that no attempt was ever made by the defendant to plead the statute before the sale or otherwise to obtain the benefit of it, and the case, therefore, must stand, if the analogy is carried out to its legitimate consequences, just as if a suit had been brought, judgment of foreclosure rendered, and a sale made and confirmed, so that the matter is finally closed and at an end, without the interposition in due time of any plea of the statute. Can it be said that a party under such circumstances may avail himself of the statute? While a party must be diligent in prosecuting his action, in order to enforce his rights, or else be barred when sufficient time has elapsed for that purpose after the cause of action accrued, the other party who seeks to avail himself of this lapse of time must be equally diligent in bringing forward his plea, or he will be deemed to have waived it. We do not mean to imply that there is any way known to the law by which a mortgagor or trustor can avail himself of the statute as against a mortgagee or trustee, who is attempting to execute the power under the deed of trust by what have been called proceedings *in pais,* instead of resorting to a suit in court. Indeed, such a right in the mortgagor or trustor to benefit by the statute under such circumstances has been held not to exist. In *Grant v. Barr,* 54 Cal., 298, the Court decides that the running of the statute for the full period of limitation "does not operate as an extinguishment or payment," and when the legal title to land has been conveyed to a trustee to secure a debt, the power and title of the trustee are not affected by the expiration of the time prescribed to bar the debt, and a court of equity will not interpose to enjoin a sale under the deed. The statute of limita-
(815) tions is to be employed as a shield and not as a sword; as a weapon of defense, not a weapon of attack. In other words, the statute of limitations by the very language of our Code is made the sub-

ject of a defensive plea only, and is required, therefore, to be specially set up in that way in an action on the debt or deed of trust. "The objection that the action was not commenced within the time limited can only be taken by answer." Clark's Code (2 Ed.), sec. 138, and cases cited. It is never the proper basis of an action in which affirmative relief is sought. 19 A. & E. (2 Ed.), p. 178, *Moline Plow Co. v. Webb,* 141 U. S., 616. It is true, a title to property may be acquired by adverse possession, but that is by express provision of the statute, and the statute is not then pleaded *eo nomine,* but the title or ownership is asserted or denied, as the case may be, and proof of a sufficient adverse possession may be offered to sustain the allegation or denial. The plea of the statute is not proper in such a case. *Mfg. Co. v. Brooks,* 106 N. C., 107; *Cheatham v. Young,* 113 N. C., 161, 37 Am. St., 617.

It has been suggested that the principle upon which such statutes are founded is the one taken from the civil law, by which a presumption of payment or release arises from the lapse of time. Mr. Wood in discussing this question says: "Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose was, and is, to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised either as to payment or otherwise from the mere lapse of the statutory period more than would naturally arise as to any stale demand." 1 Wood on Limitations (1893), sec. 5. The statute of presumption has been repealed and for it has been (816) substituted the statute of limitations, as a statute of repose which bars the remedy only.

But there is another reason why the statute cannot avail the defendant either directly or indirectly: It is provided in the deed of trust that the debtor may have one year within which to pay one-half of the debt, and if that one-half is paid at maturity, then another year to pay the other half. The provision is not in principle unlike the one in the deed which was construed in *Capehart v. Dettrick,* 91 N. C., 351. In that case it appeared that a series of notes had been given and secured by a deed of trust in which it was provided that if the debtor failed to pay any one of the series, all the notes should become immediately due and payable; and this Court held that it was optional with the creditor whether or not he would avail himself of the right to accelerate the payment of the notes actually due by their terms. The same principle was declared in *Barbee v. Scoggins,* 121 N. C., 135, and in that case it was further held that the failure of the creditor to exercise the option did not set the statute in motion. So, in our case, while the extension of payment of half of the

debt for two years was made to depend upon the payment of the other half at the expiration of the first year, the plaintiff could waive the benefit of the condition or the payment of the first half of the debt and elect to wait until the end of the two years for the payment of the entire amount. The case of *Parker v. Banks,* 79 N. C., 481, 488, would seem to be directly in point. In that case the Court (*Bynum, J.*) says: "The condition of the mortgage was a continuing one—to pay in installments, at several times—and the mortgagee could await the maturity of the last note before an entry and sale or elect to treat the nonpayment of the first or any subsequent note at maturity as a forfeiture of the mortgage. . . . This doctrine of election to waive or enforce a forfeiture is discussed in *Towle v. Ayer,* 8 N. H., 57, and in Angell on Limitations,
(817) 470, and notes. The exercise of the right of election was a matter within the sound discretion of the mortgagee, to be determined by a prudent consideration of the interests of the parties to the trust, and his action is binding upon a mere volunteer claiming as a purchaser with full notice." In *Capehart v. Dettrick,* 91 N. C., 351, and *Barbee v. Scoggins,* 121 N. C., 135, the Court held that the mortgagee or trustee had an option to sell, though by the terms of the deed the entire debt was matured by the failure to pay any part of it. In *Cox v. Kille,* 50 N. J. Eq., 176, the Court says: "It is urged that because the bond provides that in case interest remains due and unpaid for the space of thirty days, then the principal shall become instantly due and payable, without saying that it shall become so payable at the option of the holder of the bond, the obligor may consider the principal as due and discharge the bond. In other words, the claim is that the obligor by means of his own default may exercise the option, which most evidently the parties intended to give only to the obligee.

"Authorities need not be cited in support of the general doctrine that equity will not permit a party to take advantage of his own wrong. The principle, however, has frequently been applied when courts have been called upon to determine the rights between landlords and tenants, under similar circumstances. It is entirely optional with the lessor whether he will avail himself of this right of reëntry or not, although by the terms of the proviso the term is to cease or become void for the nonperformance of the covenants; and if the lessor does not avail himself of it, the term will continue, for the lessee cannot elect that it shall cease or be void."

In construing a similar provision in a mortgage, the Court, in *Lowenstein v. Phelan,* 17 Neb., 430, said: "The provision, however, is for the benefit of the mortgagee to enable him to procure the money loaned at the time it was agreed to be paid. If the mortgagee so desires,
(818) he may institute an action upon default to foreclose and, upon

obtaining a decree, have the premises sold. He need not do so, however. The stipulation being made for his benefit, he may waive it without putting himself in default." It follows, therefore, that if the statute of limitations applies in this case, the right to foreclose was not barred until 4 May, 1901, which was after the date of the sale under the power.

There was no error in the ruling of the court as to the payments, which the plaintiff alleged prevented the running of the statute. The reason why a part payment is allowed to prevent the bar of the statute is that it is deemed an admission of a subsisting liability, from which a promise, as of the date of the payment, to pay the balance of the debt will be implied; but in order to raise this implication there must be a voluntary payment by the debtor or by some one authorized to make the payment for him. The trustee was not so authorized in this case. *Battle v. Battle,* 116 N. C., 161.

Our conclusion is that in no view of the case was the plaintiff's right to recover affected by the statute of limitations, and the court below erred in holding that the plaintiff's cause of action is barred and in instructing the jury to answer the second and third issues "No."

New trial.

CLARK, C. J., and DOUGLAS, J., dissent on grounds stated in their dissenting opinions in *Menzel v. Hinton, ante.*

Cited: *Miller v. Coxe,* 133 N. C., 582; *Call v. Dancy,* 144 N. C., 496; *Jones v. Williams,* 155 N. C., 193; *Bank v. Hamrick,* 162 N. C., 217; *Bank v. King,* 164 N. C., 309; *Weathersbee v. Goodwin,* 175 N. C., 239.

---

(819)

SMITH v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 6 June, 1903.)

1. Evidence—Sufficiency of Evidence—Negligence—Contributory Negligence—Proximate Cause—Master and Servant.

The evidence in this case is sufficient to be submitted to the jury upon the issues of negligence of defendant, contributory negligence of plaintiff, and the proximate cause of the injury.

2. Negligence—Ordinances—Speed of Train.

The running of a train at a greater speed than is allowed by an ordinance is evidence of negligence.

3. Negligence—Railroads—Master and Servant—Signals—Rules of Railroad Company.

It is the duty of an engineer of a railroad company to use all proper and reasonable efforts to avoid injuring other servants of the company engaged in their work and to observe the rules laid down by the company.

ACTION by Fred Smith against the Atlanta and Charlotte Air Line Railway, heard by *Shaw, J.*, and a jury, at January Term, 1903, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Burwell & Cansler for plaintiff.
George F. Bason for defendant.

CONNOR, J. The plaintiff, being in the employment of the lessee of the defendant, was on the date of the injury complained of sent to paint switch targets, and at the time of the injury was painting a target the center of which was 4 feet from the center of the west rail of the defendant's track. The flange of the switch target extended from the center of the target toward the rail 6 inches. The engine extended over the track and towards the switch target as follows: Tender frame 23½ inches, punch pole 24 inches, the step between the engine and tender 29
(820) inches, and the cylinder 26 inches. While engaged in painting the target, the plaintiff set his bucket, containing paint, down near the rail. A shifting engine and tender were passing back and forth over the tracks, and just before this engine reached the point where the plaintiff was at work he reached over to put his brush in the bucket and was instantly stricken by the shifting engine, which was backing up towards him.

The plaintiff put in evidence certain rules of the defendant company, *Rule W* being, "Whenever any person, animal, or other obstruction appears upon the track, or so close thereto as to be in danger, then instantly the following precautions must be observed: First, the alarm whistle must be sounded; second, the brakes must be applied; third, every other possible means must be employed to stop the train and prevent the accident. If there is time, all of these requirements must be complied with. If by reason of the speed of the train, or the suddenness of the obstruction, only a part of these precautions can be observed, then such of them as under the particular facts of each case are best calculated to prevent a possible accident must be observed." *"Rule 66.* The unnecessary use of the whistle is prohibited. When necessary in shifting at stations and in yards, the engine bell shall be rung, and the whistle used only when required by rule or law or when necessary to prevent accident." *"Rule 121.* In all cases of doubt or uncertainty, take the safe course and run no risks."

The plaintiff testified that he was familiar with these rules, and that the switch engine was moving backward and forward in the yard on the defendant's tracks; that he went to work and put his bucket right down beside the switch and started to paint the target; had been engaged in the work about ten or fifteen minutes when the engine came and knocked him down. That is the last he remembers. That he heard no bell ringing or any whistle blown, or any warning of any kind given; that he was stricken about half an inch from the (821) left temple on the forehead, going across the top of his head, and the bone on the left eye was broken or injured, and he was thrown on the right side of his shoulder; and was stricken across the breast, and suffered from his chest for a long time afterwards. Witness illustrated to the jury his position and that of the target and of the engine. Said he was relying on the rules, of which he knew, for his protection. That it was impossible for him to do the work well and at the same time keep a constant lookout for the movements of the engine. That if he put his whole attention on the painting he could not be on the lookout all the time. When he looked down he looked both ways. Looked down and did not see any engine. Thought he could get through painting before the engine came out of the coach-yard, and if it did come out he expected it to ring the bell or blow the whistle to give him warning. It was necessary for him to keep his eye on the target while he was painting because there were two colors. Had been employed by the defendant company for about three years; says he did not hear the bell ring. That he put his bucket over next to the rail, illustrating the position in which he stood and the point at which he put his bucket by means of photographs offered in evidence. The track was pretty fair, level and straight.

On redirect examination plaintiff stated that when he was doing this work in the manner he had shown the jury he was relying upon the rules of the company and the ordinance of the city of Charlotte for his protection. Wouldn't say that he had nothing else in mind. Thought if the engine came it would give some signal to get out of the way.

Plaintiff introduced Sherman Ludwick, who testified that he was a short block from where the plaintiff was painting. Saw him painting the target. When the train passed up the track and struck Mr. Smith, the witness heard them "holler"; saw the engine; (822) heard no bell ringing; no bell was ringing; could have heard it if it had been; the train was running 25 or 30 miles an hour.

The plaintiff introduced Kerry Reynolds, who testified that he was about 100 feet from the plaintiff at the time of the injury. The train was running 30 miles an hour. He says he saw that the plaintiff was

in danger and "holloed" at him twice to look out, and about that time it struck him.

Thomas Robinson, introduced by the plaintiff, says that he was working 15 or 20 feet from the plaintiff; that the switch engine was coming from the depot with a sleeper, and when it went down the main line it came in the coach-yard. The witness was busy wiping off the coach; the plaintiff was painting. The last witness saw of the plaintiff, the engine was as far as from "here to the middle of the street," and the witness heard Grant Wallace "holler," "I think we have struck Mr. Smith." I looked around at the engine and saw Grant pull the bell cord, and saw the plaintiff; did not hear the bell ring until after the plaintiff was struck, could have heard it ring; the train was moving 20 or 25 miles an hour; the engineer was on the opposite side from the plaintiff; saw nobody on the left-hand side; the fireman did not seem to be in his place.

M. L. Harris, witness for the plaintiff, testified that the train was running 10 or 15 miles an hour; heard no bell; could have heard it if it had been ringing; heard no whistle blow.

The defendant introduced the engineer, who testified that he saw the plaintiff painting and passed him several times; "I reckon a dozen times"; that he was not in his way, and if he had stayed where he was when the witness saw him, he was perfectly safe; he was perfectly safe where he was painting as long as he stayed there; the tender
(823) obscured his view about 60 feet before he reached the plaintiff; engine was backing; the bell was ringing; that he was about 400 feet from the plaintiff when he first saw him; if there had been any danger, could have stopped; a man could stand between the target and the rail and let an engine pass; I have seen it done; no part of the engine struck him; it was the corner of the tender—what is called the pole socket.

The defendant introduced J. F. Boyd, who stated that he was painting targets on the morning of the injury, and that it required no skill to do so; witness was about 100 feet from plaintiff; witness illustrated how he would paint a switch target without any danger to himself.

There were several other witnesses whose testimony tended to sustain the contentions of the plaintiff and the defendant.

The plaintiff offered in evidence section 299 of the ordinances of the city of Charlotte, prohibiting the running of trains at a greater rate of speed than four miles an hour in the corporate limits of the city. At the close of the plaintiff's testimony, the defendant made a motion to nonsuit, which was denied. At the close of the whole evidence, the motion to nonsuit was renewed and overruled, and the defendant excepted.

We concur with his Honor in his ruling upon this motion. There was evidence sufficient and competent to be submitted to the jury upon the issues raised by the pleadings. He submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant's lessee, as alleged in his complaint?

2. Did the plaintiff of his own negligence contribute to his injury, as alleged?

3. If the plaintiff's negligence contributed to his injury, could the defendant's lessee, notwithstanding the said negligence of the plaintiff, have avoided the injury to him by the exercise of (824) ordinary care?

4. What damage, if any, is the plaintiff entitled to recover?

The defendant requested the court to charge the jury that if they believed the evidence, the answer to the first issue must be "No." The instruction was refused, and the defendant excepted. There was no error in refusing this instruction.

The court stated the contentions of the parties, charged the jury at length, explaining to them the law applicable to the testimony, and charged them that if they found that there was an ordinance in force in the city of Charlotte forbidding the running of an engine in the corporate limits at a speed greater than four miles an hour, and the engineer was running at a greater rate of speed than four miles an hour within the corporate limits in violation of the town ordinance, it would be evidence of negligence on the part of the defendant to be considered by them in connection with the other testimony. He also instructed them that it was the duty of the defendant's engineer to ring the bell while moving his engine in the yard, and to use all proper and reasonable efforts to avoid injuring the servants of the defendant engaged in work on the yard. He also instructed the jury in regard to the duty of the engineer to observe the rules laid down by the defendant. We think his Honor's instructions are fully sustained by the authorities prescribing the duty of the defendant under the circumstances testified to.

In *Erickson v. R. R.*, 41 Minn., 500, 5 L. R. A., 786, the plaintiff was lawfully at work as a section hand, in close proximity to the defendant's track, where he was liable to be stricken by passing trains. It was held that as the plaintiff occupied his position rightfully as an employee of the defendant, he was not required to look out for passing engines, as in case of trespassers and licensees, and that the company owed (825) him the duty of "active vigilance," in giving proper signals and warnings of the approach of engines and trains; and that 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.

In *Schultz v. R. R.,* 37 Minn., 271, the Court held that, without regard to any custom or any rule of the company as to ringing the bell or giving other warnings, the defendant is required to give some signal of the approach of an engine, and that the failure to ring the bell or give warning was not a risk assumed by the plaintiff.

In *Kelly v. R. R.,* 95 Mo., 279, the plaintiff was an experienced track repairer and was fastening a fishplate to a T rail in the yard of the defendant at 12 o'clock in the day, and cars were frequently passing over the track where he was at work. A train was permitted to approach him without the ringing of the bell or other warning, and without having any one posted on the car to give proper signals. The plaintiff being absorbed in his work, did not hear the noise of the train, until he looked up, but too late to avoid being struck by the car. It was held that the plaintiff was lawfully and rightfully on the track, and if no person was placed on the car to give warning, or if, being placed there, he failed to warn the plaintiff, and no other signal was given, then the company was liable. "This rule," says the Court, "is humane, conservative of human life and consonant with public policy, and that, when the person is lawfully and rightfully on the track or in the way of passing trains and apparently unmindful of approaching trains, the duty to give signals is imperative."

In *R. R. v. Henze,* 71 Mo., 636, the plaintiff was employed in painting a car on the defendant's track, and while engrossed in his work a
(826) switch engine, attached to cars, was moved onto this track without any signal or warning to the plaintiff, and he was injured. The Court held that he was entitled to recover, and after stating that it is the duty of the defendant to establish rules and regulations to warn workmen on its track, proceeded as follows: "It is true, also, that the cars would probably at any moment be switched onto the sidetrack on which he was at work; but this would not necessarily, or even probably, import that he knew that the appellant would neglect to give him adequate warning of their approach, and that it was hence unsafe for him to perform the work in obedience to his orders. The mere fact that he knew that cars would probably be switched in upon the sidetrack would not preclude a recovery by him, unless he also knew that it was unsafe to continue his labor; and this was a question for the jury."

In *Felice v. R. R.,* 43 N. Y. Supp., 922, it is said: "It is the duty of the master to use reasonable care to provide for the servant, so far as the work in which he is engaged will permit, a reasonably safe and proper place in which to do his work, and to that end, if the place may become dangerous, by reason of perils arising from the doing of other work pertaining to the master's business different from that in which the particular servant is engaged, to give him such warning of the additional

dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard himself against them."

In *Promer v. R. R.*, 90 Wis., 215, 48 Am. St., 905, the Court used the following language: "But the employee does not assume the risk of those dangers which are known by or can be obviated or avoided by the exercise of reasonable care and caution on the part of the company. The company is bound to take reasonable care and caution to protect those working in its yards from such dangers, and it would be (827) liable for damages sustained by any employee in consequence of its neglect or failure to discharge its duty in that regard. The duty is one arising from the relation of master and servant, and the servant has a right to assume, until he has knowledge to the contrary, that the master has taken and will adopt such reasonable measures as are within his power to protect him against such dangers while engaged in his work. The master is required to furnish the servant with a safe and proper place in which to perform his work, and while requiring the performance of work by a servant at a place which may or has become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger—that is to say, such as may be avoided by the exercise of reasonable care and caution on the part of the master."

The plaintiff swears that he knew the rules requiring the ringing of the bell, and he was relying on that for his protection; that it was impossible for him to do the work well and at the same time keep a constant lookout for the movements of the engine; that if he put his whole attention on the painting, he could not be on the lookout all the time. There was evidence proper to be submitted to the jury that the bell was not ringing and that the engine was moving at a dangerous rate of speed. We think there was ample evidence, if believed by the jury, to sustain their finding upon the first issue, and we find no error in the instruction to the jury as to the measure of duty which the defendant owed to the plaintiff.

The jury having found the second issue in favor of the defendant, it becomes unnecessary to examine the charge of the court in respect thereto.

His Honor instructed the jury that the burden was on the (828) plaintiff upon the third issue to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care; and if they found that the plaintiff had negligently placed himself in dangerous proximity to the defendant's track and he was engaged in his work with his head down and was unaware of the approach of the train, and if they further found that the defendant's

rules required its agents in charge of its trains, whenever they saw a person in such position, to sound the alarm whistle when necessary, and if they further found that the defendant's employee saw, or by the exercise of reasonable care could have seen that the plaintiff was in a dangerous position in time to avoid injury, and ran the train down the track without proper signal of the approach of the train or stopping it, and that this was the proximate cause of the plaintiff's injury, they should answer the third issue "Yes"; that the defendant contended that the plaintiff was not in a dangerous position until a second before the train struck him, and that after the defendant company discovered that he was in a dangerous position they did all they could to avoid the injury, and that it was impossible for them to avoid it; that as soon as he placed himself in that dangerous position, warning was given and the brakes applied at the same instant he was struck; that if they found from the evidence that the plaintiff was in a place of safety up to the time he leaned over to get paint on his brush, and if they found that he did this, and it took him less than a second, and that he was stricken instantly upon leaning over, they would answer this issue "No"; but it was the duty of the plaintiff to establish his contention as to this issue by a preponderance of the evidence. There was no exception to this charge, and we think that there was evidence to be submitted to the jury to sustain that finding.

Upon a careful examination of the entire record, we think that his Honor's instructions are sustained by both authority and reason. (829) See, also, *McLamb v. R. R.*, 122 N. C., 875; *Anderson v. R. R.*, 8 Utah, 128; Beach on Cont. Neg. (Ed. 1899), sec. 67.

Judgment affirmed.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

Cited: *Lassiter v. R. R.*, 133 N. C., 246; *Peoples v. R. R.*, 137 N. C., 97; *Lassiter v. R. R., ib.*, 151; *Edwards v. R. R.*, 140 N. C., 50; *Sherrill v. R. R., ib.*, 257; *Ray v. R. R.*, 141 N. C., 86; *Wilson v. R. R.*, 142 N. C., 338; *Brown v. R. R.*, 144 N. C., 636; *Snipes v. Mfg. Co.*, 152 N. C., 45; *Wolfe v. R. R.*, 154 N. C., 575; *Zachary v. R. R.*, 156 N. C., 501; *Norman v. R. R.*, 167 N. C., 540; *Ingle v. R. R.*, 167 N. C., 638; *Hinson v. R. R.*, 172 N. C., 652; *Geddy v. R. R.*, 175 N. C., 521.

FRITZ v. SOUTHERN RAILWAY COMPANY.

(Filed 6 June, 1903.)

Negligence—Carriers—Passengers—Personal Injuries—Nonsuit.

The plaintiff attempting to alight from defendant's train, had reached the second step of the platform, when a heavy man caught hold of the car rail, swung himself up on the step, his valise striking plaintiff on the knee and injuring her. The conductor and plaintiff's father were both standing near by. Plaintiff testified it could not reasonably have been anticipated the man was going to hit her. The conductor could have seen the man coming if he had been attending to his business. The rules of the company required conductors to give particular attention to women and children. Under these facts a motion for nonsuit was properly granted.

CLARK, C. J., dissenting.

ACTION by Bertha Fritz against the Southern Railway Company, heard by *McNeill, J.*, at October Term, 1902, of GUILFORD. From a judgment of nonsuit, the plaintiff appealed.

L. M. Scott and John A. Barringer for plaintiff.
King & Kimball for defendant.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of damages sustained by her on account of the alleged negligence of the defendant. The plaintiff alleges, and the testimony for the purpose of the appeal establishes, the fact that she was on 12 (830) August, 1899, a passenger on the defendant's train and that she purchased a ticket from Thomasville to High Point, reaching the last-named place about 9 o'clock at night. After the train stopped at the station, she, together with other passengers, left the car at the rear end, following the conductor, for the purpose of alighting. She had reached the second step, and the conductor was standing on the ground, his head turned back over his shoulder in the direction of the engine, in which direction there were some young ladies. If he had been standing straight he would have been facing the plaintiff. The plaintiff's father was standing behind the conductor about three paces, and a little to the west of him. Quite a crowd were at the station. As the plaintiff reached the second step a heavy man with a valise in his hands came rapidly down the side of the car in the direction of the engine, and as he reached the step, he caught hold of the car rail and swung himself on the step, his valise striking the plaintiff on the knee and injuring her. The train was stopped at the usual place. The conductor was in front

of the steps. The man intended to board the train, and the conductor told him to stop. He noticed the man after he had gotten up and told him to stand aside where he was, and the man did so. The plaintiff, in response to a question, testified: "I believe you said on a former trial that this man came rushing up very hastily in the direction of the engine and made no stop?" Answer, "Yes." "You said that you could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated?" Answer, "Yes." "And you say it now?" Answer, "Yes." When the man got up the plaintiff came down, and when in reach of the conductor he took her hand. The plaintiff had no reason to believe that the man was going to hit her. The whole thing was quickly done. The conductor could have seen him coming
(831) from the direction of the engine if he had been attending to his business. The plaintiff's father was standing about three paces away. The car steps are 26 inches wide and 22 inches between rails. The plaintiff's father said that the man who struck her was a large red-faced man, looking like he might have been a mechanic. The conductor helped the plaintiff down. The platform was a good one. The plaintiff introduced certain rules of the defendant company and showed that they were furnished to conductors in its employ:

Rule 408. Conductors must always be vigilant to foresee and, as far as possible, to prevent anything which might cause accident or delay to their trains.

Rule 426. They must contribute as far as they can, without being unduly officious, to the convenience and comfort of passengers, and must give particular attention to women and children who are unattended, and to all persons who are infirm, inexperienced, or otherwise unable to care for themselves.

Rule 448. Passenger conductors should never lose sight of the fact that their duties are of a most delicate and responsible character, and demand unusual judgment, tact, and courtesy, and that the safety of their trains and passengers and the reputation of the road are dependent upon their discretion and care.

Upon the close of the plaintiff's testimony the defendant moved for a judgment of nonsuit, which was allowed, and the plaintiff appealed.

When this cause was before this Court at the February Term, 1902 (130 N. C., 279), the testimony was the same as upon this appeal, except that the rules of the company had not then been introduced. *Furches, C. J.*, speaking for the Court, said: "After a careful examination
(832) of the evidence, we are of the opinion that the defendant's motion, at the close of the plaintiff's evidence, to nonsuit the plaintiff, should have been allowed. There is no evidence, in our opin-

ion, showing negligence on the part of the defendant." The case was disposed of upon another question.

We are of the opinion that the ruling of this Court should be affirmed. We do not think the rules of the company introduced by the plaintiff did more than declare the measure of duty which the defendant owes to its passengers. In *Brittain v. R. R.*, 88 N. C., 536, 43 Am. Rep., 749, *Ruffin, J.*, says: "According to the uniform tendency of these adjudications, which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, *by the exercise of proper care,* the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter, which might reasonably be expected to occur under the circumstances of the case and the condition of the parties." This rule we find fully sustained by the decisions of other courts and the text-books.

In *Putnam v. R. R.*, 55 N. Y., 108, 14 Am. Rep., 190, it is said: "A railroad company has the power of refusing to receive as a passenger or to expel any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety or annoying others; and this police power the conductor or other servant of the company in charge of the car or train is bound to exercise with all the means he can command, whenever occasion requires. If this duty is neglected without good cause and a passenger receives injury, which *might have been reasonably anticipated* or naturally expected from one who is improperly received or permitted to continue as a passenger, the carrier is responsible." (833)

The Supreme Court of Iowa, in *Felton v. R. R.*, 69 Iowa, 577, held that, upon a finding by the jury that the defendant ought not reasonably to have anticipated that an assault would be committed on the deceased, the defendant was not liable.

In *Flint v. Transportation Co.*, 34 Conn., 554, it is held that "Carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order and guarding those they transport against violence from whatever source arising, *which might be reasonably anticipated* or naturally expected to occur, in view of all the circumstances and of the number and character of persons on board."

There is no controversy in this case in regard to the relation which the plaintiff occupied toward the defendant. She was a passenger, hav-

ing paid her fare, and at the time of the injury the contract of carriage had not come to an end. She was, therefore, entitled to demand of the defendant the degree of care for her protection prescribed by the law and the rules of the company. In the very excellent brief filed by the plaintiff's counsel, many authorities are cited to establish this proposition. They also cite authorities to the effect that if the conductor was negligent and, by reason of such negligence, a third party, as in this case, a fellow passenger, injured the plaintiff, the defendant would be liable. The question which lies at the threshold of this case is whether there is any negligence on the part of the conductor. It will be observed
(834) that in the cases cited the question of liability is made to turn upon a neglect of duty, as do all cases of negligence. The right to recover is dependent upon a failure on the part of the conductor to maintain such care as would prevent an injury *which could be reasonably anticipated,* or, as said by *Justice Ruffin* in *Brittain's case, supra,* "could have been foreseen and prevented." The plaintiff here testifies expressly that the man who injured her was coming very rapidly, and that, "You could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated." Applying the principle which is to govern the case, this language of the plaintiff relieves the defendant of any actionable neglect. Her statement is sustained by the circumstances surrounding the transaction. She said in reply to a question, that she had no reason to believe that this man was going to hit her. Her father, standing within three paces of the conductor and seeing the man coming, did not anticipate any trouble. The man had a right as a passenger, seeking to board the train, to go to the step and, so soon as he could safely do so, enter the car. The fact that he was coming rapidly was not calculated, in view of the conduct of men under such circumstances, to arouse in the conductor any apprehension that he would attempt to board the car in a rough and violent manner. He made no such impression on the plaintiff or her father. If the conductor had stopped him before he reached the step, the defendant would have been liable in an action for damages.

We do not intend to relax in the slightest degree the rules of the company or the high degree of care which the law requires of conductors in protecting their passengers. But we do not think that, in view of this testimony, these rules, applied to the conductor's conduct, show any negligence on his part. The general rule is that whenever a carrier through its agents or servants knows or has opportunity to know of a threatened injury or might have *reasonably anticipated* the in-
(835) jury, and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, the carrier is liable.

We have carefully examined the case of *Sheridan v. R. R.*, 36 N. Y., 39, 93 Am. Dec., 490, cited by the plaintiff's counsel. There the plaintiff's intestate, a child of nine years, was compelled by the conductor of a crowded railroad car to stand upon the platform, and while there was thrown from the car by the hasty and careless exit of another passenger. The company was properly held liable, *Mr. Justice Hunt* saying: "For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants and against his own remonstrance, properly, so far as the defendants are concerned. If by the motion of the cars he had been thrown from his dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars, he had been pushed from his standing place, the defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd and in aiding in throwing the deceased from the cars; but this does not relieve the defendant's wrong. If they had not removed the deceased from his seat and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendant's illegal conduct in overcrowding their cars and in placing the deceased upon the platform, that produced the disastrous result." The wrongful act of the defendant in that case was in compelling the plaintiff's intestate to stand upon the platform. In our case there was no wrongful act in respect to the plaintiff's being upon the second step in alighting from the car. There was no suggestion of overcrowding preventing her from leaving the car in the usual manner, nor is there any suggestion that the conductor was not in his proper place. The only sug- (836) gestion made is that he was looking over his shoulder, with an intimation that his attention was attracted by some young ladies. It does not appear that he was prevented from seeing the man approach the car. On the contrary, the plaintiff testifies that immediately upon his swinging himself upon the step the conductor stopped him. While we fully recognize the very delicate duties imposed upon conductors in looking after their passengers, and would not lower the standard by which their duty is measured, we cannot fail to also recognize that as the train stops at the station the duty becomes exceedingly difficult, in respect to passengers alighting and those desiring to enter the car. We would not be willing to say that the momentary attraction of the conductor's attention, even by young ladies, would constitute negligence. In applying the rules of law to the conduct of men in the discharge of their various duties of life, we must recognize existing conditions; and while we enforce a high degree of care between agents and servants of railroads and

their passengers, we must not impose unreasonable requirements or expect men to anticipate and provide against contingencies beyond the capacity of the human mind. It is certainly desirable that in public stations and in other places where people assemble more consideration for each other's welfare, safety, and comfort be observed. The conduct of the man who caused this injury was inconsiderate and perhaps rude; but conductors no more than other men can be required to anticipate that men are going to act in a rude and inconsiderate manner towards ladies. While they must be upon the alert, they cannot be expected to anticipate conduct which the plaintiff herself says could not have been anticipated, and which did not attract the attention of her father standing near by the conductor. While the injury sustained by the plaintiff is a
(837) source of regret, we cannot see that it is the result of any actionable negligence on the part of the defendant's conductor. In regard to the width of the steps, it is not suggested that they should be wide enough for two persons to pass. The rules of the company require that passengers entering cars shall await the exit of those leaving. This we think is a reasonable requirement.

Upon the whole evidence we are of the opinion that the judgment of nonsuit should be

Affirmed.

CLARK, C. J., dissenting: The defendant owed the plaintiff a safe exit from its cars. The usual requirement nowadays, wherever there is much travel, is that outgoing passengers leave by one door of the car and incoming passengers enter at the other. This prevents any collision between the two streams of passengers, and it is negligence for a railroad company not to establish and enforce reasonable regulations, which are in general use, to prevent accidents by the strong trampling upon the weak, burly men running over weak and delicate women and children.

The plaintiff was descending and on the second step when a strong, able-bodied man with a heavy iron-bound valise in his hand, caught hold of the iron stanchion to swing himself up. The conductor was standing by the step, and, if advertent to his duties, instead of allowing his attention to be attracted elsewhere, he could certainly have put out his hand more quickly than the man could swing his own weight and that of the valise up, and have made him wait until the lady and other passengers had gotten out. At least, this was evidence for the jury to consider. and this Court, I think, should not hold as a proposition of law that it was not negligence for the conductor to permit the heavy man and his heavy valise to crowd up the steps 22 inches wide, on which the
(838) lady was descending and where she had the right of way. The lady says she did not anticipate the man would strike her with the

valise. If she had, it might have been contributory negligence, possibly, not to have called out or shrunk back (if possible); but because, relying on the care of the defendant's servant, she was not thus guilty of contributory negligence, it is hard measure to hold that therefore the conductor was not negligent in not stopping the man, nor the company in not having safe regulations to prevent collision between incoming and outgoing streams of passengers. The conductor was at the foot of the steps and should have seen, sooner than the lady or than her father, who was three steps away, that the heavy man with the heavy valise had laid hold of the iron rod to swing up on the crowded steps. The conductor's hand should have been instantly stretched out across the steps, and he should have told the man politely, but firmly, he could not go up till those on the steps had descended. If there was any reason to the contrary, the conductor should have gone on the stand and have told what it was. Whether the conductor was attending to his duties or negligent in the premises, was a matter of fact to be determined by the jury.

When the case was here on the former appeal (130 N. C., 279) this present question as to whether there was any evidence was not before the Court, and could not be, for the appeal was by the plaintiff from the judgment below granting the new trial, and the Court expressly so stated in the opinion. Besides, there was some additional evidence on the last trial. His Honor in the second trial below was doubtless misled by the first headnote in the former appeal.

Cited: *Mangum v. R. R.*, 145 N. C., 155.

---

(839)

FINISHING AND WAREHOUSE COMPANY v. OZMENT.

(Filed 6 June, 1903.)

1. Reformation of Instruments—Equity—Mistake.

A court of equity may correct mutual mistakes in written instruments.

2. Evidence—Sufficiency of Evidence—Reformation of Instruments—Mistakes.

The evidence in this case is sufficiently clear, strong, and convincing to warrant the correction of the mistake in the deed.

3. Reformation of Instruments—Deeds—Mistakes—Issues.

In this action for the reformation of a deed for mistake, the issue, set out in the statement of facts, is sufficiently comprehensive.

4. Evidence—Reformation of Instruments—Mistakes.

In an action to reform a deed for a mistake, it is competent for a witness to testify as to the intention of the parties.

5. Reformation of Instruments—Mistake—Evidence.

The mere fact that a tract of land intended to be conveyed was described in the deed as 50 by 150 feet, whereas it in fact contained only 50 by 116 feet, was not evidence of negligence on the part of the grantor, such as to deprive him of the right to reformation.

ACTION by the Southern Finishing and Warehouse Company against W. R. Ozment, heard by *McNeill, J.,* and a jury, at September Term, 1902, of GUILFORD.

This is an action to reform a deed. Plaintiff being the owner of a large parcel of land at the southeast intersection of Bessemer Avenue and Carolina Street, in the city of Greensboro, on which it had erected several buildings in close proximity to each other, the defendant applied to plaintiff for the purchase of a part of said land, known as the storehouse lot, which was then and had been for some time occupied by the defendant as tenant of the plaintiff, and which was immediately east of the Combs lot, which also belonged to the plaintiff, and which (840) was and had been occupied for some time by one Combs as tenant of the plaintiff. The storehouse lot, according to its true dimensions, fronted 50 feet on Carolina Street and extended back with that width westwardly along Bessemer Avenue 116 feet to a point just east of a flower-house or pit which stood upon the adjoining lot, known as the Combs lot, and was used with it. That on 19 March, 1901, plaintiff executed a deed to the defendant for a part of said land, so owned by it, which was described in the deed as fronting 50 feet on Carolina Street and extending with that width westwardly along Bessemer Avenue 150 feet, which boundaries would include not only the flower-house or pit, but nearly one-half of the dwelling-house on the Combs lot. There was no reference in the deed to the "storehouse lot" by that name. Neither of the parties knew the size of the storehouse lot at the time the deed was executed, but there was evidence introduced by the plaintiff which tended strongly to establish that defendant intended to buy and the plaintiff to sell no more of the land of the plaintiff than was embraced within the actual boundaries of the lot then occupied by the defendant. The plaintiff sold and the defendant bought that lot, and nothing more. After the deed was made, the defendant never attempted to occupy or use any part of the Combs lot and never made any claim or demand for any part thereof, but the same continued to be occupied and used by Mr. Combs and his family. About three weeks after the deed was executed the plaintiff learned of the mistake in the deed through one Lindau,

its secretary and treasurer, who had negotiated the sale and conducted the entire transaction in its behalf. Lindau, having heard it reported that the deed by mistake had been drawn so as to cover a part of the Combs lot, went to see the defendant, who admitted that the parties had both made a mistake in drawing the deed and that it really embraced more land than he had bought or that was intended to be (841) conveyed. Defendant further admitted that the deed included 34 feet of the Combs lot, which was not purchased by him, and that the correct dimensions of the storehouse lot, which was all that he bought, were 50 feet on Carolina Street by 116 feet on Bessemer Avenue, and that he was willing that the deed should be corrected so as to convey to him only the storehouse lot, but that he did not know whether his wife would consent to do so unless she was paid something for the change in the deed. He promised to see his wife and let Lindau know what she said about it. Shortly afterwards Lindau saw defendant and he told him his wife wanted $100 as a consideration for her joinder in the corrected deed. Plaintiff declined to pay this amount, but its president, Moses H. Cone, went to see the defendant and proposed to him that the plaintiff would pay back the consideration ($700) and whatever sum defendant had paid out for improvements and betterments on the property, or, if defendant preferred, he could keep the storehouse lot and deed could be reformed. Defendant declined the proposition, but admitted in the interview that he had not bought any of the Combs lot, and that he had only bought the storehouse as then occupied by himself. He also stated to Mr. Cone that the western boundary of the storehouse lot was just east of the flower-pit on the Combs lot; but "he insisted" that, as his deed covered 150 feet, he was going to hold on to it, as he had been advised that he could do so, if he desired to be "contrary," unless the plaintiff would give him the $100. One of plaintiff's witnesses, Miss Combs, testified that the defendant stated to Moses H. Cone in her presence and hearing, "that he did not think he was getting any part of the Combs house or lot, but he did not know how far it ran; that he did not think the lot he was getting was farther west than the flower-pit." She further testified that the flower-pit was on the lot occupied by her father. There was testimony tending to show that the storehouse lot was a well-defined lot with visible marks and boundaries, and it could be (842) well seen to what division line the occupants of the respective lots had used them. There were outhouses on the lots which clearly indicated the boundaries, and a survey showed that the storehouse lot was 50 by 116 feet and that the boundaries as set forth in the deed would take in one-half of the Combs lot. The defendant in his answer denied the plaintiff's allegation as to the mistake. He testified in his own behalf as follows: "That on 9 March, 1900, he went to the office of the

plaintiff and there met the witness Lindau, who asked him what he could do for him, and that he answered, 'I understand that you want to sell the storehouse and lot,' and he asked me to make him a price—what I would give, and I said, 'I am not pricing your property.' I made him an offer of $700 for 50 feet on Carolina Street and 150 on Bessemer Avenue. This proposition was in writing. On 19 March thereafter, or about that time, the deed was handed me and I paid the $700. That the witness had been renting the storehouse and lot for some two or three years before the transaction. That J. H. Combs occupied the house and lot immediately west of the storehouse lot. That the witness did not use any part of the lot west of the east end of the flower-pit; that he did not use any part of the Combs house and lot, nor was any part of either rented by him. That he saw the Combs family using the flower-pit; that the witness had not used any part of the Combs house since making the deed and never made any claim to any part till after the bringing of this suit by the plaintiff; and then it was, or soon thereafter, he instituted the suit in the justice's court, claiming part of the rents of the Combs house and lot. That when he bought and took the deed in controversy he was simply buying the storehouse and lot;
(843) that he did not know how large the storehouse lot was when he proposed to Mr. Lindau to buy the same, but that Lindau told him it was 50 by 150 feet; the witness had never measured the lot and did not know its size at the time he bought. That the first time he claimed any part of the Combs house and lot was after he had taken a deed and the lot was measured according to the distances given in the deed, and it was found that the deed covered a part of the Combs house and lot. Witness would not say positively that he did not say to Mr. Cone in his interview that he did not think his lot extended back to the flower-pit."

The witness Lindau, over the objection of the defendant, testified as follows: "We intended (to sell) the storehouse and lot which the defendant had been using for several years." Lindau had testified just before this that he (defendant) never expected to get more than the place he had originally rented and that he intended to buy to a point just east of the flower-pit.

Defendant moved, at the close of the testimony, to dismiss the complaint or for judgment as in case of nonsuit. The motion was refused and defendant excepted.

He then tendered the following issues:

1. Was the deed set forth in the complaint made by mutual mistake of both plaintiff and defendant?

2. Were the facts as to the location and description of the land conveyed by plaintiff to defendant equally known to both parties?

3. Were the facts as to the location and description of the land conveyed by the plaintiff to defendant unknown to both parties?

4. Did the plaintiff and defendant each have adequate means of information to ascertain the true location and description of the land conveyed?

The court refused to accept these issues, and instead thereof submitted the following issue to the jury: "Was the 34 feet of the Combs lot included in the deed from the plaintiff to the defendant by mutual mistake of the parties?"

At the close of the evidence the defendant requested the court (844) to give the following instructions to the jury:

1. If in a contract for the purchase of land either party fails to avail himself of those sources of information readily within his reach, and fails to do so, in the absence of any fraud or fraudulent representation made by the other party, the maxim of *caveat emptor* applies as it does to personal property, and the courts will not aid the purchaser who desires to rescind the contract.

2. A contract made under mistake or ignorance of a material fact is not voidable where the facts are equally known or were unknown to both parties, or where each has equal and adequate means of information, if the party complained of has acted in good faith.

3. That there is no evidence to go to the jury of a mutual mistake between the plaintiff and defendant in this case.

The court refused to give these instructions, and the defendant excepted.

The charge of the court was full and in all respects correct and covered the controverted questions, and there was no exception to it.

Defendant assigned the following errors: 1. Refusal of his Honor to submit issues tendered by defendant. 2. Admission of Lindau's testimony that he intended to convey only 116 feet. 3. Refusal of his Honor at the conclusion of plaintiff's testimony to dismiss the action under the Hinsdale act. 4. Refusal of his Honor at the close of all the testimony to dismiss the action under the Hinsdale act. 5. Refusal of his Honor to give the instructions as asked for by the defendant. 6. The judgment of the court.

The jury answered the issue yes, and judgment was entered for the plaintiff upon the verdict. The defendant excepted and appealed. (845)

King & Kimball and W. P. Bynum, Jr., for plaintiff.

John A. Barringer and Chas. M. Stedman for defendant.

WALKER, J., after stating the case: The case made out by the plaintiff and reinforced by the testimony of the defendant appeals

strongly to the conscience of the Court, and it would be strange indeed if any principle of equity could be successfully invoked which would cause us to withhold from the plaintiff the relief which he seeks in this action and enable the defendant to retain a part of the Combs lot which it clearly appears he did not buy and for which, of course, he has paid nothing. He is insisting upon his strict legal right and the advantage which he has gained by the miscarriage of the parties in writing their real agreement in the deed.

It is true that the defendant starts in the case with a technical advantage, for the law always presumes, nothing else appearing, that a deed has been correctly written and that it is the true expression of the intention and agreement of the parties, and it must stand as it was prepared and executed by the parties, unless this presumption of the law is in some way rebutted, in an action brought to reform the deed, the burden being upon him who seeks to correct it to show by strong and convincing proof and in the clearest and most satisfactory manner that there was a mutual mistake and that the alleged intention of the parties, to which he desires it to be conformed, continued concurrently in the minds of both of them down to the time of its execution; and he must also show precisely the form to which the deed ought to be brought. This is a familiar principle. Bispham Eq., sec. 469.

It has been said that this rule is founded upon the salutary principle that the parties have agreed upon the writing as the evidence of the contract between them and as the memorial of their agreement
(846) if any dispute should arise as to its terms, and that the law will not change it "until by a weight of proof greater than itself a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it." *Ely v. Early*, 94 N. C., 8. Mr. Adams, in referring to this jurisdiction of a court of equity, says: "In the second case, where the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake; for then there is clear evidence in the instrument itself that it operates beyond its real intent. If, however, there is no recital of any agreement, but a mistake is alleged, and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are more difficult to define. The *prima facie* presumption of law is that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be inconsistent with that contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended

by both parties to be prepared in one form has, by reason of some undesigned insertion or omission, been prepared and executed in another." Adams Eq., p. 343; star p. 169.

But when the party who seeks to rectify the instrument produces evidence of any material mistake which is clear, strong, and convincing, there is no good reason, and surely there ought not to be any, why a court of equity should not exercise its powers, according to established principles, in the correction of the mistake. The remedy by reformation is obviously one which is necessary to the complete and exact administration of justice, and which, moreover, can be attained (847) by equitable procedure alone.

"Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake, or the mistake of one of the parties, induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties." Eaton on Eq., sec. 618.

In *Newsom v. Bufferlow,* 16 N. C., 381, this Court recognized and enforced the right to have a deed corrected upon the ground that it was an executed contract, and the plaintiff therefore had no remedy at law, as he might have in the case of some executory contracts, and further, that unless a court of equity give relief the plaintiff would have no redress, and the remedy will be applied where a clause is either inserted in a deed or is omitted through fraud or mistake. In that case the Court refers with approval to *Gillespie v. Moore,* 2 Johns., ch. 585, 7 Am. Dec., 559, in which it appeared that a deed was executed by mistake for 250 acres of land, when it ought to have been for 200 acres only. The court permitted parol evidence to prove the mistake, although it had been positively denied in the answer. It is needless to pursue this discussion further, for this Court has repeatedly held that the jurisdiction of a court of equity to correct mutual mistakes in deeds and like instruments, when such mistake is admitted or distinctly proven, is clear and unquestionable. *Morisey v. Swinson,* 104 N. C., 555; *Kornegay v. Everett,* 99 N. C., 30.

In this connection we will consider the third and fourth assignments of error, that is, the refusal of the court to dismiss the complaint under the statute, at the close of the evidence, and the refusal to charge that there was no evidence of mistake. The court properly refused both requests. The evidence is abundantly sufficient to sustain plaintiff's allegation of a mistake. It was clear, strong, and convincing (848) in character, and the court, in its charge, instructed the jury that plaintiff must have satisfied them by that kind of evidence of the mistake, and unless it had done so, the jury should answer the issue "No." How could the evidence be less than strong, clear, and convincing when the plaintiff's witnesses testified positively to the mistake

and also to the admissions of the mistake by the defendant, which admissions he would not deny when he took the stand as a witness and testified in his own behalf?

But the defendant complains that the court did not submit the proper issues, although requested to do so. We think the issue submitted was sufficiently comprehensive in its scope to enable the defendant to present his defense in all its aspects, and it seems that by appropriate prayers for instructions he fully availed himself of this opportunity and privilege, and he suffered no prejudice by the action of the court. *Ratliff v. Ratliff,* 131 N. C., 435. The prayers for instructions were refused, to be sure, but not because they did not come within the scope of the issue submitted to the jury, but because they were not proper in themselves and were not applicable to the peculiar facts of the case. Besides, the second, third, and fourth issues as tendered by the defendant should not have been submitted, because they were irrelevant to the facts of the case. The first issue tendered was not broad enough, and as far as it did go was embraced within the issue submitted by the court. The testimony of Lindau, as to the intention of the parties, was clearly competent. The question in dispute was as to the intention of the parties in making the deed, and any testimony tending to show what it was, especially when it came from one of the parties to the transaction, who must have known that intention, was admissible to show what the parties intended to do and that the deed did not correctly express the agreement, which was the very fact in issue.

(849) The defendant's first and third prayers for instruction were given by the court and the second and fourth refused. We can see no error in this ruling. This is not a case where the principle invoked by these prayers has any application. Both parties were laboring under a wrong impression as to the dimensions of the storehouse lot. It is clearly established that the parties intended to convey that lot, with reference to its particular boundaries, and no more land than it embraced, and we do not think the mere fact that it was described as containing 50 by 150 feet was any evidence of negligence on the part of the plaintiff which is sufficient to deprive him of equitable relief by the correction of the mistake. It is just that kind of a case where the parties have been thrown off their guard and for that reason have failed to inform themselves, by a clear misapprehension of both of them as to the dimensions or the boundaries of a lot which was sold by one and bought by the other. *Pugh v. Brittain,* 17 N. C., 37, it seems to us, effectually disposes of this exception. In that case the deed described the land conveyed by metes and bounds, and by mutual mistake of the parties it covered land which the vendor did not intend to sell nor the vendee to buy. In reference to the plaintiff's right to a

correction of the deed, the Court said: "It is therefore the opinion of the defendant that the plaintiff conveyed land to him which neither he nor his brother believed was included in the boundaries set forth in the deed, and which they both knew belonged to another person. The bill is filed to rectify the mistake. But the defendant insists that as the parties were ignorant of the lines and had not the means of ascertaining them by a survey, the vendor meant to sell and he to purchase all the land described in the deed to the elder Pugh, grandfather of the plaintiff—that he looked to the paper title only. If a person was purchasing another's interest in land in no respect located, there might be some ground for such a claim. But in this case the parties had a knowledge of the land sold, but not of its particular boundaries: for the defendant describes it as low, flat land, uncleared and covered with water in the winter. And neither party ever dreamed that Chamberland's land was part of it. For it seems that Bartlett, who claimed under Chamberland, was in actual possession of that land." (850)

But if plaintiff had been negligent, it does not follow that he has lost thereby his right to relief. "Even negligence may not in all cases close the doors of chancery against a complainant; for if the position of either party had not been changed in consequence thereof, relief may be granted." Bispham Eq., sec. 192. What change prejudicial to the defendant has taken place since the deed was made? There has been none, except the outlay for improvement or betterments, and the plaintiff agreed to repay to him the amount so expended. When he made these improvements he knew, according to his own testimony and the admissions which were made by him, that he had not purchased any part of the Combs lot, and therefore made the improvements, it would seem, with full notice of the plaintiff's equity. The plaintiff will no doubt allow him for the money actually expended in the way of betterments; but that is now a matter which must be settled between them. We merely suggest it as a proper course to be taken.

Upon a careful consideration of the whole case we can find no error which was committed by the court in the trial below.

No error.

DOUGLAS, J., concurring: I concur in the opinion upon the evidence of the defendant himself, who practically admits that he did not think he was buying anything more than the storehouse lot. And yet I think this case goes to the verge of the doctrine. There is no discrepancy between the previous contract and the deed. The defendant did not offer to buy the storehouse lot as such. He made a written offer to buy a lot at a designated spot, measuring 50 by 150 feet. The deed was made in strict accordance with the written offer. It is (851)

true, this lot covered the storehouse lot, but it was not limited to the storehouse lot, certainly not in terms. Both parties thought the lot was 150 feet deep, and both parties knew that the plaintiff had the right to convey that much land, as it owned the surrounding land. Strictly speaking, there was no mistake either in the written contract or in the deed made in pursuance of the contract. Both papers were written as the parties intended them to be written. The sole mistake lay in the fact that neither party knew the exact depth of the storehouse lot, so-called; which, it seems, was all that either party intended to buy or sell. I fully concur in the intimation of the Court that the defendant should recover all betterments. Asking from a court of equity relief from its own mistake, the plaintiff should be required to do equity to the one admittedly holding the legal title.

While this decision does not overrule *McKenzie v. Houston,* 130 N. C., 566, which involved the construction of a deed, it is, of course, subversive of its essential principle.

Cited: *Hatcher v. Dabbs,* 133 N. C., 241; *Deaver v. Deaver,* 137 N. C., 246; *Lehew v. Hewett,* 138 N. C., 8; *King v. Hobbs,* 139 N. C., 173; *Jackson v. Telegraph Co., ib.,* 357; *Wilson v. Cotton Mills,* 140 N. C., 57; *White v. Carroll,* 147 N. C., 334; *Bell v. McJones,* 151 N. C., 89; *Busbee v. Land Co., ib.,* 515; *Moore v. Moore, ib.,* 557; *In re Herring,* 152 N. C., 259; *Clements v. Ins. Co.,* 155 N. C., 61; *Ellett v. Ellett,* 157 N. C., 163; *Wilson v. Scarboro,* 163 N. C., 389; *Palmer v. Lowder,* 167 N. C., 334; *Ray v. Patterson,* 170 N. C., 228; *Allen v. R. R.,* 171 N. C., 342; *Sills v. Ford, ib.,* 738; *Plemmons v. Murphey,* 176 N. C., 673; *Brewer v. Ring,* 177 N. C., 487; *Hall v. Giessell,* 179 N. C., 660.

(852)

COGDELL v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Filed 10 June, 1903.)

1. Evidence—Opinion Evidence—Expert Evidence—Negligence.

In an action to recover for personal injuries, it is not competent for a witness to testify that a plank, alleged to have been rotten, would have, if sound, held the weight of the intestate of the plaintiff.

2. Negligence—Presumptions—Ordinary Care—Inference—Instructions.

Where the trial judge is requested to instruct that one who is killed is presumed to have exercised due care, it is error to refuse the same and substitute therefor the instruction that an inference arises from the instinct of self-preservation that the person killed used due care.

3. Pleadings—Contributory Negligence.

Where an answer alleges that the death of the intestate was caused by his own negligence and not by any negligence of the defendant, such allegation is not a sufficient plea of contributory negligence.

PETITION to rehear this case, reported in 130 N. C., 313. Petition allowed.

Charles F. Warren for petitioner.
Small & McLean in opposition.

WALKER, J. This case is before us the third time, upon a petition to rehear and revise the former judgment of this Court, rendered at February Term, 1902, affirming the judgment of the court below, which was adverse to the plaintiff. The case is reported in 124 N. C., 302, and 130 N. C., 313.

We think it is necessary to refer to only three of the exceptions taken by the plaintiff at the trial. The plaintiff proposed to ask a witness the following question: "If this plank on the apron had been sound and not cedar-hearted or rotten, could a man of Cogdell's weight and size have stood on it with safety and thrown off the lump coal, or fallen on it from the top of the car without its breaking under (853) him?" Defendant objected to this question; the objection was sustained, and plaintiff excepted.

We do not think that this matter is the subject of expert or opinion evidence. The witness could well have described the plank and its condition, and the jury would then have been just as competent to form an opinion as to its strength and safety as the witness. The conclusion reached by the Court at the last term upon this question was correct, for the reasons stated in the opinion of the Court.

The plaintiff in apt time requested the court to charge the jury that "The law presumes that a person found dead and killed by alleged negligence of another has exercised due care himself." The court refused to give this instruction, and charged the jury in its stead that "An inference arises from the instinct of self-preservation that the person killed has exercised due care himself." We are of the opinion that the court erred in refusing to give the instruction as prayed for by the plaintiff and in substituting therefor the instruction which it did give with reference to this matter. It is well settled that the court is not required to charge the jury in the very words of a prayer for instruction; but if the prayer contains a correct statement of the law as applicable to the facts of the case, the court must give it at least substantially, and cannot substitute an instruction of its own for it, if thereby the instruction as requested to be given is weakened or dimin-

ished in its force. While the court is not required to use the words of the prayer, it must not change the substance of it in a way calculated to impair its force. The law does not regard the form, but even the form should not be so modified as to impart to the instruction less weight than it would have with the jury if given as it was submitted to the court; provided, always, that the instruction, as asked, is in itself correct with reference to the case presented by the proof. In the case now under consideration the court was requested to charge that there
(854) was a presumption that the deceased had exercised care, which the court refused to give, but charged the jury that there was an inference that due care was exercised. It is undoubtedly true that the law raises a presumption of care and the party against whom it is raised must overcome it by proof of facts inconsistent with the fact presumed. The presumption has a technical force of weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but in the case of a mere inference there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury. In *Johnson v. Chambers,* 32 N. C., 292, *Pearson, J.,* distinguishes between a presumption and inference. "Malice," says he, "may, in some cases, be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should have been left to them." We do not think the charge given by the court in response to this prayer of the plaintiff was the full equivalent even in substance of the latter, and, as we have seen, it must be so to justify the court in changing the form of the instruction. When the court refused to give the instruction as plaintiff requested it to be given, and substituted that which was given, the jury might well have inferred that the court was of the opinion that the prayer for instruction was too strongly worded, and that the inference was to be drawn by them and that it was not obligatory upon them to infer the fact of care on the part of the intestate. In *Bragaw v. Supreme Lodge,* 124
(855) N. C., 154, the Court recognizes the legal difference between a presumption and an inference. The court had charged the jury that if a notice was correctly addressed and deposited in the post-office, the law presumes that it was received and, therefore, had been duly served; but afterwards the court left it to the jury to decide as an open question of fact or as an inference to be drawn from the evidence

whether the notice had been served or not. This Court held that it was error to have thus weakened the force of the presumption.

The plaintiff objected to the submission of the issue as to contributory negligence, and we think the objection should have been sustained. It is alleged in the answer that the intestate's death was not caused by any negligence of the defendant, but by his own negligence. This is not a sufficient statement of the defense of contributory negligence. Indeed, it is not a statement of contributory negligence at all, for the law, when contributory negligence exists, presupposes the negligence of the defendant, which is denied in the answer in this case. The answer in this respect did not state any matter which could not have been considered under the first issue. What is said in the answer is nothing more than an averment that there was no negligence on the part of the defendant, and that the intestate's death was caused solely by his own negligence. If a pleading is defective in statement, the defect will be waived unless the opposing party demurs to the pleading for that reason. Where there is any uncertainty or indefiniteness in the statement, the court will order the pleading to be made certain and definite on motion, if made in apt time. This is not a case of defective or indefinite statement, but an entire failure to plead the defensive matter. The court may, and no doubt will, permit an amendment of the answer in this respect if the defendant desires it.

There must be a new trial because of the errors pointed out. (856) Petition allowed.

Cited: *S. v. Adams,* 133 N. C., 672; *Marks v. Cotton Mills,* 135 N. C., 290; *Stewart v. R. R.,* 141 N. C., 277; *Dermid v. R. R.,* 148 N. C., 195; *Britt v. R. R., ib.,* 41; *Wright v. R. R.,* 155 N. C., 329; *Daniel v. Dixon,* 161 N. C., 380; *Bennett v. Tel. Co.,* 168 N. C., 499; *Brown v. R. R.,* 172 N. C., 606.

SEAWELL v. CAROLINA CENTRAL RAILROAD COMPANY.

(Filed 10 June, 1903.)

1. Evidence—Sufficiency of Evidence—Passengers—Carriers—Railroads.

In this action against a railroad company to recover damages for an assault by its agents and employees while the relations of passenger and carrier existed between the plaintiff and the railroad company, the evidence justifies the refusal of a nonsuit by the trial judge.

2. New Trial—Misconduct at Trial—Trial—Judge.

It is not improper for the trial judge, during the trial and while reading the evidence to the jury, to move to a table within the bar in front of the jury.

3. New Trial—Misconduct at Trial—Trial—Judge—Witness.

It is not prejudicial for the trial judge to order a witness for the defendant into custody for laughing at certain evidence offered by the plaintiff, such witness afterwards stating that he was not laughing, but coughing, and the court taking no further notice of the matter and releasing him from custody.

ACTION by H. F. Seawell against the Carolina Central Railroad Company, heard by *Robinson, J.*, and a jury, at September Term, 1902, of MOORE.

The following issues were submitted:

1. Was the plaintiff a passenger of the defendant company, as alleged in the complaint?

2. Did the defendant company, through its agents and employees, assault, or aid, abet, and encourage an assault, on the plaintiff, as alleged in the complaint?

3. Did the defendant company neglect, fail, and refuse, through its agents and employees, to protect or offer to protect the plaintiff (857) against the assault, as alleged?

4. What damage is the plaintiff entitled to recover?

The jury answered the first, second, and third issues "Yes," and the fourth issue "Four thousand and five hundred dollars ($4,500)."

From a judgment for the plaintiff, the defendant appealed.

W. J. Adams, U. L. Spence and Douglass & Simms for plaintiff.

J. D. Shaw, Day & Bell, Shepherd & Shepherd, and Murchison & Johnson for defendant.

CLARK, C. J. The complaint alleges "that on or about 2 June, 1900, the plaintiff, who had previously purchased for a valuable consideration a mileage ticket, then in his possession, which entitled him to transportation on said Carolina Central Railroad, entered upon the premises of the defendant at its station in the town of Shelby, in the county of Cleveland, for the purpose of boarding as a passenger a train of the defendant company, which, according to the schedule and time-table of the defendant, as plaintiff is informed and believes, was expected to arrive at said station within a short time thereafter, with a view to traveling on said train from said station to Hamlet, in Richmond County. That while the plaintiff was thus on the premises of the defendant awaiting the arrival of said train, and between the time of the arrival and departure of said train, and while the plaintiff was in the act of entering said train for the purpose of riding as a passenger thereon from said town of Shelby to the said town of Hamlet, and while the relation of passenger and carrier subsisted between the plaintiff and the defendant, as the

plaintiff is advised and believes, the defendant company, through (858) one Walter Ramseur and Paul Carroll, who, as plaintiff is informed and believes, were then the agents and employees of the defendant in said town of Shelby, and had charge of the business and premises of the defendant at said station, and were then and there engaged in the service of said company, together with other persons to the plaintiff unknown, wrongfully and unlawfully did assault and beat the plaintiff, striking him on the face and on various other parts of his person with eggs, and did otherwise maltreat the plaintiff, and in the presence of the plaintiff and of various other persons did use indecent, insulting, and opprobrious language with reference to the plaintiff while at said station, by reason of which assault, battery, and maltreatment the plaintiff was obliged to ride on said train in the presence of various passengers from said station in Shelby to the city of Charlotte in clothing which was badly soiled by the impact and bursting of said eggs, and thereby rendered uncomfortable, disagreeable, and for the time unfit for use on said train, or other public place, or in the presence of said passengers or other persons, and by reason of which assault, battery, and other maltreatment the plaintiff was greatly humiliated, injured in body, mind and reputation, and damaged in a large sum, to wit, in the sum of $10,000."

For a second cause, the same state of facts are set out, save that instead of alleging the active participation of the agents of the defendant, it is averred that the assault, in the manner and under the circumstances as above described, was committed by various persons to the plaintiff unknown, in the presence of Walter Ramseur and Paul Carroll, agents of the defendant, who then and there had charge of the premises of the defendant at said station, "and the defendant neglected, failed and refused, through its agents and employees, to restrain the conduct of said persons or in any manner to interfere with them, or to protect or to offer protection to the plaintiff against said as- (859) saults, insults, and maltreatment; but on the contrary, the defendant, through its said agents and employees, encouraged, aided, and abetted the same."

The chief exception relied on is to the refusal of the motion to nonsuit the plaintiff. The evidence showed that he had bought a ticket and was at the station to take the train, and while so waiting was assaulted in the manner stated in the complaint. "When a person comes upon the premises of a railroad company at the station, with a ticket, or with the purpose of purchasing one, he becomes a passenger" (*Tillett v. R. R.*, 115 N. C., 665; *Hansley v. R. R.*, 115 N. C., at p. 603, 32 L. R. A., 543, 44 Am. St., 474), and the right to care and protection begins. *Dodge v. Steamboat Co.*, 148 Mass., 207, 2 L. R. A., 83, 12

Am. St., 541. It is the duty of a carrier to protect its passengers from injury, insult, violence and ill-treatment from its servants, other passengers, or third persons. *Daniel v. R. R.*, 117 N. C., 592; *Williams v. Gill*, 122 N. C., 967; *Cogdell v. R. R.*, 124 N. C., 302; *Owens v. R. R.*, 126 N. C., 139, 78 Am. St., 642; *Palmer v. R. R.*, 131 N. C., 250; *Steamboat Co. v. Bracket*, 121 U. S., 637, 5 A. & E. (2 Ed.), 541; *Traction Co. v. Lane* (Tenn.), 46 L. R. A., 549. As far back as 1883, this doctrine was thus concisely stated by *Ruffin, J.*, in *Britton v. R. R.*, 88 N. C., at p. 544, in terms ever since deemed settled law. "The carrier owes to the passenger the duty of protecting him from violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be
(860) expected to occur under the circumstances of the case and the condition of the parties." The defendant in its answer admits that Ramseur was its employee, but alleges that Carroll was a servant temporarily employed by Ramseur. There was evidence that Ramseur, the station agent, knew the plaintiff, that he lived east of Shelby, and the next train was the one going east; that Ramseur saw the plaintiff on the platform at which passengers would board the train, with his traveling bag ten minutes before the train arrived; that Ramseur was on the platform of the depot when the first eggs were thrown at the plaintiff; that Ramseur came out of the depot building with the crowd by whom the eggs were thrown at the plaintiff from the company's platform, and that Ramseur was there when the last eggs were thrown and was laughing because the eggs were thrown, and soon after the first shower of eggs Ramseur said, "You did not egg him enough," and that the plaintiff had a mileage ticket.

As to Carroll, there was evidence that he was there to do anything Ramseur ordered, and especially to load and unload baggage; that he came out of Ramseur's office and threw an egg at the plaintiff, and that this was one of the first eggs thrown at him; that Carroll also threw the last egg. There was also evidence that the crowd was egging plaintiff and laughing and jeering at him and pelting him with eggs in plain view of Ramseur, and that he neither did nor said anything to prevent it, but simply laughed; indeed, Ramseur admitted in his testimony that he offered no remonstrance to the crowd and that he waved his hands at the plaintiff and laughed as the train moved off. There was also evidence that Trower, the conductor, was within fifteen or

twenty feet of the plaintiff and offered him no protection; that no other agent or employee of the defendant offered him any protection; that Ramseur and Carroll were in the crowd on the platform, when some one in the crowd said, "Leave here, you Populist dog; you suck eggs. I see them on you," the whole crowd laughed and jeered, Hamrick calling out, "Put that suck-egg dog off at Buffalo and (861) let him wash himself"; that Ramseur, the station agent, nor Wells, the assistant agent, nor any one else in the service of the company, made any effort to stop the assault or insult, and that Ramseur, Wells, and Carroll joined in the laughter at the insults and assault; that the plaintiff was just opposite Ramseur's office when the egging occurred; that the egging crowd went into Ramseur's office several times before the beginning of the assault and came out of the office with Ramseur immediately before the assault.

There was evidence contradictory of some parts of the above evidence, but upon a motion to nonsuit the court can only consider the evidence favorable to the plaintiff and in the most favorable light for him. The evidence was properly submitted to the jury to determine the truth of the controverted matters of fact.

The exceptions to evidence do not require discussion, and indeed were not much pressed here. The charge was as follows, but the exceptions entered thereto are without merit, and indeed they are omitted from the defendant's brief, except the last exception:

"This is an action brought by the plaintiff against the defendant to recover damages for an assault made upon him by its agents and employees while the relations of passenger and carrier existed. This is his first cause of action. The burden is on the plaintiff to satisfy you by the greater weight of the evidence that the relationship of passenger and carrier existed, and if you find as a fact from the evidence, and by the greater weight thereof, that the plaintiff had a mileage book entitling him to passage over the defendant company's road, and (862) that he came to the depot of the defendant ten or fifteen minutes before the departure of the train with the purpose to take passage on said train, and was at the place where passengers usually assemble for this purpose of boarding the train, then you will respond 'Yes' to the first issue. If the plaintiff has failed to so satisfy you, you will respond to the first issue 'No,' and will not consider the other issues. (To this the defendant excepted.) Eleventh exception.

"In passing upon the second issue the burden is on the plaintiff to satisfy you by the greater weight of evidence that the assault was committed by the agents and employees of the defendant company, or that they aided and abetted and encouraged said assault; and if the jury find as a fact from the evidence and by the greater weight thereof that the

agents and employees of the defendant company either assaulted or aided, abetted, or encouraged such assault upon the plaintiff while acting within the general scope of their employment—and acting within scope of employment means while on duty as agents and employees of defendant company—you will respond 'Yes' to the second issue; if not so satisfied, you will respond 'No' to said issue. (To this the defendant excepted.) Twelfth exception.

"For a second cause of action the plaintiff alleges that while the relationship of passenger and carrier existed he was assaulted at the depot of the defendant company, while he was there for the purpose of taking passage on defendant's train and at the place where passengers assemble for the purpose of boarding the train, and that the agents and employees of defendants, after they had notice of said assault made upon him by the persons who were at the depot, failed and neglected to afford to him the assistance and protection which was their duty to do, provided the jury respond to the first issue in the affirmative. The burden is on the plaintiff to satisfy you by the greater weight of the evidence of the fact that the agents and employees of the defendant company had
(863) notice of the purpose on the part of those who assaulted the plaintiff and had an opportunity to offer aid and protection to the plaintiff, and failed and neglected to do so, and if the plaintiff has so satisfied you, then you will respond 'Yes' to the third issue; and if not so satisfied, you will respond 'No' to said issue. (To this the defendant excepted.) Thirteenth exception.

"If the jury respond 'No' to the first, second, and third issues, then you will not consider the fourth issue; but if the jury respond 'Yes' to first issue and respond 'Yes' to either one of the issues two and three, then you will consider the fourth issue as to damage. In passing upon this issue the court charges you that the plaintiff is entitled to recover such actual damage as will compensate him for the injury to his wearing apparel, for any physical pain he suffered and for the mental anguish he endured by reason of the assault." (To this the defendant excepted.) Fourteenth exception.

The court began reading his notes of the testimony to the jury Thursday evening and continued to read until it began to grow dark, when the court moved to a table within the bar in front of the jury, where there was sufficient light, and continued in this place during the remainder of the session Thursday evening. When the court convened Friday morning, the court resumed its position which it had occupied Thursday evening, because of the convenience and to save the voice of the court and to enable the jury to hear the testimony and the charge of the court. (Defendant excepted.) Fifteenth exception.

During the trial of this cause, and while the plaintiff was testifying as to his condition during the assault, and how he got the eggs out of his ear and face, some persons in the audience broke out in a loud laugh. The court required the jury to retire, and then stated, during the absence of the jury, that if there were any persons in the audience who had come for the purpose of laughing this case (864) out of court it would be well for them to retire at once. That if it were repeated, such unseemly and disreputable conduct would be punished by sending the person or persons engaged in it to jail for contempt of court. Afterwards some of these parties were called as witnesses for the defendant and testified that they engaged in the egging of the plaintiff.

Later during the hearing of the testimony, when Lineberger was sitting on the front seat in full view of the court and while one of the defendant's witnesses was testifying to how he pelted the plaintiff with eggs, the court saw and heard Lineberger break out in a loud laugh, and directed the sheriff to take him into custody. This was done, and Lineberger was placed out of view of the jury and remained there until he was called as a witness for the defense as to the character of some of the defendant's witnesses. At the close of his testimony the witness asked to make a statement to the court, and said that he was not laughing; that he had a bad cough and had his head down to cough so as not to make a disturbance; that he was one of the men who condemned what was done. This man was known to the court to be a witness at the time he was ordered into custody, and the purpose was to attach him for contempt; but after his statement the court took no further notice of his conduct and released him from custody. (Defendant excepted.) Sixteenth exception.

The judge stated that he saw and heard the witness laugh. The failure of the judge to take any further notice of the matter, or to punish for contempt, was not a matter for exception by the defendant. This and the preceding exception are evidently on the ground that the trial was prejudiced by the conduct of the judge, but we find nothing therein to sustain the allegation.

Affirmed.

Cited: *S. c.*, 133 N. C., 515; *Clark v. Traction Co.*, 138 N. C., 79; *Roberts v. R. R.*, 155 N. C., 86; *Lanier v. Pullman Co.*, 180 N. C., 412.

(865)

ELMORE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 June, 1903.)

1. **Negligence—Contributory Negligence—Couplers—Railroads—Master and Servant.**

In an action by a brakeman for damages for personal injuries, there can be no recovery where the injury was caused, not by a defective coupler, but because plaintiff negligently used his foot to push the bumper in place.

2. **Negligence—Contributory Negligence.**

The failure of a railroad company to have self-coupling devices on their cars is a continuing negligence; and, to an action for an injury resulting therefrom, contributory negligence is not a defense.

3. **Negligence—Contributory Negligence—Master and Servant—Couplers.**

The fact that an employee remains in the service of a railroad company, knowing that its cars are not equipped with self-couplers, does not excuse the railroad from liability to such employee, if injured while coupling its cars by hand.

4. **Negligence—Automatic Couplers—Railroads.**

The failure on the part of a railroad company to keep automatic couplers in proper condition and repair is negligence, as much as if the cars had never been equipped with such couplers.

5. **Negligence—Contributory Negligence—Master and Servant.**

In an action for a servant's injuries, a charge that if a coupler was out of order, so that it was necessary to go between the cars to make the coupling, and plaintiff was directed by the conductor, whom he was under duty to obey, to couple the cars, and he was compelled to go between the cars to couple, and it was dangerous, and more probable that it could not be safely done than that it could, plaintiff would be guilty of contributory negligence, was sufficiently favorable to defendant.

6. **Negligence—Contributory Negligence—Master and Servant.**

In an action for a servant's injuries, an instruction that if plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that by reason of his position he acted foolishly and without prudence with reference to the character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler, was sufficiently favorable to the defendant.

MONTGOMERY, J., dissenting.

ELMORE *v.* R. R.

PETITION to rehear this case, reported in 131 N. C., 569. Petition allowed.

I. F. Dortch, W. T. Dortch, and W. C. Monroe for petitioner.
Day & Bell, Shepherd & Shepherd, and T. B. Womack in opposition.

CONNOR, J. This cause is before us upon a second petition to rehear. We have given the case a very careful consideration, recognizing the well-settled principle by which this Court has always been governed, that a petition to rehear will not be entertained unless it appear that some material point was overlooked or some controlling authority escaped the attention of the Court, or some other weighty consideration requires it. *Hannon v. Grizzard,* 99 N. C., 161; *Fisher v. Mining Co.,* 97 N. C., 95.

The cause was heard at the February Term, 1902, upon an appeal from the judgment of the Superior Court of Wayne County in favor of the plaintiff. The judgment was affirmed by a majority of the Court, two of the justices dissenting. *Clark, J.,* said: "This case is simply a repetition of *Greenlee v R. R.,* 122 N. C., 977; 41 L. R. A., 399, 65 Am. St., 734; *Troxler v. R. R.,* 124 N. C., 191, 44 L. R. A., 313, 70 Am. St., 580, and of several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but when plaintiff was injured in making a coupling there was evidence that the automatic coupler had been out of (867) repair five months or more, to the knowledge of the defendant." The opinion concludes: "It is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans.* If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as failure to have the automatic coupler on that car." *Cook, J.,* dissenting upon the ground that, in his opinion, the Court should have instructed the jury that, upon the whole evidence, they should answer the second issue, to wit, "Did the plaintiff by his own negligence contribute to his injury?" in the affirmative. *Mr. Justice Montgomery* concurred in the dissenting opinion.

The cause was reheard at the August Term, 1902, 131 N. C., 569, and the opinion of the majority of the Court was adverse to the plaintiff; *Clark, J.,* and *Douglas, J.,* writing dissenting opinions.

We are now called upon to reëxamine the record in the light of the several opinions and dissenting opinions heretofore filed. The

syllabus of the report of the case at the last term states the conclusion arrived at by the majority of the Court as follows: "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." We unhesitatingly adopt this as a correct proposition of law. The fact put in issue by the pleadings and in respect to which testimony was introduced by the plaintiff and defendant, is whether there was a defective coupler, and whether the plaintiff was injured by reason of such defect, and whether he was at the
(868) time in the discharge of his duty, that is, whether he was ordered by the conductor to make the coupling. Of course, if he was not injured by a defective coupler, or if he was not in the discharge of his duty, or if he recklessly or carelessly went between the cars, he could not recover. This brings us to an examination of the testimony and his Honor's charge.

The allegation is, that the plaintiff, being in the employment of the defendant as a flagman on 17 September, 1900, was ordered by the conductor in charge of said train, whose orders plaintiff was bound to obey, to remain near the cars on the main track, below the sidetrack, for the purpose of coupling the cars to the cars upon the sidetrack, which order the said conductor well knew could not be performed without going between such cars on account of the condition of the coupler, and the said cars upon the sidetrack were put in motion by the defendant, and were negligently permitted to roll very rapidly, by means of what is known as "kicking cars," along said sidetrack and on the main track, and while in the discharge of such duty was injured by reason of the defective condition of the coupler.

These allegations are denied. It was also denied that it was any part of the plaintiff's duty to couple the cars, or that he was ordered to do so by the conductor, and it is alleged that his act in doing so was voluntary and officious, and that he negligently and carelessly undertook to use his foot to kick over the drawhead, instead of his hands, and that in so doing his foot slipped and was caught between the drawheads and was crushed, and that he was injured by his own gross negligence. Upon these allegations appropriate issues were submitted to the jury. Without reviewing the testimony, it is sufficient to say, and it is not denied, that there was testimony in behalf of the plaintiff to the effect that the cars were supplied with automatic couplers, but that, at the time of the injury,
(869) they were not in proper condition; that they had been in a defective condition for several months, and that the conductor knew of it. There was also evidence that the plaintiff knew of the defective condition of the couplers. There was evidence that plaintiff was ordered

by the conductor to make the coupling, and that it was the duty of the conductor to report persons engaged in the service under him for disobedience of orders, and that upon such report they would be discharged. There was testimony in behalf of the defendant contradicting much of this testimony. The plaintiff was asked the question: "If the coupler had been in perfect condition, would you have been able to couple without putting your foot between there?" He answered: "Yes, sir; I would have been able to fix it without my foot." Upon cross-examination he was asked: "Why did you go between those cars when you knew that it was against the rules of the company to do so, and when you were ordered to do a dangerous thing by the conductor?" To which he answered: "I obeyed him, sir." He was asked: "Did you know that he could not discharge you?" He answered: "I knew if he reported me, that he could have me discharged if I disobeyed him." He was asked the question upon cross-examination: "If the link had been in perfect condition, would you have had to kick it?" To which he answered: "No, sir." "Did you not know that it was carelessness to use your foot to do such a thing?" "I had seen other people use their feet. I was instructed to couple and I tried to do so." He was asked if he knew the rule prohibiting employees from going in between the cars while they are coupled to the engine, or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose while the train is in motion, and providing that one who did so was acting at his own risk and against the rules of the company, and would be subject to discharge from the service. He answered (870) that he had never read it and had never heard it read. He had heard of it. That he violated the rule because he was instructed by the conductor. That he knew that the coupler was out of repair. Heard the conductor say so. There was much other testimony from the plaintiff along the same line. The defendant introduced the conductor and several other witnesses, who contradicted the plaintiff in many material respects. The testimony was conflicting and contradictory. Upon the close of the evidence, defendant moved the court to nonsuit the plaintiff, which motion was refused.

The court charged the jury as follows: "It was the duty of the defendant to furnish the train of cars spoken of in evidence with the automatic couplers, and it is admitted that they had automatic couplers, and it was further its duty to inspect from time to time these couplers, for the purpose of seeing if they were in repair; and if they failed in this respect, and if said couplers became out of repair, it was guilty of negligence (but if the jury shall find from the evidence that the part of the coupler on the end of the caboose car was not quite in line with the corresponding part on the end of the car coming toward it and to which

it was to be coupled, and if the plaintiff to get it in line kicked the part on the end of the caboose, and if the jury further find that the standard automatic coupler on said cars had some play in its socket, allowing it to move to the right and left on account of curves in the track, and that this was necessary for the movement of the train, and if the jury shall find that this was the proper way for such couplers to be, and if the jury shall further find that this was the natural result from its proper construction and use, and that the coupler was not otherwise out of repair, then the defendant was not negligent in failing to provide
(871) these couplers as prescribed by law.) To this part of the charge enclosed in brackets the defendant excepted.

("If the jury further find from the evidence that the train of cars spoken of in evidence had automatic couplers, which would have made it unnecessary for the plaintiff coupling the cars to go between them and to use his hand or foot, and they further find that those couplers had become out of repair for such a length of time that the defendant knew or ought to have known that they were out of repair, and for such a length of time that defendant could have had them repaired, and that the defendant failed to repair said couplers, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, and that in the condition in which the couplers were that it was necessary in order to couple to use the hand or foot, and they further find that the plaintiff was a flagman on said train and under the direction of the conductor, and that the conductor directed him to couple the cars, and in doing so he was injured, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the first issue 'Yes.') To so much of the charge enclosed in brackets, the defendant excepted.

("If the jury find from the evidence that the train of cars had automatic couplers which would have made it unnecessary for the plaintiff coupling the cars to go between them, and it is admitted that they had standard automatic couplers, and if they further find from the evidence that these couplers were in repair, so that it was unnecessary for the plaintiff coupling the cars to go between them, and that the plaintiff was a flagman on said train and under the direction of the conductor, and the conductor directed him to couple the cars, and in so doing he did go between them unnecessarily and was injured, then it is the
(872) duty of the jury to answer the first issue 'No.') To so much of charge in brackets the defendant excepted.

"If you answer the first issue 'No,' you need go no further, but return your verdict; but if you answer the first issue 'Yes,' then you proceed to answer the second issue. The second issue, you will understand, is this:

'Did the plaintiff by his own negligence, contribute to the injury complained of?'

("Now, coming to the consideration of the second issue, if you should reach that issue: If the jury find from the evidence that the couplers were out of repair and had been for such a length of time that the defendant knew, or by the exercise of reasonable care should have known, that they were out of repair, and for such a length of time that the defendant by the exercise of reasonable diligence could have had them repaired, and that the plaintiff coupled the cars under the direction of the conductor, and that it was his duty to obey the conductor, and that he would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the second issue 'No.') To that part of the charge in brackets the defendant excepted.

("And if the jury further find from the evidence that the plaintiff undertook to couple the cars under the direction of the conductor and that it was his duty to obey the conductor, and but for the condition of the couplers he would not have been injured, this would be a continuing negligence on the part of the defendant, and would continue up to the time of the injury, and would be a negligence subsequent to any negligence of the plaintiff, if such existed, and the negligence of the plaintiff under these circumstances would not be the proximate cause of the injury and would not be contributory negligence, and in that event it would be the duty of the jury to answer the second issue 'No.') To that part of the charge enclosed in brackets the defendant excepted.

("But this instruction is given subject to an instruction which (873) I will give you further on, and this will be so, although they may further find from the evidence that the plaintiff undertook to couple the cars in disobedience of the rule of the company, and although they may further find from the evidence that the coupling was dangerous, and that he knew it was dangerous, and although they may believe that he was negligent in coupling the cars and did not exercise due care on his part. This is given subject to an instruction I will now give you, which is the one alluded to in the previous instruction.) To that part of the charge enclosed in brackets the defendant excepted.

"In case of the use of couplers by railroads they are required to use improved couplers to prevent going between the cars to couple, and automatic couplers are such, and it is admitted that the defendant did use automatic couplers at the time of the plaintiff's injury; but it is contended that the one in use at the time of the injury was out of repair, and that it was known to be so by the defendant, or had been so for such a length of time that the defendant should have known it, and this is denied by the defendant, so that is a matter of contention.

("In this case, if the jury find by the greater weight of evidence that this particular coupler was out of order, so that it was necessary to go between the cars to couple, and the plaintiff was directed by the conductor to couple the cars, and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that if the jury shall further find that it was dangerous and that the probability that it could not safely be done was greater against his chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue would be 'Yes.') To that part of the charge enclosed in brackets the defendant excepted.

("This is the instruction I said I would give you to which a
(874) previous instruction was subject. If the jury find from the evidence that the coupler was out of order, and that the plaintiff knew it was such, and that it was too dangerous under the rule I have just given to go between the cars to couple, and if the jury find further that the plaintiff stood on the ground and used his foot to make the coupling, and that by reason of his position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was carelessness and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part, and even if the defendant knew of the defective condition of the coupling, and in that event it would be the duty of the jury to answer the second issue 'Yes.') To that part of the charge enclosed in brackets the defendant excepted.

("If the plaintiff acted recklessly and without care, if the jury have previously found the defendant guilty of negligence, the plaintiff could not recover. Now, it is important for you to get that distinction under the matters in controversy. If you find that the plaintiff was injured by reason of the negligence of the defendant in not having these couplers in proper condition, but when (if you answer the first issue yes) and in considering the second issue you should find that the plaintiff acting under the direction of the conductor and being subject to his orders, if you find he was so, went in between the cars to couple them, when the conditions were such that it was so dangerous that the chances were greater against his safety than in favor of it, then it would be such recklessness as would make him guilty of contributory negligence; or if after he went in there he acted with such carelessness as made his chances greater against his safety than in his favor, he would be guilty of contributory negligence; and in case of either of these findings it
would be the duty of the jury to answer the second issue 'Yes.'
(875) Now, if you answer the second issue 'No,' then you would proceed no further with your verdict.") To that part of the charge enclosed in brackets the defendant excepted.

This Court has decided in *Greenlee v. R. R.*, 122 N. C., 977, that the failure to have self-coupling devices on their cars was negligence *per se;* that it was a continuing negligence, and the question of contributory negligence did not arise when an employee was injured by reason of the failure to have automatic couplers in proper condition; that the fact that plaintiff remained in the service of the railroad company knowing that its freight cars were not equipped with self-couplers does not excuse the railroad from liability to such employee if injured while coupling its cars by hand. The doctrine of assumption of risk has no application where the law requires the use of new appliances to secure the safety of employees. This doctrine is approved in *Troxler v. R. R.*, 122 N. C., 902.

Mr. Justice Montgomery in the opinion in this case, 131 N. C., 573, says: "We are not disposed to modify in the least the decision made in *Greenlee v. R. R.*, 122 N. C., 977, 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." In *Fleming v. R. R.*, 131 N. C., 476, *Mr. Justice Montgomery* says: "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 defendant 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. There can be no contributory negligence of the plaintiff available to the defendant as a defense in (876) 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."

Chief Justice Furches, in his opinion, says: "While I agree to the doctrine in the *Greenlee* and in the *Troxler cases,* as I understand them, I cannot agree that they apply to the facts in this case."

We must accept the doctrine laid down by this Court in the *Greenlee* and *Troxler cases* as the law of this case. His Honor clearly followed the law, as thus laid down, in charging the jury in regard to the first issue, and could not in the light of those cases have charged the jury as a matter of law to answer the second issue "Yes." He did charge the jury that if they found by the greater weight of evidence that this particular coupler was out of order, so that it was necessary to go be-

tween the cars to couple, and the plaintiff was directed by the conductor to couple the cars and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that it was dangerous and the probability that it could not be safely done was greater against the chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue would be "Yes." The defendant excepted to this charge. It seems to us that it was as favorable as the defendant could have asked for or was entitled to. His Honor further charged the jury upon the second issue, that if the plaintiff knew that the coupler was out of order and that it was too dangerous to go between the cars to couple, and if the jury further find that plaintiff stood on the ground and used his foot to
(877) make the coupling and that by reason of his position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was carelessness and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part; and even if the defendant knew of the defective condition of the coupler, and in that event it would be the duty of the jury to answer the second issue "Yes." The defendant excepted to this instruction. We think it as favorable as could have been asked by the defendant. His Honor repeated to the jury that if the plaintiff acted recklessly and without care, plaintiff could not recover.

We have examined the instructions with care and have held the case under advisement for a long time. We are unable to see any reversible error in his Honor's instruction. The contentions were clearly and fairly stated to the jury, and we think his Honor's charge upon the whole correct. Whether the verdict of the jury is in accordance with the weight of the testimony, in view of the many contradictions therein, we have not considered, and it would not be proper for us to do so.

Voelker v. R. R., 116 Fed., 867, is very similar to the facts in this case, the Court saying: "The statutory requirement with respect to equipping cars with automatic couplers (referring to the act of Congress) was enacted in order to protect railway employees, as far as possible, from the risk 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
(878) is bound to know that if it calls upon one of its employees to make

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 risk 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 to 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 certainly negligence which will become actionable if injury results therefrom to the employee."

This Court has held in *Mason v. R. R.*, 111 N. C., 482, 18 L. R. A., 845, 32 Am. St., 814, that an employee "when acting under the order of the conductor, but contrary to a rule of the railroad company to which he has assented, was injured in coupling defective cars, of which he had no notice until it was too late to escape, it was error to withdraw the case from the jury on the ground that plaintiff, upon such facts, could not recover."

The relation existing between the conductor and brakeman with the relative rights and duties, and in respect to giving and obeying orders, is clearly set forth by *Mr. Justice Field* in *R. R. v. Ross*, 112 U. S., 391, and the subject is fully and ably discussed by *Mr. Justice Avery* in *Mason v. R. R.*, 111 N. C., 482.

Much of the argument in this cause before us was directed to the contention that the accident could not have occurred in the manner testified to by the plaintiff. The decision of this question was peculiarly the province of the jury, and its verdict, read in the light of the testimony and the instructions given, establishes the contention made by the plaintiff. The only portion of this record which we can review is the instruction of his Honor. This we have done carefully, and find (879) no reversible error therein. We are of the opinion that the judgment of this Court at the February Term, 1902, should be affirmed. This will be certified to the Superior Court of Wayne, to the end that the judgment below be *affirmed.*

Petition allowed.

MONTGOMERY, J., dissenting: I cannot concur in the disposition of the petition to rehear this case. The evidence in the case was stated correctly, as I think, in the opinion of the Court, 131 N. C., 569; and my views of the law, as in that opinion written, have undergone no change. It would serve no good purpose to repeat here what was written in the reported case above referred to.

Cited: Covington v. Furniture Co., 138 N. C., 378; *Liles v. Lumber Co.*, 142 N. C., 42, 43; *Biles v. R. R.*, 143 N. C., 86; *Hairston v. Leather*

Co., ib., 519; *Nelson v. Hunter,* 145 N. C., 334; *Beck v. R. R.,* 146 N. C., 470; *Dermid v. R. R.,* 148 N. C., 183, 193; *Blackburn v. Lumber Co.,* 152 N. C., 363; *Horne v. R. R.,* 153 N. C., 242; *Montgomery v. R. R.,* 163 N. C., 600; *McNeill v. R. R.,* 167 N. C., 398; *Sears v. R. R.,* 169 N. C., 454; *Smith v. Electric R. R.,* 173 N. C., 494; *Moore v. Harkins,* 179 N. C., 526, 528.

(880)

VICKERS v. DURHAM.

(Filed 10 June, 1903.)

1. Nuisance—Injunction—Sewage—Writ.

The discharge of sewage on the premises of a person is only a nuisance *prima facie,* and not *per se,* and whether an injunction should issue will depend upon the facts in the case.

2. Nuisance—Injunction.

In an action for an injunction to restrain the defendant from discharging sewage on the premises of the plaintiff, it is incumbent on the plaintiff to show that such action would result in a nuisance and in irreparable damage.

3. Evidence—Sufficiency of Evidence—Injunction—Nuisance.

The evidence in this case to restrain a city from discharging sewage on the premises of the plaintiff is not sufficient to show a probability that a nuisance would result therefrom.

4. Eminent Domain—Damages—Injunction.

The fact that the method prescribed for assessing the damage caused by taking land for the construction of a sewage plant was illegal is not ground for restraining the construction of the plant.

ACTION by J. H. Vickers against the City of Durham, heard by *McNeill, J.,* at September Term, 1902, of DURHAM. From a judgment dissolving a temporary injunction, the plaintiff appealed.

T. M. Argo, W. P. Bynum, Jr., and Boone & Biggs for plaintiff.
Jones Fuller for defendant.

MONTGOMERY, J. Our former courts of equity, from a very early day, as will be seen from the reported cases, have exercised jurisdiction to prevent by an injunction threatened evils of the nature of nuisance, when the injury, if done, could not be repaid in damages—the foundation of the interference of equity resting in the necessity of preventing irrep-

arable mischief and multiplicity of suits; and under The Code (881) still larger powers have been conferred, affording additional remedies for the protection of rights and the prevention of the committing or continuing of wrongs connected with the free use and enjoyment of property. Indeed, so common has it become to resort to the courts for such relief that injunction cannot properly be longer called a high prerogative writ. Nevertheless, such jurisdiction ought to be carefully exercised, and the party seeking relief by injunction should be required to show that the matter complained of is of more than trivial consequence and that he has a strong apparent right to relief. Little difficulty is experienced in administering rights under injunction proceedings where the matter in litigation is in existence and constitutes a nuisance *per se,* under that head being embraced offenses against the public morals, the unlawful obstruction or use of the public highways, acts endangering the health or safety of human beings, the overhanging of another's land, for the reason that proof, other than the fact of their existence, is not necessary to establish the nuisance. It is not necessary to go into the ill effects of such nuisance. Relief is granted in such cases as matter of course, upon its being shown that the fact exists. *Bell v. Blount,* 11 N. C., 384, 15 Am. Dec., 526. So, where the threatened and apprehended mischief would be a nuisance *per se,* upon an apparent cause being shown, an injunction would issue. In all other cases a different rule prevails, and its application to the different phases of each particular case is often attended with trouble, and has given rise to many conflicts in the decisions of the different courts. In the case now before us the apprehended mischief complained of is not a nuisance *per se.* In the complaint, used as an affidavit, the allegation is that the defendant intends to discharge and deposit the sewage of the city of Durham upon the plaintiff's premises near his residence, and there leave it. That threat, if carried out, would constitute a nuisance *prima facie,* but not a nuisance *per se. Evans v. R. R.,* 96 N. C., 46; (882) Wood on Nuisances, sec. 569. We are then, in the present case, required to examine the evidence with the view to see whether the judge who heard the matter was in error, as the plaintiff alleges, when he held that the restraining order should be dissolved.

The complainant must set forth and show that the acts which he seeks to restrain will be a nuisance, that the injury to him will be real and the damage irreparable, and that the apprehension is based on imminent danger. How or to what degree of certainty must the complainant make out his case? That is the main question in this matter. We think the rule has been laid down by this Court, and that is, that injunctions should be issued only in cases where, upon the evidence, there is a *probability* that the act complained of is, or will be, a nuisance if permitted

to remain or be committed. In *Raleigh v. Hunter,* 16 N. C., 12, the Court, after an examination of the evidence, said: "With us, under all the circumstances of the case, a probability is sufficient"; and in *Lowe v. Commissioners,* 70 N. C., 532, where the injunctive relief was the main relief sought in the action: "In such case where a reasonable doubt exists in the mind of the court whether the equity of the complaint is sufficiently negatived by the answer, the court will not dissolve the injunction, but continue it to the hearing." The plaintiff's counsel accepted the rule of the probability of resulting injury as the correct one in this case.

Upon a careful examination of the evidence, and fully alive to the importance of the matter involved, we have come to the conclusion that it is not probable that the plaintiff will be injured by the erection of the defendant's sewage plant, or that it will be a nuisance after it is erected and put in use. The answer of the defendant and the affidavits (883) filed in addition thereto leave no doubt upon our minds of sufficient importance to induce us to reverse the action of the judge. The complaint of the plaintiff and the affidavit signed by twenty-four citizens of Durham County constituted the plaintiff's evidence in the case before the judge. The substance of the complaint is that the defendant intended to extend its sewerage system out of the city and to deposit the sewage upon the lands of the plaintiff near his house, and that if the act was done it would injure the health of his family and thereby cause him irreparable damage and injure the value of his property. The defendants in their answer aver their purpose to discharge the sewage of the city of Durham, not on the lands of the plaintiff, but in a sewage disposal plant, built with brick and cement, and then, by most approved methods known to science, have it purified before its discharge into the streams. The defendants further allege that the plant will not in any way endanger the health of the plaintiff or in any way interfere with or interrupt his comfort. The defendants further answered as follows: "That after great diligence and inquiry as to his fitness, ability, and skill, it employed J. L. Ludlow, an engineer of great experience in such matters, to make the plans by which its system of sewerage is being constructed, and to supervise the erection and building of the sewage disposal plant; that it is necessary, in order to prevent disease, preserve health, and render the disposal of sewage harmless and inoffensive in every way, to purify the same in the manner above set out, and that owing to the topographical situation of the city of Durham it is necessary and most expedient to locate one of said plants at the place designated in the complaint and above referred to, and that by locating the same at that point the plaintiff will not be injured in health, nor will his comfort or happiness be in anywise disturbed; that the disposal

plant aforesaid will be entirely harmless and inoffensive, and the defendant again denies any and all allegations of injury to plaintiff, irreparable or otherwise." The affidavit of J. L. Ludlow, a sanitary and hydraulic engineer of experience and reputation, contains the (884) following: "Owing to the absence of near-by running streams of sufficient size to satisfactorily dispose of the raw sewage from the city of Durham, I have incorporated in my plans disposal works for purifying the sewage before being turned into the streams. In determining the system to be adopted for this disposal and the preparation of plans for the same, I have not been restricted in any way by the city authorities of Durham, but have been given full license to adopt the best methods available.

"The plan comprehends a bacterial treatment of the sewage by a system known as septic tank and contact beds, which constitutes the best method of sewage purification known to the science of engineering and sanitation.

"Numerous experiments conducted in Europe and America during the last quarter of a century of the purification of sewage have demonstrated that the purification of sewage is accomplished by means of microscopic organic life, known as bacteria, and the bulk of experimentation and investigation have been directed toward determining the most favorable conditions and environments in which the bacteria can perform their life process. Nature provides bacteria in abundance in the raw sewage, but the conditions favorable to their operation must be artificially provided wherever a large quantity of sewage is accumulated and requires treatment.

"The most important demonstration by these investigations and experiments has been that bacterial action is performed by two different groups of bacteria, viz., the anærobic and the ærobic, and that for proper and effective treatment of sewage, the conditions favorable to both groups of bacteria must be promoted. This has led to the development of the septic tank and contact bed system, which has been brought to a point of rational and practical operation under con- (885) trollable conditions and fixed regulations.

"In the septic tank and contact bed system, purification takes place in two or more stages. First, the raw sewage, from which the coarser materials may or may not be previously removed and strained, is passed into the septic tank, when the conditions favorable to biologic action by the anærobic bacteria are promoted and the solid matter contained in the sewage is broken up into more simple compounds. The septic tank is just what the name implies, viz., a tank of dimensions suitable to the amount of sewage to be disposed of, where the sewage is confined for a time out of direct contact with light and air, which is the condition

essential to the life processes of anærobic bacteria, *i e.,* absence of oxygen. While it does not appear that the anærobic bacteria constitute the only agent at work in the septic tank, but that organic substances known as enzymes, and probably other forces, are assisting in the process known as hydrolosis, or the tearing down of organic compounds and rendering them in a fluid or semifluid state; however, it is amply demonstrated that such treatment of sewage does render it in a condition favorable to rapid, effective purification when exposed to the action of the ærobic bacteria by means of filtration in the contact beds.

"The filtration process may be pursued with a sand or other porous bed of sufficient area, but as the agency required are the ærobic bacteria, that is, the group requiring an abundance of oxygen for performing their life processes, the purpose should be to use the type of filter most conducive to the activity of this group of bacteria and their rapid multiplication. This is best accomplished by a form of filter known as contact beds, wherein the filter media is some form of medium-sized material having the largest practical amount of surface for adhesion
(886) of bacteria. Quite a large number of different materials have been experimented with and found satisfactory, viz., broken stone, coal, coke, gravel, furnace slag, top cinders, clinkers, burned clay, broken into lumps, etc.

"By this system of sewage purification, almost any degree of purification that may be desired can be obtained by properly regulating the length of time which the sewage is exposed to the septic action in the septic tank and on the contact beds, and the number of contacts to which the sewage is exposed, and the purification of from 80 to 90 per cent, which is the extraction of this percentage of all impurities existing in the sewage, is entirely practicable and of easy accomplishment. This is accomplished, too, with an entire absence of injury, or even offense, to persons living in the immediate vicinity of the works.

"This system of sewage purification is universally recognized by the engineers and sanitarians as the best and most complete method known to science, and has already been adopted and installed in a large number of American, English and Continental towns and cities, and is rapidly displacing all other systems of purification. The city of Manchester, England, with a population of more than half a million, established a large experimental plant for bacterial purification of sewage in 1895, and conducted experiments much more exhaustive than any other city in the world. In 1898, this city employed a commission composed of an engineer, a biologist and a chemist, all of the highest rank in England, to report upon the various schemes of purification that had been suggested or tried up to that time, investing the commission with full authority and ample means for making any further experiments they

might deem advisable. The result of this investigation and experimentation was the adoption of the septic tank and contact bed system for treating the sewage, and to render it in a proper condition for discharging into streams without violating the very stringent requirements of the health authorities of the English Government. (887)

"The plans adopted for purification at Durham are shown in the blue print attached hereto. The sewage first goes into the chamber indicated as septic tank, where it is exposed to septic action, and is retained until the tank is filled. It is then pumped from the septic tank to what is designated as a dosing channel, from which it is fed by automatic apparatus to primary bed No. 1, until the bed is filled. The sewage remains in this contact bed for a sufficient length of time, viz., three or four hours, and is then discharged automatically by a time syphon to the secondary bed No. 1, where it is again exposed to the operation of the ærobic bacteria until the degree of purification that is desired is obtained, when it is discharged to the effluent pipe running into a near-by water-course.

"During the operation of primary and secondary beds No. 1, the sewage is again accumulated in the septic tank until it is filled and septic action has taken place, whereupon it is applied to primary bed No. 2, thence to secondary bed No. 2, in the same manner as on primary and secondary beds No. 1. We thus have the contact beds working intermittently, allowing each bed in turn to have a renewed supply of air while not in operation, so that the conditions favorable to the constant multiplication in numbers of the ærobic bacteria are provided by means of working the two pairs of beds intermittently, and all conditions favorable to both the anærobic and ærobic bacteria are thoroughly provided for, and the purification of the sewage is accomplished without any injury or harm to any person or any interests, and without any offense to the senses of smell or sight. Nature's process of purification of sewage and its transformation back into the original elements of which it is composed has been accomplished, and the effluent from the purification works which is turned into running streams has been rendered in a non-putrefying condition, and is quite harmless (888) and entirely inoffensive."

Affidavits of two other distinguished scientists were filed by the defendant, in which the plans and statements of the affiant Ludlow were approved and verified, except as to the lack of offensive odors at all stages of the purification of the sewage. The affidavit of Ludlow contains the statement that the purification of the sewage is accomplished with an entire absence of injury or even offense to persons living in the immediate vicinity of the works. The affidavits of the other affiants are silent on this point. The affidavit signed by twenty-four

citizens and filed by the plaintiff is as follows: "We, the undersigned, make oath and say that the sewerage system as proposed and now attempted to be established by the city of Durham would be greatly injurious to the property and health of the people resident in the vicinity of the locality in which it is proposed to establish what they call a plant. It would corrupt and poison the air and water which we and our domestic animals must breathe and drink, and generate disease and produce death. We further swear that we live near and along the line of this fork, the wet weather stream upon which it is proposed to locate the dumping ground of the filth, slime, excrement, and ordure of over one-half of Durham city, and have opportunities of knowing, and do know, whereof we speak. For some years this sewage has been emptied into Third Fork, which is dry most of the year, and has trickled down the bed of the stream and soaked into our lands, who reside along the stream, has filled the air with a nauseous and offensive and unhealthy stench, has produced disease, and in some families the death of its members. That we live along the line of such stream, some very near and others a mile or more therefrom, and speak from actual experience. That some of us live in the immediate vicinity of the proposed place of discharge and collection of the garbage, filth, and sewage, and know
(889) that the plaintiff, J. H. Vickers, as well as ourselves would be irreparably injured and damaged in our property and health and comforts of home by the collection in any way of said sewage in or near the creek or vicinity aforesaid, and that it would be a dangerous and unbearable nuisance; and the defendant further swears that the line of drainage could be safely and conveniently extended down said creek and the sewage conveyed away into a flowing stream, without harm or inconvenience to the people, and that those of us through whose lands the drain pipes would run will give the right of way without charge.

"Wherefore, we protest, in defense of our property, our families and our lives, against the establishment of the proposed plant."

So it appears from everything in the case that the complaint of the plaintiff is based solely upon an apprehension of injury. None of the witnesses of the plaintiff professed to know anything concerning the plant for disinfection, or the methods of purification. The plaintiff is simply afraid that he may be injured by something of which he has no theoretical knowledge and with which he has had no practical experience. On the other hand, the affidavits filed by the defendant are made by prominent and experienced scientists, and one of them has in several instances seen the practical results of the plan proposed by the city of Durham to dispose of its sewage. In *Dorsey v. Allen,* 85 N. C., 358, 39 Am. Rep., 704, this Court said: "When the anticipated injury is contingent and possible only, or the public benefit preponderates over the

private inconvenience, the court will refrain from interfering." We think that still the correct rule, though there may be and are some expressions to the contrary in *Marshall v. Commissioners,* 89 N. C., 103. In addition to what we have said above, the great importance to the city of Durham of the public work which it is trying to carry out, would make us hesitate before we would interfere by (890) injunction.

In the complaint of the plaintiff there is an allegation that the method of condemning the plaintiff's land by section 31, Private Laws 1899, is unconstitutional and void, and it is argued by the plaintiff's counsel here that the injunction should have been continued to the hearing on that account. We cannot see how an unconstitutional act of the General Assembly can be made a ground of equitable jurisdiction. In the case before us it is not questioned that power is conferred by the act upon the authorities of the city of Durham to take real estate for the purpose of establishing the sewage plant. The objection is that the method of assessing the value of the property condemned is illegal and unconstitutional. If that question was properly before us we would concur in that view. He can have his damages assessed in an action at law for that purpose or the defendant can proceed to have damages assessed under chapter 49 of The Code. We have no case in our reports in which this question is decided, but we have several in which the principle is decided —cases in which injunctions against alleged invalid city ordinances were refused. *Wardens v. Washington,* 109 N. C., 22; *Scott v. Smith,* 121 N. C., 94; *Cohen v. Comrs.,* 77 N. C., 2. The ground on which such relief is refused is that "a court of equity will never interpose its jurisdiction in the way of a mere protective relief, when the party has an adequate and effectual remedy at law, and is so circumstanced as to be able to assert it, but would rather leave him to seek his redress in that forum, except in some States where they have statutes expressly permitting it to be done." *Busbee v. Lewis,* 85 N. C., 332.

No error.

DOUGLAS, J., concurring in result only: I concur in the judgment of the Court on the understanding that its opinion means that the condemnation proceedings, so far taken, are unconstitutional (891) and therefore void, and that the plaintiff will have the right to maintain his action in the nature of trespass for damages for any such unlawful entry upon his property.

Cited: Paul v. Washington, 134 N. C., 385; *Durham v. Cotton Mills,* 141 N. C., 630; *S. c.,* 144 N. C., 711; *S. v. R. R.,* 145 N. C., 521;

Cherry v. Williams, 147 N. C., 458; *Little v. Lenoir,* 151 N. C., 419; *Berger v. Smith,* 160 N. C., 214; *Hines v. Rocky Mount,* 162 N. C., 414; *Scott v. Comrs.,* 170 N. C., 330.

RAY v. LONG.

(Filed 10 June, 1903.)

1. Issues—Ejectment—Trusts—Husband and Wife.

In ejectment of a husband and wife for land sold under execution against the husband, the issue set out in the opinion is sufficient in form and substance to present every material fact necessary to a determination of the case.

2. Evidence—Ejectment—Husband and Wife.

Where a husband and wife, suing in ejectment, claimed that the land involved had been purchased jointly by them, each furnishing a portion of the money, evidence to show the purpose for which a certain sum of money was furnished by the wife, and her accompanying directions, was properly admitted, as tending to prove a material fact.

3. Questions for Jury—Evidence—Weight of Evidence—The Constitution, Art. X, Sec. 6.

Whether evidence is clear, strong, and convincing is a question for the jury.

4. Estates—Entirety—Husband and Wife—The Constitution, Art. X, Sec. 6.

Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety is created, and they hold *per tout et non per my.*

5. Husband and Wife—Judgments—Executors—Estates.

No part of land purchased jointly by husband and wife can be sold under execution against the husband.

CLARK, C. J., and MONTGOMERY, J., dissenting.

(892) ACTION by H. M. Ray and wife against Jacob A. Long, heard by *McNeill, J.,* and a jury, at September Term, 1902, of ALAMANCE.

From a judgment for the plaintiffs, the defendant appealed.

John W. Graham for plaintiffs.

E. S. Parker, Jr., J. T. Morehead, and R. C. Strudwick for defendant.

DOUGLAS, J. This case was before us at February Term, 1901, and is reported in 128 N. C., 90. In that opinion the Court says: "The marriage having taken place since 1868, he should have said to the jury, as laid down in *Kirkpatrick v. Holmes,* 108 N. C., 206, and approved in *Ross v. Hendrix,* 110 N. C., 405: 'If her separate estate went into the hands of her husband and he invested it in land, taking title in his own name in the absence of any agreement to the contrary, a trust would have resulted to her.' In *Briscoe v. Norris,* 112 N. C., 676, it is said this equitable title was 'such as to enable her, upon the strength of it, to recover the land from her husband, or from any one purchasing of him with notice of her rights, or from any one who had bought the land at a sale under execution against her husband, for such person would acquire only such title as her husband had.'" That remains the law of this case, to be modified in its application in so far as the further development of the facts may require.

The following is the only issue submitted: "Was purchase money paid for the land in controversy furnished equally by Elizabeth A. Ray from her separate estate and by H. M. Ray, to procure a home for said H. M. Ray and wife? It was answered in the affirmative. This issue was objected to as insufficient by the defendant, who tendered seven different issues. We think that the issue as submitted was sufficient in form and substance to present every material fact necessary to (893) a determination of this case. When this is true, no exception thereto can be sustained. *Patterson v. Mills,* 121 N. C., 258; *Pretzfelder v. Ins. Co.,* 123 N. C., 164, 44 L. R. A., 424. In *Denmark v. R. R.,* 107 N. C., 185, this Court laid down the following rules governing the submission of issues:

1. Only issues of fact raised by the pleadings must be submitted to the jury.

2. The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment.

3. Of the issues raised by the pleadings, the judge who tries the case may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence, through the medium of pertinent instructions on some issue passed upon.

This is in entire consonance with the rule laid down in *Tucker v. Satterthwaite,* 120 N. C., 118, relied on by the defendant's counsel, to the effect, "That it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment

rendered therein, this Court will remand the case for a new trial." *Mitchell v. R. R.*, 124 N. C., at page 245, 44 L. R. A., 515.

Nor does it conflict with what is said in *Cox v. R. R.*, 126 N. C., 103, and *Thomas v. R. R.*, 129 N. C., 392, at page 396, as to the propriety of submitting separate issues in cases of negligence and others of kindred nature, where the material facts cannot be directly presented in
(894) one issue or found therein except inferentially by reference to the charge of the court. The issues tendered by the defendant were unnecessary, while some of them presented merely evidentiary facts. In *Timmons v. Westmoreland*, 72 N. C., 587, it was held that "It is error to submit to the jury issues which involve matters of evidence only tending to establish or deny the main issue."

The motion to dismiss was properly refused, as there was evidence tending to prove the plaintiff's contentions.

We see no objection to the evidence offered by the plaintiffs to show the purpose for which the $600 was furnished by the *feme* plaintiff and her accompanying directions. It was competent evidence tending to prove a material fact.

We find no error either in the charge or refusal to charge. Among other prayers the defendant requested the court to charge in substance that the evidence offered by the plaintiffs was *not* clear, cogent and convincing. This prayer was properly refused under the authority of *Lehew v. Hewitt*, 130 N. C., 22, where it was held that whether evidence was clear, strong and convincing was a question of weight and effect to be determined solely by the jury.

We come now to the legal effect of the verdict. The jury have found upon competent evidence and under proper instructions that the purchase money for the land in question was furnished equally by the plaintiffs, who are husband and wife, for the purpose of procuring a home for them.

When the case was here before it was held that with or without an agreement, if the wife's money went into the purchase of the land, a resulting trust was created whereby the husband became a trustee for his wife to the extent of her interest. Under the facts as now found, the wife had a right to demand a conveyance jointly to herself and her husband; and she would now have a right to have the deed reformed so as to give full force and effect to her equities. This is the practical
(895) result of the judgment in this case, certainly as between the parties. The effect will be to create an estate in entireties, in which the parties will hold, in the ancient language of the law, *per tout et non per my*. This estate is fully recognized by our law, and has not been impaired by section 6 of Article X of the Constitution. Whether it arises directly from the marital relation or from a presumption of intention,

is immaterial, so long as it exists. In *Motley v. Whitemore,* 19 N. C., 537, it is said (by *Gaston, J.*): "When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor. This was settled at least as far back as the reign of Edward III, as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by Lord Coke, 1 Inst., 187a." This case has been repeatedly cited with approval since the adoption of the present Constitution. In *Bruce v. Nicholson,* 109 N. C., 204, 26 Am. St., 562, the Court says (through *Merrimon, C. J.*): "The defendants, husband and wife, held the small tract of land conveyed to them, not as joint tenants or tenants in common, but by entireties. In contemplation of law, they were for such purpose but one person, and each had the whole estate as one person, and when one of them should die the whole estate would continue in a survivor. They, by reason of their relations to each other, could not take the *fee-simple* estate conveyed to them by moities, but both were seized of the entirety *per tout et non per my.* This is so by the common law, and is the settled law of this State," citing numerous authorities. "The nature of this estate forbids and prevents the sale or disposal of it or any part of it by the husband or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice such estate to any (896) greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person and the ownership of the estate of that person prevent the disposition of it otherwise than jointly. As a consequence, neither the interest of the husband nor that of the wife can be sold under execution so as to pass away title during their joint lives or as against the survivor after the death of one of them." "Indeed, it seems that the estate is not that of the husband or wife; it belongs to that third person recognized by the law, the husband *and* the wife."

Among the numerous cases that might be cited, the following will serve to exemplify the principle: *Todd v. Zachary,* 45 N. C., 286; *Woodford v. Higley,* 60 N. C., 237; *Long v. Barnes,* 87 N. C., 329; *Jones v. Potter,* 89 N. C., 220; *Simonton v. Cornelius,* 98 N. C., 433; *Harrison v. Ray,* 108 N. C., 215, 11 L. R. A., 722, 23 Am. St., 57; *Gray v. Bailey,* 117 N. C., 439; *Spruill v. Mfg. Co.,* 130 N. C., 42.

It is unnecessary to discuss the nature and effect of a resulting trust, as that point was decided, as far as it affects this case, in our former opinion; but a further discussion of the principle can be found in *Gorrell v. Alspaugh,* 120 N. C., 362.

While the action in this case is neither for the reconveyance of land nor for the reformation of the deed, yet we think it comes within the essential principle of *Stamper v. Stamper,* 121 N. C., 251. There the contract was to reconvey the land to H. H. and Anna Stamper, and it was held that the widow was entitled to specific performance. In the opinion it is said: "We must now consider the quantity of interest to be conveyed, which we think is the entire estate in the land acquired by Milton Stamper under the deed. The covenant was to
(897) reconvey to H. H. and Anna Stamper. They, being husband and wife, held their equitable interest, the right to demand a reconveyance upon breach of the covenant, in entirety, with the right of survivorship."

The judgment of the court below is

Affirmed.

MONTGOMERY, J., dissenting: In the original complaint it was alleged that the *feme* plaintiff, wife of the other plaintiff, had furnished one-half of the purchase money, $600, toward the purchase money of a tract of land of 154 acres which was conveyed by Thomas H. Long to the husband, and that the plaintiffs were entitled each to a deed for one-half of the 154 acres; "that of the tract of 154 acres 59 and 15-100 acres were conveyed by the plaintiffs to a son of the husband by a former marriage, upon an agreement that the wife should have a larger interest in the remaining 94 and 85-100 acres, and her interest in the 94 85-100 acres has thus been raised from half, which it was originally, to 6-7 as stated in the first article of this complaint in regard to the 60 acres therein described," and that the defendant Long is in the unlawful possession of the same, having purchased it at execution sale, the execution having been issued against the husband. The prayer for judgment is in the following words: "Wherefore the plaintiffs demand judgment that the *feme* plaintiff, Elizabeth A. Ray, is entitled to 6-7 of said land, and that the said H. M. Ray be declared to have held the same as trustees for her, and that her interest could not be sold under execution, and that the said defendant could not acquire the interest which said Elizabeth A. Ray had in said land; and that, she forbidding the sale, the defendant took subject to all equities which she had in said land; and for such other and further relief," etc.

(898) An amended complaint was afterwards filed as follows:

1. That at the time of the purchase of the 154 acres it was expressly agreed that the deed should be made to both the plaintiffs, H. M. Ray and Elizabeth Ray, and their heirs, by Thomas H. Long, but that through mistake the deed was made to H. M. Ray and his heirs; that said Elizabeth A. Ray having paid $600 toward the purchase money,

under the agreement, was entitled to have had said deed made to said H. M. Ray and Elizabeth and their heirs.

2. That the equitable title to said land at the time of the sale under execution of the 60 acres described in the complaint, being in said H. M. Ray and Elizabeth and their heirs, the sheriff had no right to sell under execution the contingent remainder of H. M. Ray, and nothing passed to the defendant by said sale and the deed of the sheriff thereunder, and the said plaintiffs are still the owners of the said tract of 60 acres and entitled to the possession thereof.

There was the usual prayer for relief in such cases. It will be seen from a reading of the plaintiff's complaint that the original cause of action was based on the allegation that the plaintiff had furnished one-half of the purchase money of the land, and that the same having been applied by her husband to the purchase, she was entitled to have him convey to her and her heirs one-half of the tract of land, he having taken the deed to the entire tract in his own name. In the amended complaint she alleged that she bought the land together with her husband, under an agreement that the deed should be made to them and their heirs, and that by mistake the deed was made to the husband alone.

According to the first complaint, the *feme* plaintiff furnished a part of the purchase money, and for that she was to have an equivalent in land conveyed to her and her heirs. According to the amended complaint, she furnished the money jointly with her husband, who furnished an equal amount, and the deed was to be made to them (899) and their heirs and assigns, by which an estate in entirety was created.

The defendant requested the court to submit, amongst others, two issues: one, whether or not the *feme* plaintiff had paid the $600 of the purchase money, and the other, whether at or before the time of the purchase by Henry M. Ray of the 154 acres from Thomas H. Long it was expressly agreed that the deed should be made to Henry M. Ray and wife jointly. His Honor refused the issues and submitted one in these words: "Was the purchase money paid for the land in controversy furnished equally by Elizabeth A. Ray from her separate estate and by Henry M. Ray to procure a home for said Henry Ray and wife?" Upon the pleadings the defendant, in my opinion, was certainly entitled to have the issues which he tendered submitted to the jury. After the evidence was all in, however, it was unnecessary to submit the last one, for the reason that there was no evidence whatever tending to show that the deed was executed under a mistake, or that it was ever agreed up to the time the deed was executed to H. M. Ray, the husband, that the deed was to have been made to him and his wife. Therefore, under the issue which his Honor did submit, the jury having found that the

feme plaintiff paid one-half of the purchase money of the land, his Honor should have held as a matter of law that a resulting trust was created by the deed to the husband in favor of the *feme* plaintiff for one-half of the tract of land, and that a judgment to that effect should have been rendered, according to the request for judgment made by defendant.

The defendant in his answer denied that any part of the land had been conveyed to the son of the husband, and there was no evidence offered on that question. In my opinion, there was error.

CLARK, C. J., concurs in the dissenting opinion.

Cited: *Jones v. Warren,* 134 N. C., 392; *Earnhardt v. Clement,* 137 N. C., 95; *Stalcup v. Stalcup, ib.,* 307; *Lance v. Rumbough,* 150 N. C., 25; *Isley v. Sellars,* 153 N. C., 378; *Eason v. Eason,* 159 N. C., 540; *Murchison v. Fogleman,* 165 N. C., 400; *McKinnon v. Caulk,* 167 N. C., 412; *Freeman v. Belfer,* 173 N. C., 582; *Moore v. Trust Co.,* 178 N. C., 124.

(900)

DOBSON v. SOUTHERN RAILWAY COMPANY.

(Filed 10 June, 1903.)

1. Exceptions and Objections—Evidence—Cross-examination—Witnesses—Waiver—Examination of Witnesses.

Objections to questions to a witness must be interposed when the question is asked and before the answer, or the right to have the testimony excluded is waived.

2. Evidence—Tax List—Railroad.

The testimony of a tax lister that the owners of a mill listed it at less than that claimed by them in an action for its loss by fire, is some evidence that it was not worth the amount claimed.

ACTION by Dobson & Whitley against the Southern Railway Company, heard by *Jones, J.,* and a jury, at February Term, 1903, of MCDOWELL. From a judgment for the plaintiffs, the defendant appealed.

Justice & Pless and Busbee & Busbee for plaintiffs.
S. J. Ervin, P. J. Sinclair and A. B. Andrews, Jr., for defendant.

WALKER, J. This action was brought to recover damages for the destruction of a flour mill belonging to the plaintiffs, together with the

machinery and stock therein, which plaintiffs alleged was caused by the negligent emission of sparks from one of defendant's engines.

In order to establish the negligence of the defendant the plaintiff introduced A. B. Finch, who had been examined as a witness at a former trial, and attempted to prove by him that the netting of the spark arrester was too coarse to prevent the escape of sparks from the engine. The plaintiff's counsel subjected this witness to a very severe and rigid cross-examination which we think was calculated to impeach his credibility and to disparage him before the jury, and thereby (901) prejudice the defendant. The examination was contrary to the rules and practice of the courts which obtain in such cases and should not have been allowed, if it had been objected to in apt time and in the proper way. A party may waive his right to the exclusion of incompetent testimony, ever so objectionable, if he fails to assert his right in due time; and so, when a witness is being examined in an improper manner, the objection to the character of the examination should be made known in apt time, otherwise the party prejudiced will be deemed to have waived it. A large part of the testimony of the witness Finch was incompetent because it was hearsay; but the defendant, so far as the record discloses, did not enter any objection in the manner required by law. Objection should be interposed when the incompetent questions are asked. It will not do to object after the question has been asked and answered. This would give the objector two chances, one to exclude the testimony if unfavorable to him and the other to make use of it if favorable; and for this reason the law requires that parties should act promptly or else the right to have testimony excluded, or the examination conducted within proper limits, will be waived.

Defendant introduced as a witness Charles A. Boyd, who testified that he was tax lister for the year in which the fire occurred, and that the machinery which was in the mill was listed by Dobson & Whitley, who told him that it cost $2,300. That he valued it at $1,200 for taxation, and they said they thought that was very high. D. J. Dobson, one of the plaintiffs, had testified that the machinery was worth $2,375.45, which was its original cost with freight charges added, and the plaintiffs placed that valuation upon it in this action. With reference to the damages the court charged as follows:

"On the point as to the value of the machinery, the loss and value of flour and other personal property, you have the uncontra- (902) dicted testimony of plaintiffs, but you must pass upon the evidence as to its truthfulness and as to the value and loss, and say how it is. What is the value of the property lost, the machinery, scales, and tools?" And again: "Upon these items you have the evidence of the plaintiff alone, the defendant offering no evidence to contradict the witness as

to the value he places upon these articles." The defendant excepted to each of these instructions; and we think that they were erroneous. The testimony of C. A. Byrd tended to contradict that of the plaintiffs as to the value of the machinery, and the court should not have told the jury, in view of Byrd's testimony, that the defendant had offered no testimony to contradict the plaintiffs upon this point. The charge practically withdrew Byrd's testimony from the consideration of the jury, when it tended directly and strongly to contradict the plaintiff's testimony as to the value of the machinery. It tended to show that while they had insisted on one valuation of the property at the trial, they had objected to the tax lister that a lower valuation was too high for the purpose of taxation.

In any view of the case, it was some evidence to go to the jury as to the true value of the property, and the defendants were entitled to have it submitted to the jury in the charge of the court. For this error there must be a new trial; and as we think the examination of the witness Finch may, under the facts and circumstances of the case, have prejudiced the defendant, though it was not objected to in the proper manner, we direct, in the exercise of our discretion, that the new trial shall extend to all of the issues.

New trial.

DOUGLAS, J., concurring in result only: I agree with the Court that the objection of the plaintiff to the tax valuation was some evi-
(903) dence to go to the jury. The plaintiff Dobson frankly told the tax lister what the machinery had cost, but insisted that it should be listed at a much lower sum. I think this might have been considered by the jury as evidence tending to show deterioration of the property, but not as contradicting the plaintiff, who presumably meant that it was assessed out of proportion to other manufacturing property. Those who have had anything to do with such enterprises know that there is a great difference between the price second-hand machinery would bring upon the open market and the amount it would take to replace it, and yet the machinery may be as valuable to the owner, that is, may have as great a productive value, as when it was new. This is the only ground on which I can agree in granting a new trial. Here I wish the opinion had stopped, as I at least must stop. I cannot agree in granting a new trial, either as a matter of right or of discretion, for the admission of evidence or the method of examination of a witness to which there is no exception. Where such a ruling, in addition to the fact of being made upon matters not before us, is in itself essentially erroneous, I must respectfully dissent. In its opinion the Court says: "The plaintiff's counsel subjected this witness to a very severe and rigid cross-

examination, which we think was calculated to impeach his credibility and disparage him before the jury, and thereby prejudice the defendant." Further on the Court says: "A large part of the testimony of the witness Finch was incompetent because it was hearsay." There is no suggestion that any part of Finch's testimony was favorable to the defendant. Therefore, the defendant could not possibly be hurt by any disparagement of the witness. If the witness's testimony was unfavorable to the defendant, as it must have been, then the disparagement of the witness was a positive benefit to the defendant, and it would have no ground of complaint. The defendant may have so thought, as its able counsel failed to enter an exception, except in terms too (904) general to be considered. Can we do for them what they failed to do for themselves? Or can we do what is equivalent thereto—pass upon the matter as if it were under exception? This has been done in a few instances with the consent of the Attorney-General in cases of capital felony; but never, as far as I have the knowledge, in civil cases.

Cited: *S. v. Stancill,* 178 N. C., 685.

LEWIS v. CLYDE STEAMSHIP COMPANY.

(Filed 10 June, 1903.)

1. Evidence—Sufficiency—Questions for Court—Questions for Jury.

Where evidence is so uncertain as to make it conjectural and speculative, it should not be submitted to the jury.

2. Evidence—Sufficiency of Evidence—Salvage—Admiralty—Contracts.

In this action to recover salvage for saving a vessel, the evidence is not sufficient to be submitted to the jury as to whether the defendant contracted to pay salvage.

3. Contracts—Corporations—Ultra Vires—Defense—Pleadings.

In an action to recover salvage for saving a vessel, a defense that a contract is *ultra vires* is in the nature of a plea of confession and avoidance and must be specially pleaded.

CLARK, C. J., and DOUGLAS, J., dissenting.

This case was heard and determined at September Term, 1902, of the Court (131 N. C., 652). It is now before us upon a petition filed by the defendant to rehear.

The action was brought for the recovery by the plaintiff of $2,444.74 alleged to be due by the defendant company for money expended and services rendered in "caring for, floating, and saving a steamship named

'The City of Jacksonville,'" which plaintiff alleged was on 19 September owned and operated by the defendant and was stranded on the
(905) North Carolina coast. Plaintiff averred that the said money was expended and services rendered at the request of defendant and with its knowledge, approval, consent, and ratification, for which defendant promised and agreed to pay a reasonable value. Plaintiff further alleged that" by reason of his skill, ability and superior knowledge of the business of caring for, handling, and floating wrecked and stranded vessels, and as a result of his said efforts, work and services, which were attended with great hardship, exposure and danger, said steamer was eventually floated and saved, and the defendant saved property of the value of a great many thousands of dollars thereby."

The defendant denied that it owned or operated the steamship "The City of Jacksonville" on said date or at any other time. It denied the material averments of the complaint in regard to the alleged contract. The defendant asked for the removal of the case into the Circuit Court of the United States for the Eastern District of North Carolina. This motion was denied, and upon defendant's appeal the action of the court below was affirmed. We have considered the contention of the defendant upon this point and think that it is correctly decided. We do not deem it necessary to set out the facts in regard to this phase of the case.

Upon the trial below the following issues were submitted:

1. Did the Clyde Steamship Company own the steamer City of Jacksonville between 1 September, 1899, and 1 June, 1900? Answer: No.

2. Did the plaintiff contract with the defendant to render the services set out in the complaint? Answer: Yes.

3. In what sum is the defendant indebted to the plaintiff for such services, if they were rendered? Answer: $2,000.

4. Was the contract between the plaintiff and defendant in
(906) writing? Answer: No.

Plaintiff testified that he was 46 years old and had lived in Beaufort all of his life; that he was a seafaring man for eight or ten years; that he had been a marine underwriter's agent since 1890, and that he was one at the time the steamship stranded; that he had had great experience with wrecks, and he had been to a great many vessels; that he knew the Clyde Steamship Company; went to sea once in their ship; that its office is No. 5 Bowling Green, New York; that the City of Jacksonville wore the Clyde colors. There was a "C" on the flag fastened to the staff. The life preservers and buckets were branded "C. S. C." and also all the bedclothes, sheets, and blankets, counterpanes, tableware, and four boats. That he found the "City of Jacksonville" on Whalebone Inlet beach, Carteret County. She was stranded, pipes were leaky, reef was cut away. That he telegraphed the underwriters and the

Clyde Steamship Company at New York. That a telegram was brought him from the secretary of the Boston Board of Marine Underwriters, saying: "Twenty-five thousand dollar hull, value thirty thousand. Protect. Advise me." He went to ship; sent Roberts and Mason there. That he went to New York, to see Mr. Clyde; he saw Theodore Eger and Marshall Clyde. They told him to sit down and wait until Frank Clyde came. Frank Clyde is president of the Clyde line. He had a conversation with Marshall Clyde. Theodore Eger is general manager; talked with Eger. Marshall Clyde asked for a report of ship. He made the report and had a conversation about it. I said, "I am going back to-night." Marshall Clyde said he wanted me to see Uncle Frank and his men and asked me did I want any money. I told him no. They told me to come in at 9 o'clock next morning; went next morning. (907) Eger was present. I was told to sit down and be comfortable. The insurance people came in and the two Clydes, Marshall and Frank, Eger and Mather were all there. I explained the condition of the ship and they gave me a sheet of paper and I drew a map on it. They said: "On what you say, we are going to get this vessel." Went in office, and Marshall Clyde and Eger were present. Marshall Clyde asked me when I was going to leave, and I said: "To-night"; asked me if I wanted any money, and I told him "No; I've got money and don't want it." Eger said: "We want you to go down there and get the ship off; we care nothing for the framework, but want the hull and machinery." Plaintiff told them the people they contracted with could not get it; that they were fresh-water wreckers. Plaintiff said to Marshall Clyde: "You are sending me with bare hands; I can't save it that way; persons there say I bother them; I will go there and advise with the master and keep you posted." Marshall Clyde said to plaintiff to "spend what is needed, and when the ship is out we will see you handsomely rewarded outside of what the underwriters pay you." Plaintiff went to and came from the ship; was engaged in all 230 days; services are worth $10 per day and expenses; expenses were $444.74; paid out that amount of money and has not been paid back, except $25. Plaintiff does not state who paid him the $25.

On cross-examination the plaintiff said he was the underwriters' agent; his first orders came from the Boston Board of Underwriters; he was employed by them. The ship did not go into the hands of underwriters, but he made out a bill against the underwriters and owners and forwarded it to the Boston Board—that is the way it has to go. Eger was present at all conversations. He and Clyde both said that the contract for saving the vessel had been made with the Atlantic Wrecking Company. He had a contract with the Clyde Steamship Company.

(908) The writing was to W. P. Clyde & Co. He has written them; cannot say that all letters were so addressed. When he works for the underwriters it is for the owners; he had expected to get his pay of the underwriters; he brought suit in Philadelphia and in his complaint stated that the underwriters owed him; he signed the paper; he swore to this. Mather is Clyde's insurance adjuster and Clyde's agent, and made contract with the Atlantic Wrecking Company. When the ship was abandoned by the overseer the underwriters took charge. Plaintiff was sent there by the underwriters. It is the general custom of the ship to have her own furniture marked in the name of the ship and not in the name of the owner. Plaintiff rested, and defendant moved to dismiss the complaint; motion denied, and defendant excepted.

Defendant then introduced the deposition of A. J. Wilkinson, enrollment and license clerk in the Custom House of United States in New York. He produced a deed duly enrolled from the DeBary Merchants Line of New York to the said "City of Jacksonville" to the DeBary Merchants Line of New York City. He also introduced certificate of enrollment of said steamship by Marshall Clyde of New York, president. Defendant again moved the court for judgment of nonsuit; motion denied, and defendant excepted.

Rountree & Carr for petitioner.
Simmons & Ward, D. L. Ward, and C. L. Abernethy in opposition.

CONNOR, J., after stating the case: In the view which we take of the case, it is not necessary to set out the defendant's prayers for instruction. The court charged the jury that they must find by the greater weight of the evidence that the evidence that the defendant company employed the plaintiff, engaged his services to look after this wreck in their interest; that the contract to bind the company must have been (909) made with some one authorized to speak for it; that some officer engaged to look after its ships engaged the services of the plaintiff; that a general manager would have such authority, but it must be the Clyde Steamship officer, and not that of some other company or corporation; that they were not to give a verdict for the plaintiff because he rendered services to the "City of Jacksonville," but he must have done so under contract or appointment with the defendant company, and that the burden was on the plaintiff to show by a preponderance of the evidence that the defendant employed him. The defendant assigned as error the refusal of the court to nonsuit the plaintiff, and to the charge as given.

The only question thus presented for our consideration is whether there was from a legal standpoint any sufficient testimony to be sub-

mitted to the jury to sustain the plaintiff's allegation that the defendant company made a special contract with him for services to be rendered at its request in saving and floating the steamship. The finding of the jury upon the first issue eliminates from the controversy any right of the plaintiff to recover as upon a *quantum meruit* based upon an implied promise to pay for services rendered, of which it received the benefit. So far as the testimony shows, the defendant company had no interest in the said steamship, nor did it receive any benefit whatever from the services of the plaintiff in saving and floating her. The plaintiff averred that the "defendant owned and operated the ship," but in the issue submitted to the jury the question is confined to the ownership. If the issue in regard to the ownership of the steamship by the defendant company had been answered in the affirmative, by reason whereof any benefit accrued to it from the services of the plaintiff, it would have been liable for such services.

We are thus brought to the consideration of the single question, whether there was any *testimony fit to be submitted to the jury to establish an express contract of employment.* In considering the case from this point of view upon the defendant's motion for (910) nonsuit, the testimony must be taken as true and considered in the light most favorable to the plaintiff. It will be well to keep in mind that so much of the testimony as referred to the steamship carrying the Clyde colors and of the life preservers and other property thereon being marked "C. S. C." is eliminated from our consideration. This testimony was competent only upon the question of ownership, which has been negatived by the verdict. The testimony in regard to the contract is indefinite and unsatisfactory. If, however, tested by the rules laid down by this Court, it is of that character which the law denominates *evidence,* and not merely speculative or conjectural testimony, which is declared to be mere *scintilla,* it was the duty of the judge to submit it to the jury and their peculiar and sole province to pass upon it.

There is probably no more delicate duty imposed upon the judiciary than the application of the well-settled rules and principles which have been adopted, in which it is sought to define the line which distinguishes testimony which should be submitted to the jury and that which should not.

Gaston, J., in *Cobb v. Fogalman,* 23 N. C., 440, says: "Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture of a fact never can amount to evidence of it."

Rodman, J., in *Wittkowsky v. Wasson,* 71 N. C., 451, in discussing this question, quoting the language of the English courts, says: "It is

not enough to say that there was some evidence; a scintilla of evidence would not justify the judge in leaving the case to the jury. There must be evidence from which they might reasonably and properly conclude that there was negligence"—that being the fact to be established:
(911) And in *S. v. Vinson,* 68 N. C., 335, the same learned justice says: "It is easy enough to express in general terms a rule of law . . . but it is confessedly difficult to draw the line between evidence which is very slight and that which, as having no bearing on the fact to be proved, is, in relation to that fact, no evidence at all. We may say with certainty, that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury."

Battle, J., in discussing and applying this principle in *Sutton v. Maddrey,* 47 N. C., 320, gives this illustration: "Suppose a plaintiff in a case was bound to show the existence of a fact within twenty years, and the only testimony he offered was that of a witness who stated that it existed either nineteen or twenty-one years, and he could not remember which. Could the judge leave that isolated statement to the jury as testimony from which they were at liberty to find the issue in favor of the plaintiff? Certainly not."

Faircloth, C. J., in *Young v. R. R.,* 116 N. C., 932, says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the parties having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

In *S. v. Satterfield,* 121 N. C., 558, the same judge says: "The duty of drawing the line between a scintilla and evidence fit for the jury is sometimes difficult and delicate, but it is important, and the court must assume the responsibility. It is a preliminary question for the court, who must find, not that there is absolutely no evidence, but that the evidence is such as would justify a jury in proceeding to a verdict, such as will reasonably satisfy an impartial mind." See, also, *Spruill*
(912) *v. Ins. Co.,* 120 N. C., 141; *Bank v. School, etc.,* 121 N. C., 107.

Merrimon, J., in *S. v. Powell,* 94 N. C., 968, says: "Legal evidence is not such as merely raises a suspicion, and leaves the matter in question to conjecture; as said above, it is such as in some just and reasonable view of it—taking all the facts, whether they be many or few—will warrant a verdict of guilty," citing *Cobb v. Fogalman,* 23 N. C., 440, and other authorities.

The difference between the province of the jury to pass upon the weight of the testimony when there is conflict, and to draw legal con-

clusions from testimony in respect to which there is no conflict, must be kept in mind. The question in this case is simply whether there is, admitting every word of the testimony to be true, any evidence upon which, as a matter of law, the jury could, under the instruction of the court, draw the conclusion that the plaintiff had shown an express contract to perform the services for and on behalf of the defendant corporation. There is no question in this case in regard to the *weight* of the testimony.

Applying this principle to the testimony in this case, we think that it was not sufficient to be submitted to the jury. A natural person becomes liable contractually when a proposition is made upon one side and accepted upon the other, or when a request is made for the performance of service and pursuant thereto the service is rendered. We are not now discussing the question of consideration, as no such question is presented in this case; nor are we discussing the question of ratification, for the same reason. It is elementary that a contract upon which a civil action may be founded must be the result of the concurrence or coming together of the minds of the contracting parties—a corporation, of course, speaking and acting through its authorized agents. The plaintiff says that his testimony establishes this condition. The "City of Jacksonville" was stranded upon the coast of North Carolina.
For the purpose of this discussion, she was not the property of (913) the defendant company, but was the property of the DeBary Company. The plaintiff resided in Beaufort, N. C., and being a marine underwriter's agent, telegraphed the underwriters and the defendant steamship company at New York. In response thereto he received a telegram from the secretary of the Boston Board of Underwriters, stating the value of the vessel and using the words "Protect. Advise me." He sent persons to Hatteras and says: "I went to New York to see Mr. Clyde. I saw Theodore Eger and Marshall Clyde. They told me to wait until Frank Clyde came in; he is the president of the company." He then had a conversation with Marshall Clyde, who is the president of the DeBary Bay Company. This conversation was in the place of business of the defendant company. Marshall Clyde asked for a report of the ship, which the plaintiff made and had a conversation about it. He asked the plaintiff if he wanted any money. Eger was present; he was the general manager of the defendant company. The next morning the plaintiff again met the two Clydes with Eger and Mather, the latter being Clyde's insurance adjuster and agent. It seems from the testimony that there was a partnership known as "W. P. Clyde & Co." They said, "On what you say, we are going to get the vessel." Marshall Clyde asked him when he was going to leave and the plaintiff said "tonight." He asked him if he wanted any money and the

plaintiff answered "No." Eger said, "We want you to go down there and get the ship off; we care nothing for the framework, but we want the hull and machinery." Marshall Clyde told him to go, "spend what is needed, and when the ship is out we will see you handsomely rewarded outside of what the underwriters pay you." This was clearly contractual language. There can be no mistake as to its purport and legal significance. Marshall Clyde had no connection, so far as (914) the testimony shows, with the defendant company.

The plaintiff further said: "My first orders came from the Boston Board of Underwriters and owners. I forwarded bill to the Boston Board. Eger and Clyde both said that the contract for saving the vessel had been made with the Atlantic Wrecking Company. I have a contract with the Clyde Steamship Company. The writing was to W. P. Clyde & Co. I have written them. I cannot say that all letters were so addressed. I did expect to get my pay from the underwriters. I brought suit in Philadelphia. In my complaint I think I said that the underwriters owed me. I signed the paper." In this condition of the testimony we think it impossible, from a legal standpoint, for a jury reasonably to conclude that the plaintiff had shown a contract between the defendant company and himself.

The court instructed the jury that "A general manager would have such authority," that is, authority to make this contract. The only testimony is that of the plaintiff, who says that Eger was the general manager. It is by no means clear that this instruction is correct.

We base our conclusion, however, upon the proposition that the testimony, measured by the rules laid down by this Court, is not sufficient to be submitted to the jury to sustain the plaintiff's contention. In the opinion rendered by this Court at the last term, the learned justice speaking for the majority of the Court said: "He (the plaintiff) further testified that the vessel in question wore the Clyde colors; that there was a large 'C' on the flag fastened to the flagstaff; that the life preservers, etc., were all marked 'C. S. C.' He also stated that he had some correspondence with the Clyde Steamship Company, the defendant in this action. This, at least, was some evidence tend- (915) ing to prove that the plaintiff made a contract with the defendant as alleged, and that the defendant had some substantial interest in the vessel."

With great deference for the opinion of the learned justice, we think that the testimony to which he refers, in the light of the finding of the jury upon the issue of ownership, should not have been considered by the jury as tending to prove that the plaintiff made a contract with the defendant. The plaintiff testified that "the writing was to W. P. Clyde & Co. - I have written them. I cannot say that all letters were so ad-

dressed." It is true that he used the words "have a contract with the Clyde Steamship Company." We are unable to see whether this language referred to the alleged contract in controversy or some other contract. If the former, it was a conclusion drawn by the plaintiff rather than the statement of a fact. The plaintiff himself appears to have regarded his employment as being by the Boston Board of Underwriters. He so expressly states. He says that he made out his account against them and brought suit in Philadelphia, and that he was sent there by the underwriters, all of which is inconsistent with the allegation that he was acting under a contract with the defendant company.

There is no evidence in the record as to when or what company employed persons who performed the service of saving and floating the steamship, or who or what company took possession of her after she was afloat. The plaintiff should undoubtedly be paid for his services, but we do not think that he produced sufficient testimony to be submitted to the jury that he made a contract with the defendant company to render the service. We can well understand that in the office of the defendant company in New York, in a conversation, in which the president of the defendant company, the president of the company owning the steamship and the superintendent of the defendant company all joined, there should be uncertainty as to which corporation was dealing with the plaintiff, and that there should be some confusion in his mind.
It would seem that good faith and fair dealing would have sug- (916)
gested to the several parties to explain to the plaintiff with whom and with what corporation he was dealing and being employed. It is this very uncertainty which surrounds the testimony that in our opinion makes it conjectural and speculative, and not sufficient to be the basis of a verdict. It may be that in another trial both parties will be able to make a fuller disclosure of the facts which are within their knowledge. Courts should be, and we think are, careful not to trespass upon the "ancient mode of trial by jury," but they must be equally careful to preserve the symmetry of the judicial system which has come to us as the result of the wisdom and experience of the centuries, by firmly preserving the rights, duties and powers of the judge in the trial of causes at law. Verdicts must be founded upon evidence, and the court must say what is evidence. The weight, credibility and the conclusions of fact to be drawn from it are the province of the jury.

The defendant contended before us that the contract, if made, was *ultra vires* and not binding upon the corporation. This defense is not raised by or set up in the answer. The majority of this Court were of the opinion on the former hearing that this defense could only be made by way of a plea of confession and avoidance. The former Chief Justice and *Mr. Justice Montgomery* thought otherwise, as set

forth in the dissenting opinion. The authorities sustain the view of the majority of the Court. It is said in 5 Enc. Pl. and Pr., page 95: "In an action against a corporation, the plaintiff need not set out in his complaint or declaration the capacity of the corporation to make the contract sued on. When the defense of *ultra vires* is allowable to a corporation the corporation must specially plead it." In the
(917) text-book, the plea is always spoken of as "a defense." 1 Clark and M. Corp., sec. 174; 5 Thomp. Corp., sec. 5967.

The defendant will pursue such course in this respect as it may be advised.

Petition allowed.

DOUGLAS, J., dissenting: Taking the opinion of the Court in its regular order, my first objection is to the vague and indefinite manner in which a well-established doctrine is therein stated. The possibility of bilateral construction is always a dangerous defect in the definition of a principle. In any event it tends to weaken the principle and may become the entering wedge in its eventual destruction. During the recent floods in the Mississippi River, I was much impressed at the published statement that five hundred men were at work on the Waterloo levee attempting to stop up what was originally only a crawfish hole. We may well learn a lesson from the laws of nature, and hence I sometimes dissent more on account of what the opinion may lead to, than from what it actually decides.

The opinion says: "The only question thus presented for our consideration is whether there was any *sufficient* testimony to be submitted to the jury to sustain the plaintiff's allegation," etc. I have italicised the word "sufficiently," as also some other words quoted in this opinion, in order to emphasize my objective point. The proposition would have been complete without this word, as a mere scintilla is not considered as evidence. Even as it stands, the word has been so often defined as meaning anything more than a scintilla that it might not be objectionable were it not for other expressions in the opinion that tend to misconstruction.

Further on the opinion says: "In this condition of the testimony we think it impossible, from a legal standpoint, for a jury reasonably to conclude that the plaintiff had shown a contract between the
(918) defendant company and himself." This can only mean that in the opinion of this Court the preponderance or greater weight of the evidence was against the plaintiff. What have we to do with deciding where lay the greater weight of the evidence? That matter is exclusively within the province of the jury. This is clearly set forth in *Wittkowsky v. Wasson,* 71 N. C., 451, the leading case upon the

subject and the one on which the Court now principally relies. The Court in that opinion says in express words: "Where there is *any* evidence to support a plaintiff's claim, it is the duty of the judge to submit the question to the jury, who are the exclusive judges of its weight." And again, "Whether there be *any* evidence is a question for the judge. Whether *sufficient* evidence is for the jury." It is true, the Court then proceeds to use expressions which are capable of a different construction, so much so that it felt it necessary to expressly disclaim any intention to "extend or alter any rule of practice or evidence heretofore recognized in this State." *Judge Reade* assented to the decision "upon the explanation therein, that it was not to be interpreted as an innovation upon the established rule that the jury are the sole judges of the weight of evidence without any intimation of opinion on the part of the judge." *Judge Bynum,* while concurring in the opinion of the Court that there was no evidence to go to the jury, dissented from the opinion as introducing a *new and dangerous* proposition.

It is remarkable that in this celebrated case the difficulty with the Court lay, not in determining the merits of the controversy, but in arriving at the true meaning and tendency of the opinion. Time has more than justified the dissent of the great jurist whose opinion stands as a monument to one who seems to have joined the instinct of the seer to the wisdom of the sage.

In *Cobb v. Fogalman,* 23 N. C., 440, cited by the Court, *Judge Gaston* clearly draws the distinction between a defect of evidence and evidence confessedly slight, and properly decides the case on the (919) ground that there was *no* evidence of a fraudulent intent. This appears from the evidence and is distinctly stated in the concluding paragraph, which is as follows: "We feel ourselves constrained to hold that there was error in leaving it to the jury to infer from the testimony a fraudulent intent in the defendant, when no *evidence* had been given from which such an intent could be inferred." There is no intimation in that opinion that this Court can pass upon the sufficiency of the testimony.

I am aware that the term "sufficient evidence" has been frequently used by this Court, but I respectfully submit that taken in connection with the context of those opinions, or at least with contemporaneous opinions by the same judges, it clearly appears that the term means simply that the evidence must amount to something more than a mere scintilla. A few examples will suffice: In *S. v. Allen,* 48 N. C., 258, in an able opinion delivered by *Judge Pearson,* the Court says: "An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of

things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected both by the Constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or *entire absence of evidence,* it is his duty so to instruct the jury, but if there be *any* competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that any one will exclaim, 'Certainly no jury will find the fact upon such insufficient evidence'; still the judge has no right to put his opinion in the way of the free action of the jury, even should he deem it neces-
(920) sary to do so in order to prevent them from being misled by the arguments of counsel or their own want of apprehension." This opinion will well repay a careful perusal, and will clearly show that the great Chief Justice would never have concurred in *Wittkowsky v. Wasson* but for the positive assurance that it did not change or modify the existing rule that the jury were the sole judges of the *weight* of the evidence.

In *S. v. Cardwell,* 44 N. C., 245, the Court, by *Battle, J.,* says: "Hence it is settled that if there be *no* testimony sufficient to establish a fact, it is the duty of the judge to say so; but if there be *any testimony tending* to prove the fact, he must leave its weight to be determined by the jury." The italics were by the Court.

In the case at bar the opinion of the Court quotes the language of *Chief Justice Faircloth* in *Young v. R. R.,* 116 N. C., 932; but in the same case, immediately after the words quoted by the Court on page 937, come the following: "There is, or may be, in every case a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a *scintilla* of evidence upon which the jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed." The Court also cites the oft-cited case of *Spruill v. Ins. Co.,* 120 N. C., 141. It would seem that the opinion taken in its entirety is free from ambiguity, but in *Cox v. R. R.,* 123 N. C., 604, decided by the same Court and written by the same judge, appears the following unequivocal enunciation of the principle: "It is well settled that if there is *more than a mere scintilla of evidence tending to prove* the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence." See, also, *Moore v. R. R.,* 128 N. C., 455; *Cogdell v. R. R.,* 129 N. C., 398; *Dorsett v. Mfg. Co.,* 131 N. C., at p. 263, where *Cox's case* is cited with approval by *Chief Justice Furches,* speaking for a unanimous
(921) Court. Further on, the opinion of the Court, says, if, however, tested by the rules laid down by this Court, it (the testimony)

is of that character which the law denominates evidence, and not merely speculative or conjectural, which is declared to be a mere scintilla, it was the duty of the judge to submit it to the jury and their peculiar and sole province to pass upon it." With great respect for the learned judge that wrote the opinion, I am compelled to say that this sentence conveys no definite meaning to my mind. The word "scintilla" has a fixed and definite meaning, both in law and in English. Webster says that it is "a spark; an iota; tittle." Black says that scintilla of evidence is "the doctrine that where there is any evidence however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence." The italics are those of the learned author. This definition is supported by the uniform current of authorities in this State, unless changed by the opinion in the case at bar. Does the Court mean to say that it intends changing the meaning of the rule by changing the definition of a word? Surely not; but why the constant reiteration of the phrase? My own views will be frankly stated. I adhere to the principle as stated in *Cox v. R. R.*, 123 N. C., 604, as the settled rule in this Court. If the Court intends to decide, directly or indirectly, in terms or by judicial intimation, that where there is *any* evidence, more than a scintilla, *tending* to prove a material issue, the court can withdraw the case from the jury and direct a nonsuit on the ground that, in the opinion of the Court, the evidence is not sufficient to justify a verdict; then I most respectfully but earnestly dissent from a proposition so new and dangerous, which in my opinion is without just foundation in authority and in violation of the Constitution and laws of the State. Large numbers of cases might be cited in support of my views. Those in this State are too well known to need citation, and I will cite but one case from (922) the Supreme Court of the United States, where the rule is less strict than in this State. In *R. R. v. Egeland,* 163 U. S., 93, 98, the Court holds that before the question can be withdrawn from the jury the inference from the fact must be *"so plain as to be a legal conclusion."*

The former Court, affirming the court below, held that there was evidence to go to the jury. The present Court thinks otherwise, and bases its opinion upon the "uncertainty which surrounds the testimony." This very uncertainty seems to me a conclusive reason why it should have been left to the jury. In *Printing Co. v. Raleigh,* 126 N. C., 516, *Chief Justice Faircloth,* speaking for the Court, says: "The defendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be taken as true, and taken in the most favorable light for him. An appellate court reviewing a judgment of nonsuit will assume every fact proved, necessary to be proved, when the evidence *tends* to prove it." See, also, *Coley v. R. R.,*

129 N. C., 407, 57 L. R. A., 817, and cases therein cited. In *R. R. v. Lowell*, 151 U. S., 209, 217, the Court says: "In determining whether the plaintiff was so guilty of contributory negligence as to entitle the defendants to a verdict, we are bound to put upon the testimony the construction most favorable to him." Can there be any doubt that under such a rule the case should have gone to the jury? The opinion of the Court also seems to lay great stress upon the absence of "contractual words." Such words are not required to make a contract binding and are rarely used in the ordinary affairs of life. If a person says to a merchant, "Send me up a bag of flour" or "Give me a pound of sugar," can there be any doubt that he is bound for the price? If a corporation through its general manager says to a professional salvor, "We want you to go down there and get the ship off," why is it not equally
(923) liable? The evidence referred to in the former opinion of the Court relating to the ship wearing the Clyde colors, flying the Clyde flag, and using furniture marked C. S. C., was cited as tending to show that while the defendant may not have had the legal title to the ship, it may have had in it at least what is equivalent to an insurable interest. For some reason, in writing the former opinion of the Court, I omitted to cite authorities in support of the proposition that the plea of *ultra vires* is a defense in the nature of confession and avoidance, with the burden of allegation and proof resting upon the party seeking its protection. 5 Thomp. Corp., sec. 5967; 1 Clark and M. Corp., sec. 174; 5 Pl. and Pr., 96; Elliott Pr. Corp., 57; 2 Spelling, secs. 780, 848, 867. I deeply regret being compelled to dissent so often and at such length, as I am aware that the time thus spent might well be given to the preparation of the opinions of the Court, but when great principles are at stake that have exercised a dominating sway over my judicial life, I feel compelled to give them what support I can, trusting to a generous profession for the appreciation of my motives and to time for the vindication of my convictions.

CLARK, C. J., concurring in dissent: I concur in what is so clearly and forcibly said by *Mr. Justice Douglas*, and I regret that I cannot add emphasis to the views stated by him and by *Judge Bynum* in *Wittkowsky v. Wasson*, 71 N. C., 451. "Juries are the sole and exclusive judges of the facts," and judges have no right to intrude into that province. The maintenance of this principle of the law inviolate is guaranteed by the Constitution, and its preservation is as necessary now as at any time in the history of our race for the protection of the liberty and the property of the humblest citizen. The act of 1796 (now Code, 413) forbidding the trial judges to intimate

any opinion upon the weight of the evidence is worse than (924) useless if the appellate court can weigh the evidence. The trial judge who at least sees the bearing and demeanor of the witnesses upon the stand, and knows the surrounding circumstances (advantages which are denied to us), can far better judge of the weight and *sufficiency* of the evidence than an appellate court. Why deny him so rigorously an expression of opinion which the jury is not compelled to accept, if the appellate court can weigh the evidence and hold it *insufficient* to justify the conclusion at which the jury have arrived, and in a case, too, in which the trial judge has not thought he ought to exercise his undoubted prerogative to set the verdict aside, as he would have done if he deemed it contrary to justice? If the trial judge sets the verdict aside, the very same evidence may be submitted to another jury for its consideration; whereas, if the appellate court adjudges the evidence *insufficient,* the appellee not only loses his verdict, but all opportunity to try his cause by a jury at all, unless he can get additional evidence.

Because there is no power anywhere to review the action of an appellate court in holding that there was *not sufficient* evidence to justify a verdict which has been rendered, is an additional and the strongest reason why an appellate court should never so hold. So important a matter is this that the Court of Appeals is expressly forbidden by the Constitution of New York to set aside a verdict, even on the ground that there is *no* evidence, when the court below is unanimous that there was evidence; and our Superior Court must be unanimous, there being only one judge. The time-honored limitation in this State within which an appellate court can set aside a verdict is when "there is *no* evidence beyond a scintilla."

Cited: Walker v. R. R., 135 N. C., 741; *Byrd v. Exp. Co.,* 139 N. C., 276; *Campbell v. Everhart, ibid.,* 517; *Berry v. Lumber Co.,* 141 N. C., 398; *Crenshaw v. R. R.,* 144 N. C., 321; *Metal Co. v. R. R.,* 145 N. C., 297; *Henderson v. R. R.,* 159 N. C., 583; *Liquor Co. v. Johnson,* 161 N. C., 76; *Finch v. Michael,* 167 N. C., 325; *S. v. Bridgers,* 172 N. C., 882; *Moore v. R. R.,* 173 N. C., 393; *Whittington v. Iron Co.,* 179 N. C., 652; *Fox v. Texas Co.,* 180 N. C., 544.

(925)

GWALTNEY v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

(Filed 11 June, 1903.)

1. Contracts—Parol Agreement—Fraud—Insurance.

The rule that parol agreements are merged in a written contract is not applicable where a written contract was by fraud or mistake executed differently from the terms of agreement.

2. Witnesses—Evidence—Competency—Insurance—The Code, Sec. 590.

In an action against an insurance company to recover premiums paid on a life insurance policy, the assured may testify as to a conversation between himself and the deceased agent of the defendant company.

3. Insurance—Contracts—Parol Agreement—Estoppel.

The receipt of an insurance policy, under the circumstances in this case, without reading it, does not bind the assured so as to prevent him from proving a parol agreement between himself and the agent of the company relative to the policy.

4. Insurance—Policy—Principal and Agent—Waiver—Contracts.

A general agent of an insurance company may waive any stipulation in a policy, notwithstanding a clause in the policy forbidding it.

5. Exceptions and Objections—Appeal—Instructions—The Code, Sec. 550.

Exceptions to a charge must be stated separately, in articles numbered, and no exception should contain more than one proposition.

6. Insurance—Premiums.

Where an insurance policy is wrongfully canceled, the amount of recovery by the assured is the premiums paid, with interest thereon from the date of payments.

MONTGOMERY, J., dissenting.

ACTION by W. R. Gwaltney and wife against the Provident Savings Life Assurance Society, heard by *Long, J.*, and a jury, at February Term, 1903, of CATAWBA. From a judgment for the plaintiffs, the defendant appealed.

(926) *T. M. Hufham and E. B. Cline for plaintiffs.*
Maxwell & Keerans for defendant.

CLARK, C. J. This action was brought to recover the premiums, with interest thereon, paid on a life insurance policy issued to the plaintiff by the defendant in 1899, through its general agent in this State. The complaint alleges that said agent, in soliciting the application, agreed to issue to the plaintiff a level rate policy, whereas the

one issued increased the premiums with age. The application on its face is for a policy "upon the annual renewal plan, with surplus applied to keeping premiums level, participating premiums payable quarterly," and the policy provides for "payment of the annual renewal premium for the actual age attained, in accordance with schedule printed on next page of this policy for each $1,000, except as reduced by the application of the surplus and guaranty fund," and at the foot of said table in the policy is the following: *"Note.*—Provided the mortality in this society shall be as favorable in the future as it has been in the past in the largest and best of the other companies (thus far it has been more favorable), this insurance will be extended and renewed during the whole expectation or probable lifetime of the insured at the rate of premium charged for the first year only of the policy."

There were thirteen issues submitted to the jury, which with the responses thereto establish the following state of facts: "That one Jones was the general agent in this State of the defendant at the time the application was made and the policy issued; that as such general agent of the defendant, by false and fraudulent representations, he induced the plaintiff to make the application and take out the policy of insurance upon an agreement, made at and before the delivery of the policy, that the premiums per quarter should be $22.41 for the life of the assured and no more, and thereby induced the plaintiff to accept the policy; that the application was filled out by the (927) defendant's general agent (Jones) and the plaintiff was induced to accept the policy and pay $22.41 per quarter, and was misled and prevented from examining the terms of the policy at the time of delivery and till demand of increase of premium, by reason of false, deceitful, and fraudulent representations of said Jones at and before the delivery of the policy; that the defendant received the premiums from the plaintiff at the rate of $22.41 for nine years, and then demanded an increase of premiums to $28.01 per quarter, which the plaintiff paid, but under protest, for two years, when the amount demanded was raised to $41.73 per quarter, and upon the plaintiff's refusal to pay the same the defendant discontinued the policy and held all the premiums paid to that date; that after the execution and delivery of the policy, the defendant through its general agent agreed to continue the policy upon the payment of $22.41 per quarter during the life of the plaintiff, waiving the provisions in the policy which permitted an increase in the premiums; that the defendant at the time of issuing the policy had notice of the special contract with the plaintiff, made by Jones; that the policy was not issued in accordance with the aforesaid verbal contract with the defendant's general agent; that the

increase in rates was contrary to said agreement, though permitted by the terms of the policy, which the plaintiff had retained in his possession from its delivery to him." There were allegations and evidence justifying the above verdict, if the jury believed the evidence.

The defendant objected to the evidence by the plaintiff of the conversations and agreements between him and the defendant's general agent, before or contemporaneous with the delivery of the policy, because such verbal agreements were merged in the written application and
(928) policy, and also under The Code, sec. 590, because the said general agent Jones was dead at the time of the trial.

The rule that parol agreements are merged in a written contract has no application when, as here, the allegation is that the written contract was by fraud (or mistake) executed differently from the terms of said agreement. *Powell v. Heptinstall,* 79 N. C., 207; *McLeod v. Bullard,* 84 N. C., 527; *Bank v. McElwee,* 104 N. C., 305. The plaintiff's testimony is substantially set out in his complaint, which is summarized in the opinion in this case, 130 N. C., at p. 630. It appeared in the plaintiff's evidence, if believed, that the plaintiff was ignorant of the terms and provisions of life insurance policies, and that the agent put him off his guard by agreeing in advance that the policy should be for level premiums, and hence, the plaintiff relying on said agent's representations, did not scrutinize the policy, but the agent handed it to him on the street when there was no opportunity to examine it, telling him "here is your policy." From which the plaintiff understood it was the policy agreed on. The receipt of the policy under circumstances similar to these, without reading, was held not binding on the assured. *Fitchner v. Fidelity Assn.,* 103 Iowa, citing numerous cases at p. 279; *Kister v. Ins. Co.,* 128 Pa., 553, 5 L. R. A., 646, 15 Am. St., 696; *McMaster v. Ins. Co.,* 183 U. S., 37. A deed under such circumstances can be avoided between the parties. *Medlin v. Buford,* 115 N. C., 260. The premiums were collected on the level of $22.41 per quarter for nine years, and not till the plaintiff was too old to obtain insurance in any other company was the premium raised to $28.01, which he paid for two years under protest (thus reserving his rights), and then suddenly the premium was jumped to $41.73 per quarter, being very nearly double the original rate, which the plaintiff testified, and the jury find, the general agent promised him should not be raised. Such promise was not such an unreasonable one that
(929) the plaintiff as an ordinarily prudent man should have refused to rely upon it, for the table annexed to the policy and referred to therein contained the note above set out, that unless there was unforeseen mortality the company expected to maintain the level rate

of the first premium in all cases. The plaintiff testified that his policy was taken out on an express agreement that this level rate should be maintained in his case.

The testimony of the agreement and conversations of the plaintiff with the defendant's agent was competent, notwithstanding the death of the agent. *Roberts v. R. R.*, 109 N. C., 670; *Sprague v. Bond*, 113 N. C., 551.

The plaintiff further testified, and the jury found, that in December, 1890, after the policy was issued, the defendant through its general agent agreed to renew and extend the policy for the term of the plaintiff's life at a level premium of $22.41, and waived the conditions of said policy providing for an increase of the rate of premium for age attained." The authorities are numerous that a general agent can waive any stipulation in the policy notwithstanding a clause in the policy forbidding it, for he can waive that clause as well as any other. A party cannot bind himself not to agree to modifications in a contract, and a corporation acts through its agents in the scope of their agency, and the agency here was a general agency. *Wood v. Ins. Co.*, 149 N. C., 385, 52 Am. St., 733; *Ins. Co. v. Gray*, 43 Kan., 504; *R. R. v. Ins. Co.*, 105 Mass., 570; 1 May on Ins. (4 Ed.), sec. 151; *Rainer v. Ins. Co.*, 74 Wis., 98; *Ins. Co. v. Johnson*, 4 Kan. App., 10; *Ins. Co. v. Wilkinson*, 80 U. S., 234; *Ins. Co. v. McCain*, 96 U. S., 84.

The issues submitted arose upon the pleadings, and as every phase of the controversy could be presented thereon, they were not objectionable. Clark's Code (3 Ed.), pp. 474-476; *Patterson v. Mills*, 121 N. C., 266. What has been already said disposes of the exceptions (930) for refusal of instructions and refusal to nonsuit the plaintiff upon the evidence.

The exceptions to the charge are without merit, but we must further say that they are not properly presented for consideration. Each exception to the charge is required by the statute (The Code, sec. 550) to be "stated separately in articles numbered," and no exception should contain more than one proposition, else it is not "specific" and must be disregarded. Clark's Code (3 Ed.), pp. 513, 514, 773, and numerous cases there cited. It is not a compliance with the statute to divide the charge (as here) into four sections, each containing many propositions and divers paragraphs, and to except *seriatim* to each of those four subsections of the charge. The object of the statute is to give the appellee information as to the errors, by specific exceptions, so that he may prepare himself to meet them on the argument here.

The policy having been wrongfully canceled, the amount of the recovery is the return of the premiums, with interest on each from the

date of payment. *Braswell v. Ins. Co.*, 75 N. C., 8; *Lovick v. Life Assn.*, 110 N. C., 93; *Burrus v. Ins. Co.*, 124 N. C., 9; *Hollowell v. Ins. Co.*, 126 N. C., 398; *Strauss v. Life Assn., ibid.*, 976, 54 L. R. A., 605, 83 Am. St., 699; *S. c.*, 128 N. C., 468.

Affirmed.

DOUGLAS, J., concurring: I cannot dissent from the opinion of the Court, because it is sustained by the law and the verdict of the jury; but like my brother *Montgomery,* I am deeply impressed with the fact that the agent Jones is dead, and that the plaintiff alone is left to tell the story of what occurred between them. So much is (931) assumed that is left unsaid in ordinary conversations that misunderstandings frequently occur between men, both of whom are honest and truthful. We have all doubtless noticed contradictions in testimony between men of equal reputation and apparently of equal knowledge. The only way I can account for this is that men are unconsciously swearing to legal conclusions. For instance, A and B have a long conversation, of which the exact words are probably remembered by neither. A swears that B agreed to do a certain thing, while B swears he did not. A, who is probably swearing, not to B's words, but to the effect produced on his own mind by the conversation, thinks there was a legal contract; while B, who perhaps regarded the entire conversation as an unclosed negotiation, is equally positive that there was no contract. Under such circumstances the jury alone can determine the question. Where one party is dead and the uncontradicted evidence comes alone from the other side, the jury is almost compelled to find for the survivor. To remedy this hardship the Legislature passed an act known as section 590 of The Code. If Jones' estate or any one claiming under him were a party to this action, the plaintiff would not be permitted to testify as to any transaction with Jones; but as his estate has no *pecuniary* interest in the suit, which is against the insurance company alone, such testimony is competent. That the *moral* interest of the deceased and his family cannot be considered is one of the hardships of the law which we are powerless to remedy. It is but just to the plaintiff to say that the terms of the policy itself were apt to mislead him, and I am surprised that the defendant company should make even a conditional representation which is apparently so utterly incapable of fulfillment.

MONTGOMERY, J., dissenting: The first issue submitted to the jury was in these words: "Was Jones the general agent of the defendant company at the time alleged in the complaint?" I think the judge

erred when he refused to charge the jury, as he was requested (932) to do by the defendant, that if they believed the evidence they should answer the issue in the negative. From the deposition of William E. Stevens, secretary of the defendant company, it appears that the agent Jones at Greensboro was authorized to receive applications for insurance, to deliver policies to applicants after their issuance by the society, and to collect and report premiums on the same; that Jones had no authority or power to issue policies or to change, waive or alter their terms in any way, and that in this particular instance he had nothing to do with the issuance of the policy except to deliver it to the plaintiff after it had been sent to him (Jones) from the New York office. It appeared, also, from the evidence of J. N. Ballentine, assistant secretary of the company, that the agent Jones was appointed to solicit applications and to deliver policies that would be written, to collect the premiums required thereon and to appoint local agents, and that he had no other powers; that all policies were issued from the New York office where the applications were passed upon and were then sent out to the agent for delivery by them to the insured; that the term "general agent" was merely an office distinction between a territorial and local agent, and that a general agent had no different powers from a local agent about writing policies and sending on applications. The evidence of the plaintiff on this point was that he knew no limitations of the authority of Jones, and supposed he had full power to act for the company; and that Jones held himself out as the general agent of the company.

In *Berry v. Ins. Co.*, 132 N. Y., 49, 28 Am. St., 548, there was a change by the general agent in a material matter in the policy, and the company was held to have waived that condition of the policy. But it is affirmatively stated in that case that the agents "were general agents, having authority to make contracts without reference to the home office, and their power to waive conditions in the policy (933) was coexistent with that of the company itself." The plaintiff in this case well knew that Jones did not intend to issue the policy himself; but, on the contrary, he knew that it had to be issued at New York, the home of the company, and sent back to Jones at Greensboro to be delivered to the plaintiff. *Berry v. Ins. Co., supra,* was quoted by this Court in *Grubbs v. Ins. Co.*, 125 N. C., 389, and the Court said in connection with it: "It is needless to say that the expression 'general agent' occurring in the above opinion was used in its legal sense as implying general powers, and not in the geographical sense in which it is usually employed by insurance companies." The reputation of the agent Jones was destroyed upon evidence submitted

to the jury after he was in his grave, and his family, if he left one, are to bear the reproach, although Jones' statement of the matter was not before the court. If the evidence of the plaintiff himself, who testified also that up to the trouble about the policy he knew nothing about Jones except what was good, and that of A. A. Shuford and the language of the note attached to the policy be considered together, it might be concluded, without injury to the character of either, that there was a mutual misunderstanding between the plaintiff and Jones, the agent, on the question involved in this litigation. That note was in these words: "Provided the mortality in this society shall be as favorable in the future as it has been in the past in the largest and best of the other companies (thus far it has been more favorable), this insurance will be extended and renewed during the whole expectation or probable lifetime ofthe insured at the rate of premium for the first year only of the policy."

Cited: Davis v. Ins. Co., 134 N. C., 61; *Gwaltney v. Ins. Co., ibid.,* 522; *Floars v. Ins. Co.,* 144 N. C., 241; *Cathcart v. Ins. Co., ibid,* 625; *Bell v. McJones,* 151 N. C., 89; *S. v. Bowman,* 152 N. C., 820; *Hardy v. Ins. Co.,* 154 N. C., 438; *Bank v. Oil Co.,* 157 N. C., 304; *Walker v. Cooper,* 159 N. C., 538; *Ins. Co. v. Knight,* 160 N. C., 593; *Machine Co. v. McKay,* 161 N. C., 587; *Murphy v. Ins. Co.,* 167 N. C., 336; *Barefoot v. Lee,* 168 N. C., 90; *Godfrey v. Ins. Co.,* 169 N. C., 239; *Bland v. Harvester Co., ibid.,* 420; *Robinson v. Brotherhood,* 170 N. C., 548; *Collins v. Casualty Co.,* 172 N. C., 548; *Hollingsworth v. Supreme Council,* 175 N. C., 367; *Taylor v. Edmunds,* 176 N. C., 328; *Arndt v. Ins. Co., ibid.,* 658; *Graham v. Ins. Co., ibid.,* 317; *Bank v. Wysong Co.,* 177 N. C., 292.

(934)

BESSENT v. SOUTHERN RAILWAY COMPANY.

(Filed 11 June, 1903.)

Negligence—Contributory Negligence—Railroads—Trespasser.

The plaintiff's intestate was walking along a railroad track with a companion in the daytime, which was commonly used by the people in that vicinity as a footpath, was warned of a train approaching from the rear, which she could have seen and heard, and answered the warning indicating that she knew of its approach. The whistle was blown and the bell rung, but intestate failed to leave the track, whereupon she was struck and instantly killed. Upon which testimony a nonsuit was properly granted.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by J. C. Bessent, as administrator of Fanny Scales, against the Southern Railway Company, heard by *Neal, J.*, at March Term, 1903, of FORSYTH.

This action was brought by the plaintiff to recover damages for the alleged negligent killing of the intestate by the defendant. The plaintiff's intestate, Fanny Scales, was walking along the track of defendant near Winston in the direction of Wilkesboro, accompanied by Will Smith, when an engine pushing four box cars approached from the south. There was evidence tending to show that the whistle was sounded twice and that the intestate could have heard it and could also have heard the noise of the train, and that she could easily have seen the train in time to have stepped from the track to a place of safety. There was nothing to prevent her doing so. Persons farther away from the train than the intestate was at the time she was killed both saw and heard it. William Hairston, a witness for the plaintiff, testified: The train coming up through the cut made a great deal of noise and persons could easily have looked back and seen the train if they had eyes, and could have gotten off if they wanted to. Will Smith had the intestate by the hand or wrist; she was on the sills of the track and he was walking on the ground beside the sills. They (935) seemed to be walking along laughing and talking. She could have stepped off on either side of the track. If she had ordinary hearing she was bound to have heard the train.

The plaintiff himself testified: When the girl was killed she could easily have gotten from the track, more easily to the left than to the right. Any person could easily have gotten off the track; all they had to do was to step off; they could easily have stepped off and been out of danger; between the two tracks it is level and she could easily have stepped off.

The evidence also tended to show that the intestate was killed near the end of a cut which was directly under the place where Main Street was when it ran over the embankment and before the embankment was cut down for a railroad track; but the cut had not been used as a street, though it had been used by pedestrians "as a common foot-path" when going from one of the factories to the northwest portion of Winston. In reference to this matter the plaintiff testified: This cut does not pretend to be a street; part of Main Street used to be where this cut is, and they have narrowed that street very much, and on the west side of the cut, up an embankment, there is still a driveway; this street is 35 feet higher than the track; people walk along the track as they do everywhere.

The ordinance of the city of Winston provides that it shall be unlawful for trains and locomotives to run at a greater speed than eight miles an hour, and the intestate was killed within the city limits; the train was running 20 miles an hour when the intestate was killed and it was in the daytime. There were two men on the end of the front or leading box car, who waved their hands and halloed to the intestate and her companion as the train approached them. A witness, Ida Douglas, testified: That she was on the track and heard the train blow at the south end of the cut; she ran to the switch and got off;
(936) as she passed the intestate she said to her, "Fanny, the train is coming," to which the intestate replied, "All right, honey." The intestate remained on the track and was killed by the train. At the close of the plaintiff's testimony the defendant moved for judgment of nonsuit under the statute. The court intimated that it would charge adversely to the plaintiff, whereupon he submitted to a nonsuit and appealed. The plaintiff assigns as error:

1. That the court refused to submit the plaintiff's third issue as to the last clear chance of the defendant to avoid the injury, which issue, it is stated in the record, was submitted in apt time.

2. That the court allowed the defendant's motion to nonsuit the plaintiff.

3. That the court directed the jury to answer the second issue "Yes" and the third issue "Nothing."

J. S. Grogan for plaintiff.
Glenn, Manly & Hendren for defendant.

WALKER, J., after stating the case: If the court dismissed this action upon the defendant's motion, or if, in deference to an adverse intimation of the court, the plaintiff submitted to a judgment of nonsuit and appealed, this Court must consider all the evidence for the plaintiff "as true, and regard it in the most favorable light" for him, as stated by this Court in *Collins v. Swanson,* 121 N. C., 67. The rule that where there is a nonsuit in submission to an intimation of the court against the plaintiff's right to recover, the evidence introduced by the plaintiff must be taken as true for the purpose of deciding whether, in any reasonable view of it, he can recover, has frequently received the sanction of this Court. *Springs v. Schenck,* 99 N. C., 551; 6 Am. St., 552; *Gibbs v. Lyon,* 95 N. C., 146; *Abernathy v. Stone,* 92 N. C., 217. All of the witnesses in this case were introduced by the plaintiff, and he represented, therefore, that they were credible.
(937) The law will not permit him to impeach their credibility, although he could have shown, if he had been disposed and able

to do so, that the facts were different from those to which they testified. It is stated in the case that the plaintiff submitted to a nonsuit because the court intimated that it would so charge the jury that they would have to answer the first issue "Yes," the second issue "Yes," and the third issue "Nothing"; but it does not clearly appear what particular form the charge of the court would have taken, if it had been delivered to the jury. We cannot infer from the statement in the record that the court intended to direct a verdict peremptorily for the defendant, and the only inference we can draw from the language is that the court would have charged the jury that if they believed the evidence they should answer the issues as already indicated.

The question, then, is whether, if the evidence is taken as true, there is any reasonable view of it which would entitle the plaintiff to a trial of the issues by a jury, the evidence being considered in the most favorable light for him. In *Neal v. R. R.*, 126 N. C., 641, 49 L. R. A., 684, the Court, referring to facts similar to those we have in this case, says: "The usual rule is to submit the issue to the jury with the instruction that if they believe the evidence they will find the issue 'Yes' or 'No,' as the case may be. This is usually a good rule and in many cases saves an appeal to this Court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff, and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff offering the evidence had vouched for its credit. He could not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that if the plaintiff had offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which (938) witness they would believe."

All the evidence in this case, as we have stated, was introduced by the plaintiff, and there is no contradiction in it. It is plain, direct, and conclusive in establishing negligence on the part of the plaintiff's intestate, which was the proximate cause of her death. It can make no difference whether he has failed to show negligence of the defendant, or whether, having shown such negligence, he has also shown by his own proof that the intestate's negligence was concurrent, up to the last moment, with that of the defendant, or that, after the defendant was seen or could have been seen to be negligent, the intestate had the last clear chance to avoid the injury. In either case, the plaintiff would not be entitled to recover. The case discloses that the situation of the plaintiff's intestate was such as enabled her to see and hear

the train as it approached her in ample time for her to have left the track and averted the injury which caused her death.

We are unable to distinguish this case from *Neal v. R. R., supra.* The facts in our case appear to be much stronger for the purpose of establishing contributory negligence than the facts in that case were. A brief statement of the facts will suffice to show that the death of the plaintiff's intestate was caused by her own negligence, and that the case of *Neal v. R. R., supra,* should apply and control in the decision of this case. The plaintiff's intestate was walking along the defendant's track in the daytime, with nothing, so far as appears, to obstruct her view, and nothing to prevent her hearing the whistle or the noise made by the train. Indeed, she was told by one of the witnesses that the train was coming, and she answered in such a way as to clearly indicate that she was aware of its approach. In order to save herself, there was nothing to do but to step from the track, a mere matter of a moment. And, besides, it appears that her companion directed her attention to the train, and he stepped off and was not injured. She was (939) not on a public street, if that could make any difference, for it is in evidence that the cut was not considered as any part of the street, though it was used by the people in the vicinity as a common footpath. If it had been a part of the street, and the duty of sounding the whistle or ringing the bell was imposed upon the defendant for that or any other reason, and the company would have been negligent if it had not given warning of the approach of the train, it is conclusively shown in this case that the whistle was sounded and that the noise made by the train could easily have been heard by the intestate; and it further appears, as well as that fact can be established by testimony, that she actually did know that the train was coming. Everybody else saw and heard the train and left the track, and why was she not guilty of negligence in not doing what they did, and did easily? She had equal opportunity with them, and her failure to avail herself of it was an omission of duty on her part, which was necessarily the direct and proximate cause of her injury and death. The wrong, therefore, cannot, in any view of the testimony and in contemplation of law, be imputed to the defendant, even though it may have been guilty of negligence.

In *Neal's case* the intestate was walking along the track and was seen by the engineer, but there was no direct evidence that the intestate either saw or heard the engine. In reference to the facts of that case, the Court said: "If the plaintiff's intestate was walking upon the defendant's road in open daylight, on a straight piece of road, where he could have seen the defendant's train for 150 yards, and was

run over and injured, he was guilty of negligence, and although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing the bell as required by the ordinance, and in not keeping a lookout by its engineer, as it should have done, yet the injury would be attributed to the negligence of the plaintiff's (940) intestate."

In *McAdoo v. R. R.*, 105 N. C., 140, this Court held that the plaintiff was guilty of negligence, which in law was the proximate cause of his injury, because he stood or walked upon the track with his back towards the engine and did not see it before he was stricken, and that the speed of the train and the failure to give a signal did not alter the case.

In *High v. R. R.*, 112 N. C., 385, the Court laid down the principle that the failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to have given the signal, and that he had the right to assume up to the last moment, when it was too late to prevent the injury, that the person on the track would get out of the way, and that it made no difference how near the person was to the engine or train, or how fast the train was running. It appeared in that case that it was a windy day, that the train was late, that the plaintiff was wearing a bonnet which obstructed her view; but the Court said that those facts could make no difference in the decision of the case, and that, under the facts and circumstances presented by the evidence for the plaintiff, the law referred the injury to her negligence as its proximate cause, and held the company blameless. Many other cases to the same effect have been decided by this Court. According to the principle declared in all of them, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff, and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track in reckless disregard of his own safety, the law adjudges any injuries he may have received to be the result of his own carelessness. *Parker v. R. R.*, 86 N. C., 221; *Meredith v. R. R.*, 108 N. C., 616; *Norwood v.* (941) *R. R.*, 111 N. C., 236; *Syme v. R. R.*, 113 N. C., 565; *Stewart v. R. R.*, 128 N. C., 518; *Wycoff v. R. R.*, 126 N. C., 1152; *Sheldon v. Asheville*, 119 N. C., 606; *Ellerbe v. R. R.*, 118 N. C., 1024.

But *Lea v. R. R.*, 129 N. C., 459, is a direct authority in support of the ruling of the court below. In that case it appeared that the defendant, for the purpose of making up a freight train, was moving

two cars with an engine between them, one of the cars being drawn and the other pushed by the engine, as in our case. The intestate of the plaintiff was standing on the end of the cross-ties in the town of Durham at a place where the track was used by pedestrians. There was no one on the front car to give a signal of the approach of the train, and there was no bell rung or whistle sounded. The ordinance of the town of Durham prohibited the running of trains within its limits at a greater rate of speed than 8 miles an hour, and the engine and cars were running at a greater rate of speed than the ordinance allowed. This Court held, upon the facts thus stated, that the jury should have been instructed that, "taking the plaintiff's evidence and also the defendant's evidence (there being no conflict in the evidence) as true, the conclusion could not reasonably be avoided that the plaintiff's intestate by his own negligence contributed to cause the injury." And further, that, "taking all the evidence together, there was nothing which placed the intestate at a disadvantage as regards avoidance of the injury, and when such is the case no recovery can be had where both parties, that is to say, the intestate and the railroad company, were negligent."

The only difference between *Neal's case* and *Lea's case* on the one side and our case on the other is that in those cases the evidence tended strongly to show that the intestate did not see or hear (942) the train, although he could have done so; while in our case the evidence is conclusive that the deceased did know of its approach. The circumstances of themselves are sufficient to show that she did, and, besides, her own words, uttered in reply to a warning from one of the witnesses who was passing her at the time, practically excludes every doubt in regard to the matter. Her death was an unfortunate occurrence, but upon the undisputed facts of this case, the law does not attach any blame to the defendant, but imputes the wrong or negligence, which caused her death, to her own conduct in not avoiding the injury when she could easily have done so.

In the view we take of the case, it is not necessary to consider the other assignments of error.

Judgment affirmed.

DOUGLAS, J., dissenting: I always regret feeling compelled to dissent from the opinion of the Court, and especially so when the case might justly be decided the same way upon grounds in which I could concur. I do not question the right of the Court to select the grounds of its opinion, and my remarks are not intended in the slightest degree as a criticism upon the Court, but simply in justification of my own conduct. When the opinion of the Court forces upon me the determina-

tion of an unnecessary question, well knowing my views upon the matter, it compels me to dissent. The Court first decides the case upon the following ground: "We cannot infer from the statement in the record that the court intended to direct a verdict peremptorily for the defendant, and the only inference we can draw from the language is that the court would have charged the jury that *if they believed the evidence* they should answer the issue as already indicated." If the opinion had stopped here, it would have ended the case. Under the circumstances of this case, I would not then have felt compelled to dissent, although I am inclined to think the logical result of the adoption of the rule of the prudent man is to abrogate the old (943) rule, that what constitutes negligence is a question of law. This Court has said in *Coley v. R. R.*, 128 N. C., 534 (542), 57 L. R. A., 817, speaking through *Furches, C. J.*: "As we understand it, the questions of prudence and the ideal prudent man are always a matter for the jury." The Court, however, then proceeds to reopen the "irrepressible conflict" by bringing in *Neal v. R. R.*, 126 N. C., 634, 49 L. R. A., 684. If the first ground taken by the Court was correct, then the *Neal case* has no application whatever. *Lea v. R. R.*, 129 N. C., 455, would have still less. It is proper to state that the Court, both in its present opinion and in the *Lea case*, treat the *Lea case* as being identical in principle with the *Neal case*. In other words, it construes the expression, "taking the plaintiff's evidence and also the defendant's evidence," to mean taking the plaintiff's evidence with such of the defendant's evidence as is favorable to the plaintiff. In that case the Court says: "So far as we remember, every principle involved in this case is decided in *Neal's case*, and that case must control this case." While that opinion possessed at least the error of ambiguity, as was pointed out in my dissenting opinion, I presume we must accept this as its proper interpretation. My views were so fully expressed in my dissenting opinion in *Neal v. R. R.*, 126 N. C., 647, that it is needless to repeat them at length. The principle that the Court can *never* direct an *affirmative* verdict was clearly enunciated by a unanimous Court in *Spruill v. Ins. Co.*, 120 N. C., 141. This case has never been overruled or even directly questioned. It was accepted by this Court as the *invariable* rule until the decision in *Neal v. R. R.* Even in that case it was expressly reaffirmed by this Court. So we may consider *Spruill's case* as correctly laying down the general rule, while *Neal's case* constitutes merely an exception thereto. A brief reference to a few of the opinions of this Court will show their general tenor. In *Spruill v. Ins. Co.*, 120 N. C., 141, during (944) my first term upon the bench, it is said for a unanimous Court:

"Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient in a just and reasonable view of it to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. That the verdict should be directed against the party upon whom rests the burden of proof, is the essence of the rule. . . . If the verdict of a jury is, in the opinion of the court, against the weight of evidence, it can be set aside, and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury. . . . The rule laid down in some authorities, that wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina and never can be under our present Constitution."

In *White v. R. R.,* 121 N. C., 484, 489, *Justice Furches,* speaking for a unanimous Court, says: "The court can never find, nor direct an affirmative finding for the jury. The most the court can do is to instruct the jury, where there is no conflict of evidence, that if they believe the evidence they should find yes or no, as the case may be." In *Wood v. Bartholomew,* 122 N. C., 177, 186, *Justice Furches,* again speaking for a unanimous Court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue and cannot be found by the court. It must be determined (945) by the jury." In *Bank v. School Committee,* 121 N. C., 109, the same Justice, speaking for a unanimous Court, says: "But no matter how strong and uncontradicted the evidence is in support of the issue, the court cannot withdraw such issue from the jury and direct an affirmative finding." The same words are quoted with approval by *Justice Montgomery,* speaking for a unanimous Court in *Crews v. Cantwell,* 125 N. C., 516 (519). In *Cox v. R. R.,* 123 N. C., 604, this Court, *Chief Justice Faircloth* alone dissenting, says: "A negative presumption necessarily accompanies the burden and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. . . . Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can

never say that a fact is proved. . . . It is a settled rule of this Court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form." "The burden of proving contributory negligence is always upon the defendant. Therefore, a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 38, Laws 1887. . . . It therefore follows that on a motion for nonsuit the court can consider only the evidence relating to the negligence of the defendant, and if there is more than a scintilla tending to prove such negligence, the motion must be denied and the case submitted to the jury." (946) In *Bolden v. R. R.*, 123 N. C., 614, this Court with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense in which the burden, both of allegation and proof, rests upon the defendant." In *Cogdell v. R. R.*, 124 N. C., 302, it is said by a *unanimous* Court that: "Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit." A large number of other cases might be cited. The cases of *Spruill v. Ins. Co.* and *Cox v. R. R.* have been repeatedly cited with approval by this Court both before and after the rendition of its opinion in *Neal's case.* In *House v. R. R.*, 131 N. C., 103, *Cook, J.*, speaking for a unanimous Court, says: "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." In *Dorsett v. Mfg. Co.*, 131 N. C., 254, *Chief Justice Furches*, speaking for a unanimous Court, cites *Cox's case* twice with approval, as well as *Bolden v. R. R.*, 123 N. C., 614.

The reason for the rule as above laid down is clear. It is there bounded by what may be called natural landmarks, the distinct line of separation between an affirmative and negative finding. Itself the logical deduction from the act of 1887, and depending for its location neither upon metaphysical angles nor artificial stakes, it is in itself capable of accurate definition and intelligent application. For this reason it is constantly recurred to except in a few cases where the requirements of natural justice, irrespective of the strict rules of law, have seemed to the Court to justify a departure therefrom. Hard cases are

(947) "the quicksands of the law," and it is not safe to bend the rule too far. Curves may be the lines of beauty, but those of right are usually straight.

CLARK, C. J., concurs in the dissenting opinion.

Cited: Pharr v. R. R., 133 N. C., 611, 615; *Morrow v. R. R.*, 134 N. C., 100; *Ruffin v. R. R.*, 142 N. C., 127; *Crenshaw v. R. R.*, 144 N. C., 325; *Beach v. R. R.*, 148 N. C., 159; *Exum v. R. R.*, 154 N. C., 411; *Holman v R. R.*, 159 N. C., 46; *Patterson v. Power Co.*, 160 N. C., 580; *Talley v. R. R.*, 163 N. C., 577, 581; *Abernathy v. R. R.*, 164 N. C., 95; *Ward v. R. R.*, 167 N. C., 151; *Davis v. R. R.*, 170 N. C., 586; *Boyles v. R. R.*, 174 N. C., 623.

HALLYBURTON v. SLAGLE.

(Filed 11 June, 1903.)

1. Curtesy—Husband and Wife—Wills—Constitution 1868—Married Woman.

Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate.

2. Deeds—Estoppel—Fraud—Bankruptcy.

Where a person to defraud his creditors conveys land and afterwards becomes a voluntary bankrupt, and the trustee in bankruptcy in behalf of the creditors sells the land and the bankrupt through another becomes the purchaser, whatever title he gets by the deed of the trustee accrues to the benefit of the original grantee.

PETITION to rehear this case, reported in 130 N. C., 482. Petition dismissed.

Merrimon & Merrimon and Shepherd & Shepherd for petitioner.
Charles A. Moore, Zeb Weaver and Locke Craig in opposition.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at the February Term, 1902, and is reported in 130 N. C., 482.

The assignment of error in regard to the defendant's claim for an estate by the curtesy in tract No. 2, known as the Chunn land, cannot be sustained. As the parties were married before 1868 and the land was acquired in 1877, the defendant was entitled to an estate (948) by the curtesy, at the death of his wife, provided she had died intestate or had not disposed of the property by her will to some one else. *Tiddy v. Graves*, 126 N. C., 620. It appears in this case that Mrs. Slagle died leaving a will in which she devised the said prop-

erty to the plaintiff. When a marriage has taken place prior to the dower act of 1867, and the husband has acquired land after its passage, the wife is entitled to dower, because, as soon as the land is acquired, the right of dower attaches to it. *O'Kelly v. Williams,* 84 N. C., 281. So when the marriage has taken place before the date of the ratification of the Constitution of 1868 and the wife has acquired property after that date, the provisions of the Constitution in regard to the separate estate of the wife and her power to devise her property immediately become operative and affect all of the rights in the property thus acquired, and the husband's estate by the curtesy, unlike that which existed prior to August, 1868, only becomes consummate upon the death of the wife intestate. *Holliday v. McMillan,* 79 N. C., 315; *Morris v. Morris,* 94 N. C., 613; *Kirkman v. Banks,* 77 N. C., 394. By the marriage before August, 1868, the husband acquired no such vested right in the future acquisitions of the wife as to prevent the application of the provisions of the Constitution and statutes to his right of curtesy. A mere expectancy or possibility of future acquisitions is not a vested right. *Holliday v. McMillan, supra.* Property is always acquired subject to the laws existing and in force at the time. *O'Kelly v. Williams, supra.*

The principal question in the case, and, indeed, the only one discussed before us, relates to the estoppel which plaintiff alleges arose out of a deed to Mr. Woodfin, and was fed by the title acquired by the defendant under the deed of Reynolds, assignee in bankruptcy, to him, whereby the plaintiff's title to the land was made (949) good and perfect as against the defendant.

The defendant for a nominal consideration and with intent to defraud his creditors made a deed for the land to Mr. Woodfin in trust for the use and benefit of his wife for life, and, after her death, for the use and benefit of her children, and in May, 1868, upon his own petition, he was adjudged a bankrupt. His assignee sold the land, and it was bought by one Lang for the defendant, and the assignee afterwards conveyed it to the latter with the consent of Lang.

Defendant's counsel contend that there was no estoppel arising out of the deed, because (1) plaintiffs cannot maintain an action upon the warranty in the deed to Woodfin, and (2) because by the acts of the assignee the land has been devoted to the satisfaction of the claims of creditors to whom it rightfully belonged, the covenant being "void and of no effect" as to them.

While the deed of Slagle to Woodfin was void as to creditors and as to their representative, the assignee in bankruptcy, if either of them should seek to set it aside, it was yet good and valid as between the parties to it, and the title to the land passed to Woodfin, as trustee,

subject to be divested by any creditors who might seek to subject it to the payment of their claims.

The defect in the title to the land was caused by the defendant's own wrongful act in making the deed with a fraudulent intent, and it would be strange indeed if the law should permit him afterwards to acquire a title through the creditors or their representative, the assignee in bankruptcy, and hold it in hostility to the one he conveyed and warranted. We do not think that the law will permit him to do so. It is not denied that, when a good and indefeasible title is transferred by deed the vendor may afterwards acquire an independent title such, for example, as a title by adverse possession under
(950) color, and hold it against his vendee; but the title so acquired must be consistent with the provisions of his own deed and his covenants therein contained. *Cuthrell v. Hawkins,* 98 N. C., 203; *Johnson v. Farlow,* 35 N. C., 84; *Eddleman v. Carpenter,* 52 N. C., 616. But when by his deed the grantor conveys without any of the usual covenants of title, or when by the form or nature of the conveyance he affirms, either expressly or impliedly, that he has a good and perfect title to the land, though, in fact, he has a defective or imperfect title, and he subsequently acquires a good title thereto, such after-acquired title will inure to the benefit of his grantee by estoppel. *Van Rensselaer v. Carney,* 11 Howard, 297; *Ryan v. U. S.,* 136 U. S., 68; 11 A. and E. Enc. (2 Ed.), p. 403; *Hagensick v. Castor,* 53 Neb., 495; *French v. Spencer,* 21 Howard, 240.

In *Van Rensselaer v. Carney* it is said: "If the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded on that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of this conveyance."

The proposition may be stated another way: "Where one assumes by his deed to convey a title and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a conflicting title and turn his grantor over to a suit
(951) upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him

the countenance and assistance of the law in breaking the assurance which his covenants have given." *Smith v. Williams,* 44 Mich., 240. The general rule is, that when the deed contains no covenant of warranty or other covenant sufficient to estop him, the grantor can set up an after-acquired title, unless he has either expressly or impliedly affirmed in the deed that he has a good title, in which case he will be estopped to set up the after-acquired title. This rule accords with common honesty and fair dealing. The covenant of warranty works an estoppel not only to prevent the circuity of action, which is sometimes given as the reason for it, but for other good and valid reasons. The grantor should not be permitted to impeach and nullify his solemn deed and act by alleging his own fraud and iniquity, as by claiming and setting up a title against his grantee which could not have existed but for his own fraudulent act and intent. It would be contrary to equity and good morals to allow him to take any advantage from the newly acquired title in such a way. *Reynolds v. Cook,* 83 Va., 817, 5 Am. St., 317. The principle would seem to be so clear and just as not to require a further discussion or citation of authority.

In this case it is apparent, we think, upon the face of the deed that the defendant intended to affirm impliedly, at least, that he had a good title to the land. It was his purpose to convey the fee which should be held by Woodfin for the use, benefit, and enjoyment of his wife and children, and this could not well be done, unless the title was not only good at the time he transferred it, but remained good, so far as any act of the grantor could affect it. He agrees to warrant and defend the title of the lot to the trustee and his heirs forever for the uses and purposes set forth in the deed. The word "warrant" is defined as an assurance of title to property sold and a stipula- (952) tion by an express covenant that the title of the grantor shall be good and his possession undisturbed. Black Law Dict., p. 1233. Indeed, it has been said to have been fully established as a principle, by the best authority, that the doctrine of estoppel applies to conveyances without warranty where it appears, by the deed, that the parties intended to deal with and convey a title in fee simple. *Graham v. Meek,* 1 Ore., 325; 1 Greenleaf on Ev., sec. 24. And, if this is not true, the estoppel certainly arises when the conveyance of the land is coupled with a covenant of warranty. Mr. Greenleaf says: "A covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant."

It was contended, though, by defendant's counsel in his able and ingenious argument, that there could be no rebutter or estoppel unless there could be a recovery upon the warranty, or unless the deed failed to pass an estate to the grantee. It is said, in *Bush v. Cooper,* 18

Howard, 82, that "there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom"; and the Court was then speaking with reference to the discharge of the covenantor in bankruptcy. "Such estoppels," says the Court, "do not depend upon personal liability for damages. This is apparent, when we remember that estoppels bind, not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel." The defendant undertook to sell and convey to Woodfin, as trustee, not a bad or defective title, but a good and perfect title, and the estoppel operates at law to pass the legal estate, and in equity to conclude him from asserting the existence of a title inconsistent with what he undertook to sell and convey. *Bush v. Cooper, supra.* In *Dunbar v. McFall,* 9 Humph., 505, the facts were very much like those in the case at bar. "It is supposed,"
(953) says the Court, "that as these negroes had been taken in execution as the property of Lemmy Williams, after the period of this fraudulent sale, had been sold, and were afterwards held by persons against whom the bill of sale of Lemmy Williams to William K. Williams would have been void—that when they were purchased by Lemmy Williams, he took them and held them in right of the creditor, and that his title against the fraudulent sale was as good as that of the creditor. This position is untenable for several reasons: (1) Because, however Lemmy Williams may have obtained the negroes, after the execution sale, still this defense is an allegation of his own turpitude in the sale to W. K. Williams which he is not permitted to make to avoid his own deed—for, as between himself and William K. Williams, the fraudulent sale was good; (2) but in the bill of sale to William K. Williams there is a warranty of title. Now, as this bill of sale was good between the parties, the moment the vendor repurchased the negroes and obtained them again, free from liability on account of the fraud, such title inured to the benefit of the fraudulent vendee, and vested in him a good title. Lemmy Williams is estopped, therefore, by his covenant to resist the title of his vendee." See, also, *Nance v. Thomas,* 1 Sneed, 327.

If the title conveyed by the defendant's deed to Woodfin was defective on account of any fraud or wrong committed by him which invalidated the deed, it was his duty to remove the defect, and whatever was afterwards done by him, which perfected the title, will be considered as done in discharge of this plain duty and obligation. *Frank v. Caruthers,* 108 Mo., 573; *Johnson v. Foster,* 89 Tex., 640; *Hannah v. Collins,* 94 Ind., 201. In the case first cited the Court says: "The law would be justly 'chargeable with connivance at fraud and dishonesty'
(954) to permit the grantor to take advantage of his own delinquency

for the purpose of wresting from his grantees the property already conveyed to them."

In *Gibbs v. Thayer,* 6 Cushing, 30, it appeared that a husband, having an estate for his own life in land of his wife, conveyed his interest therein, in trust for her benefit, by a deed fraudulent and void as against creditors, and which contained a warranty against all claims of the grantor or his heirs or of any other person claiming under him or them; and having subsequently taken advantage of the insolvent law, and himself become the purchaser and received a conveyance of the assignee's interest in the land, it was held that he was estopped by his covenant to set up against his grantee the title so acquired. "If at the time of such conveyance and warranty the estate conveyed was liable to be taken by the grantor's creditors to satisfy his debts, this liability was an encumbrance, by reason of a subsisting right of creditors to take and hold the estate under him, and was at that time, therefore, a paramount subsisting claim, within the qualified warranty, and the taking of the estate by the creditors would be a breach of that warranty." In that case the Court draws the distinction between a title acquired by the grantor under a sale made in behalf of creditors against whom the fraudulent deed is void, and an independent title acquired by the grantor. Mr. Bigelow cites this case with approval and says: "It was immaterial whether or not the original conveyance was fraudulent against creditors. If it was not, then the property did not pass to the assignee, and the plaintiff took no title under it; if it was fraudlent, it was by reason of acts done by him, which had given rights to creditors to reclaim the land and hold it, and was an encumbrance against which he had warranted. In this case the purchase of the interest was only an extinguishment of the encumbrance; and by the doctrine of of estoppel this (955) purchase of the outstanding right of creditors inured to the benefit of the plaintiff's grantee." Bigelow on Estoppel (5 Ed.), p. 407.

The same doctrine is recognized in *Bank v. Glenn,* 68 N. C., 36, where it is said that when the title proposed to be conveyed is defective and the grantor afterwards perfects the title by buying in the adverse claim and removing the cloud or defect from the title he undertook to convey, the subsequently acquired title will inure to his grantee by estoppel. And so in *Taylor v. Shuford,* 11 N. C., 131, 15 Am. Dec., 512, the Court, after stating that the estoppel affects the estate conveyed by the deed, proceeds as follows: "The breach is not that no estate passed, but that an estate did pass, but that the title to that estate was not good, and that he was disturbed in the enjoyment of that estate by one having title. In fact, the very idea of annexing a war-

ranty or covenant presupposes an estate to pass; for without the estate passes there can be no warranty, which is a dependent covenant, as is a covenant for quiet enjoyment, although by the phraseology there may be an independent covenant, but it is not attached in law to the estate. This very clearly proves what is affirmed, and what estoppels arise out of a bargain and sale." In *Cuthrell v. Hawkins,* 98 N. C., 205, this Court, citing *Moore v. Willis,* 9 N. C., 559, says: "If A sell to B by indenture he thereby affirms that he has title when he makes his deed; and if he did not, and afterwards acquire one, in an action by him against B the title of the latter prevails, not because A passes to him any title, because he had not any then to pass, but because he is precluded from showing the fact." We have shown that it makes no difference in the application of the rule whether the vendor had no title at the time of his conveyance, or only a defective title. The principle of law, therefore, which governs the two (956) cases must be the same, as the reason is the same.

We do not think *Moore v. Willis,* 9 N. C., 559, which was cited to us by the defendant's counsel, sustains his position. In that case the property fraudulently conveyed had been transferred by the vendor and delivered to his creditors to pay their debts, and the Court simply held that the latter could retain the property as against the fraudulent vendee, because the original transfer was void as to them, and they had received only what the law gives them. The controversy was not between the vendee and the fraudulent vendor, as in our case, and no estoppel, therefore, could arise.

There is no force in the objection that the estoppel must be pleaded in order to avail the plaintiff. The same point was made in *Bank v. Glenn, supra,* and this Court held that the estoppel being part of the title, may be given in evidence without being pleaded. Besides, this objection comes too late.

While the other assignments of error were not pressed in the argument before us, we have carefully examined them and think that they are without any merit.

The former decision of the Court is correct and cannot, therefore, be disturbed.

Petition dismissed.

Cited: *Wool v. Fleetwood,* 136 N. C., 468; *Watts v. Griffin,* 137 N. C., 579; *Weeks v. Wilkins,* 139 N. C., 218; *Buchanan v. Harrison,* 141 N. C., 41; *Lumber Co. v. Price,* 144 N. C., 53; *Eames v. Armstrong,* 146 N. C., 6; *Bryan v. Eason,* 147 N. C., 292; *Jackson v. Beard,* 162 N. C., 115; *Weston v. Lumber Co.,* 162 N. C., 199;

Cooley v. Lee, 170 N. C., 22; *Olds v. Cedar Works,* 173 N. C., 165; *Baker v. Austin,* 174 N. C., 435; *Bourne v. Farrar,* 180 N. C., 140.

(957)

HALLYBURTON v. SLAGLE.

(Filed 11 June, 1903.)

1. Improvements—Betterments—Compensation.

The finding of the jury, in an action for the recovery of land, that defendant acted with a fraudulent purpose in purchasing the same, could be considered on his application for the allowance of the value of the improvements made by him, though for various reasons the issue was immaterial in the action itself.

2. Improvements—Betterments—Petition for Betterments—The Code, Sec. 473.

The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required that the court impanel a jury to ascertain the value of the betterments.

3. Improvements—Betterments—Compensation—The Code, Sec. 473.

One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a *bona fide* holder of the premises under a color of title believed by him to be good, and is therefore not entitled to the value of improvements placed thereon by him.

ACTION by W. S. Hallyburton and wife against J. L. L. Slagle, heard by *Councill, J.,* at September Term, 1902, of BUNCOMBE. From a judgment for the plaintiffs, the defendant appealed.

Charles A. Moore, Locke Craig and Zeb Weaver for plaintiffs.
Merrimon & Merrimon and Shepherd & Shepherd for defendant.

WALKER, J. This is an application by the defendant to be allowed the value of certain improvements alleged to have been made by him on the property which the plaintiffs have recovered in the action.

The jury have found and the court has adjudged that the defendant conveyed the land to Woodfin in trust for his wife and (958) children with intent to defraud his creditors, and that he was afterwards adjudged a bankrupt on his own petition, and the land was sold by his assignee in bankruptcy for the reason that, being fraudulent, the deed of the defendant to Woodfin was void as to creditors. The defendant bought at the assignee's sale. The jury found in the principal case, under an issue submitted to them, that the defendant procured the sale to be made and purchased at the same for the

fraudulent purpose of defeating the rights of his wife and children under his deed to them. It is true that the defendant objected to the submission of this issue to the jury, and while it was not material to inquire in the main suit as to the intent of the defendant in procuring title by purchase at the assignee's sale, as the defendant was estopped to take any benefit from the said purchase and the deed of the assignee, and the title thus acquired fed the estoppel created by his deed, without any regard to his intent, yet we think that the defendant has no legal ground to complain of the action of the court. It did him no harm in contemplation of law in the trial of the issues involving the title to the land. But the finding of the jury may be considered upon this application, as the defendant's right to the relief he seeks depends upon his good faith in claiming the land. We do not think he comes into this court of equity with very clean hands.

But apart from these considerations, the court below, as the record shows, was not satisfied of the probable truth of the allegations of the defendant's petition, and this is a preliminary fact necessary to be found before the court is required to impanel a jury to ascertain the value of the improvements. Clark's Code (3 Ed.), sec. 473. The court found against the defendant as to this fact, and this is sufficient to defeat his claim for the value of the improvements. *Merritt* (959) *v. Scott,* 81 N. C., 385; *Johnston v. Pate,* 95 N. C., 68.

We do not think, upon a careful review and consideration of the facts as disclosed by the record, that the defendant was such a bona fide "holder of the premises under a color of title believed by him to be good," within the meaning of the provisions of the statute or within any equitable principle, as entitles him to the aid of the Court in the manner now invoked by him. He bought with full knowledge of the rights of his wife and children, and if he made any improvements with his own funds on the land, which alleged fact is stoutly contested by the plaintiffs, he must, under the facts and circumstances of this case, bear the consequent loss.

We find no error in the judgment of the court below.

No error.

Cited: Carter v. White, 134 N. C., 478; *Walker v. Taylor,* 144 N. C., 178; *Alston v. Connell,* 145 N. C., 6; *Joyner v. Joyner,* 151 N. C., 183.

SMITH v. INGRAM.

(Filed 11 June, 1903.)

1. Warranty—Covenants—Real Estate—Lex Rei Sitæ—Estoppel.

Where a covenant for title is regarded as an estoppel affecting the title, it must be governed by the law of the State in which the property is situated.

2. Warranty—Covenants—Assignments.

A covenant of warranty in a void deed is of no avail to a remote grantee, there being no assignment thereof to him.

3. Husband and Wife—Estoppel—Warranty—Improvements.

A married woman who permits a grantee and subsequent grantees under a void deed from her to take possession of the land and make improvements thereon is not estopped thereby from recovering such land.

CLARK, C. J., dissenting.

PETITION to rehear the case, reported in 130 N. C., 100. Peti- (960) tion dismissed.

Adams, Jerome & Armfield for petitioner.

McIver & Spence, Douglas & Simms, and J. A. Spence in opposition.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at February Term, 1902, and is reported in 130 N. C., 100. On 21 January, 1878, the plaintiff, being the owner of the land in controversy, which is situated in this State, joined with her husband in the execution of an unsealed paper-writing by which they professed to convey the said land for a consideration received by her to one Lindsay Hursey, who afterwards conveyed to the defendant A. Leach. The other defendants claim their shares in the land by *mesne* conveyances from Leach.

At the time of executing the paper-writing to Hursey the plaintiff and her husband were citizens of the State of South Carolina and were domiciled in that State, and Hursey was a citizen of this State and domiciled therein. The paper-writing was proved by witnesses, there being no acknowledgment of it or privy examination of the wife. There was a general covenant of warranty in the deed. By the Constitution and laws of South Carolina in force at the time the paper-writing was executed a married woman could purchase and convey real property as if she were unmarried, and her deed to the same could be proved by witnesses without privy examination, and

when thus proved and registered was binding upon her. The plaintiff's husband died since this suit was brought.

It may be assumed that if the land had been situated in South Carolina the paper-writing executed by the plaintiff to Lindsay Hursey was valid and effectual for the purpose of passing the (961) land to the latter, and further, that the plaintiff, according to the laws of that State, would be bound by the covenant of warranty. But as the land is situated in this State, the transfer of it must be governed by our law. It seems to be conceded that the title to the land did not pass by the mere force and operation of the deed as a conveyance; but the defendants contend that the plaintiff is estopped by the deed, and especially by the covenant of warranty, to claim the land, as her covenant is valid and binding on her under the laws of South Carolina where she resided and had her domicile at the time she entered into it.

There is a marked difference between the validity of a covenant of warranty where the question is whether the covenantor is liable in damages for a breach of the covenant, treated as a mere personal contract, and its validity for the purpose of creating an estoppel against the covenantor to claim the land which he had sold and conveyed and the title to which he has warranted. In the one case the remedy is by an action on the covenant which sounds only in damages, and in the other the covenant is considered, not as passing the estate, if we speak with technical accuracy, but as concluding the party, who has affirmed that he had the title at the time of the conveyence and has agreed to warrant and defend it, from afterwards disputing that fact, or from asserting a title in opposition to the one he professed to convey; but while the estoppel may not have the legal effect of transferring the title to the covenantor, it indirectly accomplishes that result. Whatever may be the rule with reference to the law governing the validity of a covenant, considered as a personal contract, for the breach of which damages may be recovered, whether it is the law of the place where the property with reference to which the covenant is made is situated, or the law of the place of the contract, we need not decide in this case, for it is sufficient for (962) the purpose of this appeal to hold, as we must, that if the covenant is to be regarded as an estoppel affecting the title, it must be governed by the law of the State where the property is situated, and in this case by the law of this State. Minor's Conflict of Laws, sec. 185; *Riley v. Burroughs,* 41 Neb., 296; *Hill v. Shannon,* 68 Ind., 470; *Tillotson v. Pritchard* (Vt.), 6 Am. St., 95. Referring to this very question of the effect of a covenant of warranty, the Court in *Succession of Larendon,* 39 La. Ann., 952, says: "The rights and

obligations arising under acts passed in one State to be executed in another, respecting the transfer of real estate in the latter, are regulated in point of form, substance, and validity, by the laws of the State in which such acts are to have effect. The rule is said by the Court to apply also to the determination of liability upon the covenant for damages.

If the question of estoppel is to be decided by the law of this State, as we hold it must necessarily be, it follows that it cannot have the effect, either directly by passing the estate or indirectly by concluding the plaintiff, of preventing her recovery in this case. A ruling which would give to the covenant the force and effect the defendants contend it should have, would be in flagrant violation of the spirit and letter of our law in regard to the transfer of real property by married women. We will always in comity enforce the laws of another State, when the rights of the parties should be determined according to the place where the contract was made, or where the transactions out of which those rights arose took place; but we cannot enforce the laws of a foreign jurisdiction when they conflict with our own laws in a matter concerning property situated in this State. If we should say that the covenant works an estoppel which concludes the plaintiff and thereby divests her of the title to the property, we would decide in effect that she had done indirectly what she could not do directly. "The wife cannot subject her (963) separate real estate or any interest therein to any lien except by deed in which the husband joins, with privy examination as prescribed by law; and she will not be allowed to do indirectly what the law prohibits her doing directly." *Thurber v. LaRoque,* 105 N. C., 301. In *Drewry v. Foster,* 2 Wallace, 34, the Court says: "To permit an estoppel to operate against her (a married woman) would be a virtual repeal of the statute which extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyance of the real property of *femes covert.*"

The defendants cannot avail themselves of the covenant, because it was not made directly with them, but with Hursey, and there has been no assignment of the covenant by him to them. It is true that a covenant of warranty is in the nature of a real covenant and runs with the land, even though the word "assigns" is not mentioned therein. *Wiggins v. Pender, ante,* 628. But the defendants can take nothing by this principle, as the deed of the plaintiff was absolutely void and the land, or, more properly speaking, the title or estate, did not pass, and, of course, the covenant cannot be said to have

passed to the defendant with the land. The covenant of warranty is incident to the estate, and as the defendants acquired no estate, it follows that they derived no advantage in any way from the covenant. *Kercheval v. Triplett,* 1 March (Ky.), 493. If it is a binding covenant at all, it is nothing more than a covenant in gross or one detached from the land, and could not have passed to the defendants except by an assignment. When the deed of a married woman fails as a conveyance because of the nonjoinder of her husband or for any other reason, it is ineffectual for all purposes and cannot be relied upon as an estoppel or ground for recovery in any subsequent
(964) controversy. Herman on Estoppel, sec. 581. In *Lowell v. Daniels,* 68 Mass., 168, 61 Am. Dec., 448, the Court, discussing this question, says: "She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seized in her own right and had full power to convey, such covenant would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate or that of the husband and children." See, also, *Pierce v. Chase,* 108 Mass., 254. In *Harden v. Darwin,* 77 Ala., 481, it is said by the Court: "It has been uniformly held that a married woman is not estopped from asserting the invalidity of a conveyance of her property not executed in the mode required by the statute, though she has received a valuable consideration and her vendee has been let into possession; and that a court of equity will not enforce it against her, as an agreement to convey." *R. R. v. Stephens,* 96 Ky., 401; 49 Am. St., 303. The covenant binds the covenantor to warrant and defend the title which passes by the deed, and to answer in damages if the title fail or proves defective. It relates to the title or estate of the covenantor, which he undertakes to convey, and not to the validity of the deed by which it is transferred. The purchaser is presumed to know that a married woman is not bound by a deed without her privy examination, and if he takes a conveyance imperfectly executed or acknowledged by her, it is his own misfortune, if not his fault. *Towles v. Fisher,* 77 N. C., 437. We think the principles laid down in this Court in *Williams v. Walker,* 111 N. C.,
604, are conclusive against the defendants in this case. While
(965) the precise question we are discussing was not involved in that case, it affords a perfect analogy for our guidance and is sufficient in all respects to sustain our decision on this rehearing.

In *Collins v. Benbury,* 25 N. C., 285, 38 Am. Dec., 722, it was held by this Court that a conveyance which failed to pass the land and was merely void could not operate as an estoppel, and this must needs be so.

The defendants further contend that plaintiff is estopped by her act in permitting Hursey and the defendant to take possession of the land and make valuable improvements thereon. We have not been able to find anything in the record upon which they can base this contention; but if there were facts sufficient for that purpose we would be unable to agree with the defendant. A married woman is no more estopped by her acts *in pais* than by her covenant of warranty. This Court has said that no one can reasonably rely upon the acts and representations of a married woman, at least those which are contractual in their nature, as he must know that she is not bound thereby, and "it is only in the case of a pure tort, altogether disconnected with the contract, that an estoppel against her can operate." *Towles v. Fisher,* 77 N. C., 438; *Scott v. Battle,* 85 N. C., 184, 39 Am. Rep., 694; *Williams v. Walker,* 111 N. C., 604; *R. R. v. McCaskill,* 94 N. C., 746.

We have examined with care the authorities to which our attention has been called, and do not think that they support the contention of the petitioner as to the estoppel arising from the covenant of warranty. We make special reference to two of them. In *R. R. v. Conklin,* 29 N. Y., 587, the question as to the valid execution of the deed was not raised, but the point was whether the words of the deed were sufficient to operate as a conveyance of the property, and the Court held that if they were not, resort could be had to the covenant of warranty as containing sufficient words for that purpose. The grantor was *sui juris.* In *Basford v. Pearson,* 89 (966) Mass., 504, there was no reference to an estoppel, as the action was brought to recover damages for a breach of the covenant. The question in our case is not whether Mrs. Smith is liable for damages upon the covenant, but whether she is estopped from claiming the land.

We have given this case most anxious thought and consideration, not only because of the interesting and important questions involved, but because of the great hardship and apparent injustice the defendants may suffer as the result of our decision based upon the application of fixed legal principles to their case.

Whether the defendants can have equitable relief is a question not now before us for adjudication. Such relief has been granted in a case closely resembling this in its facts and circumstances. In that case the Court fully recognized the invalidity of a deed executed by a

married woman, and based its decision upon the ground that the right to equitable relief or to compensation for improvements to the extent that they had enhanced the value of the land did not involve the enforcement of a contract either directly or indirectly, but simply denied to her the use and enjoyment of property for which she had paid nothing and which she acquired by the repudiation of her deed. *Preston v. Brown,* 35 Ohio, 18. Whether this is a correct principle, and the case just cited and others of a like tenor are in accord with our decisions and should be followed by us, is a question which, if it should ever arise, we will leave open for future consideration and entirely free from any expression or even intimation of opinion by us.

However much we may regret the unfortunate situation of the defendants, we cannot grant them any relief, as the matter is now presented, without abrogating well-settled principles and violating the plain provisions of our statute, the enforcement of which is obligatory upon us. After careful examination of the case, we (967) can find no error in the former decision of this Court.

Petition dismissed.

CLARK, C. J., dissenting: Refers, without repeating them, to the views expressed in the dissenting opinion at the former hearing, *Smith v. Ingram,* 130 N. C., 108-115, and to the opinion of the Court in *Wood v. Wheeler,* 111 N. C., 231, and *Taylor v. Sharp,* 108 N. C., 377. Also, to what is said in the concurring opinion in *Vann v. Edwards,* 128 N. C., pp. 425-435, and the dissent (concurred in by two members of the Court) in *Williams v. Walker,* 111 N. C., p. 613. There are some decisions of this Court as to the rights of married women which are hard to be reconciled with the liberal provisions of section 6, Article X, of the Constitution, which has been owing, doubtless, to the fact that the judges who occupied this bench in the years first succeeding its adoption had been thoroughly imbued with the common-law ideas as to the incapacity of married women and the failure of the Legislature to change the language of one or two provisions in statutes which had been passed in conformity with the former Constitution, but which are repugnant both to the spirit and the letter of the present Constitution. This has not escaped the notice of the Court in *Bank v. Howell,* 118 N. C., 273; *Finger v. Hunter,* 130 N. C., 529, and other cases, and has been discussed in the dissenting opinion in *Weathers v. Borders,* 124 N. C., 615-619, and *Walton v. Bristol,* 125 N. C., pp. 426, 432, to which reference is made without repeating what is there said.

By chapter 78, Laws 1899, the General Assembly took married women out of the class of incompetents and from the companionship of "infants, idiots, lunatics, and convicts," in which they had been placed by the statute of limitation (The Code, secs. 148 (968) and 163), and a further approximation to the Constitution was made by chapter 617, Laws 1901. *Finger v. Hunter,* 130 N. C., 529. The Constitution, Art. X, sec. 6, in its terms would take them out of the class of those *non sui juris* in all respects, as has been done in England, where the conception of these disabilities first arose) and in so many States of this Union, among them our neighboring States, Virginia and South Carolina, in which last this contract was made.

The majority of the Court being of opinion that the plaintiff should recover back this land, it would seem elementary justice and equity that she should pay for the betterments placed thereon *(Thurber v. LaRoque,* 105 N. C., 301), and, indeed, should render compensation for the enhanced value of the land *(R. R. v. McCaskill,* 98 N. C., 526, *Preston v. Brown,* 35 Ohio St., 18), though these matters are not now before us. Certainly this should be so here, for the plaintiff received the money for the land under a contract made while residing in a State where she was *sui juris,* and liable upon her contracts as if a *feme sole.* Upon her repudiation of the conveyance, she should not profit by her breach of contract, but should be held liable for the damage caused thereby, like all others who are *sui juris.*

She sold the land living where she had the unrestricted right to sell it, and received the agreed price, $130, her husband joining in the deed. She now wishes to recover the town of Star which has been built upon the land, with all the houses and other improvements placed upon it, and benefiting further by the enhanced value given to the land, upon the technical ground that her privy examination was not taken, when as a matter of fact the sale was her free act and deed and she has acquiesced in such sale since 1878, when it was made. There is not a tittle of evidence, nor any suggestion even, that she did not understandingly and wittingly make the sale of her own will, and it was the law at the place of contract that she could make this sale (969) even without the consent of her husband—though this was had. Should she recover the land under these circumstances, she should account for betterments and enhanced value, and receive back the land only after paying the value of these additions and returning the $130. *Burns v. McGregor,* 90 N. C., 222.

Cited: Wallin v. Rice, 170 N. C., 419.

MOORE v. PALMER.

(Filed 11 June, 1903.)

Evidence—Incompetent—The Code, Sec. 590—Partnership.

In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent, as against the executor of the deceased partner or as against the firm.

CLARK, C. J., dissenting.

ACTION by D. W. Moore against James Palmer and others, heard by *McNeill, J.*, and a jury, at September Term, 1902, of GUILFORD. From a judgment for the plaintiff, the defendants appealed.

King & Kimball for plaintiff.
John A. Barringer for defendants.

MONTGOMERY, J. The plaintiff alleged in his complaint that the defendants, James Palmer and John Eudy, the testator of the other defendant, were partners, and that at the death of Eudy the partnership owed to the plaintiff a balance of about $235 for goods sold and delivered to them. On the trial the defendant Palmer was allowed to testify over the objection of the other defendant, "that he (970) and the testator Eudy had entered into a copartnership for the purpose of cleaning out and putting in proper shape and condition and selling the Lindsay mine. That they were to bear all expenses incident thereto equally, and after paying the same divide the profits on the same basis; that the work of cleaning out the mine commenced the latter part of November, 1896, and ran up to the time of Eudy's death, 15 June, 1897. That the goods, the price of which was sued for, were furnished by the plaintiff on his order for the firm of Palmer & Eudy in the main, but some was for tools, etc., used about the mine."

In his instructions to the jury his Honor said in reference to that testimony: "Now, I have to say to you that it was possible error to have admitted the testimony of Palmer as to transactions with the deceased man, Eudy, and those statements are excluded from your consideration as against such party, but they may be considered as against Palmer only, the man making them. I exclude from your consideration all transactions and communications as against Eudy."

The evidence was clearly incompetent. *Fertilizer Co. v. Rippy,* 123 N. C., 656. And the question that presents itself is, Was the effect

of the attempted correction of the error in his Honor's instruction to put the defendant in the same condition as if the evidence had not been received? We think it did not. The jury should have been instructed not to consider any part of the witness's evidence except that part in which he stated that the plaintiff furnished the goods on his (witness's) order, and not to consider his testimony of the alleged partnership even in connection with the witness himself. It may have been that the jury would not have believed the testimony of the other witnesses concerning the partnership if Palmer's testimony on that question—allowed, it is true, only against himself—had not been given in. His testimony may have given more weight to the testimony of the other witnesses concerning the alleged partnership than it would have carried without it. His Honor should have held (971) that all that the witness Palmer could testify to was that he had ordered the goods, and that he was therefore liable for the price. He should not have submitted to the jury, on Palmer's evidence, anything concerning the alleged partnership to hold even Palmer himself on the partnership liability. If there had been a partnership existing between himself and Eudy at the time Palmer ordered the goods, and if they were used for the partnership benefit, those matters should have been proved by other witnesses.

Error.

WALKER, J., concurring: This action was brought to recover the amount of an account for goods alleged to have been sold and delivered by the plaintiff to the firm of Palmer & Eudy. The defendant Palmer filed no answer and did not deny his individual liability, but the defendant Moon, administrator of Eudy, did answer and deny the partnership, and also denied that any goods had been sold or delivered to his intestate, as a member of said firm or otherwise.

The plaintiff, in order to establish his claim, introduced as a witness the plaintiff Moore, who on his examination was asked to state to whom plaintiff sold the goods. The defendants objected to this question, the objection was overruled and the defendants excepted, the court holding at the time "that anything the witness might say about the intestate Eudy being connected with the business or any transaction between him and the plaintiff would be incompetent and should not be considered by the jury, but that the witness might state to whom he sold the goods as affecting and bearing upon the liability of the defendant Palmer." Thereupon the witness testified "that he had repeatedly seen the intestate Eudy about the mine which was being cleared up; that he had repeatedly heard him giving (972) orders to the employees there working under the defendant

Palmer; that he had repeatedly carried Eudy there, and had gone with him from his home, where Eudy boarded, to the mine. That the bill sued on was for goods furnished to laborers working for Palmer and Eudy and were furnished upon the order of Palmer; that the balance due plaintiff 7 April, 1897, was $235.63, and that no part of the same was paid, but the whole was still due and owing. That the mine being cleaned up was the Lindsay mine. That the account originally was for a sum between $300 and $400; that $50 had been paid thereon in December, 1896, and $44 in the spring of 1897. That Eudy died 15 June, 1897."

It is conceded that the court may admit testimony which is competent against one of the parties to the suit and not against another, for the purpose of charging with liability the party against whom it is competent. The rule is well settled, but I do not think it is applicable to this case. The testimony may be admitted and restricted to one of the parties, but it should not be admitted in such a form as is calculated to prejudice the other party, if this can be avoided.

Why it was necessary to show the liability of Palmer, when he had not denied it and was not disputing the plaintiff's claim, I cannot understand. It will be observed that while the court ruled that Moore might state "to whom he sold the goods, as affecting and bearing upon the liability of the defendant Palmer," the testimony elicited from the witness Moore almost wholly related to dealings, transactions, and communications with Eudy. It is true that the court, in its charge, told the jury that so far as the testimony of Moore "tended to bear upon the question of partnership between Palmer and Eudy or any contract with Eudy and the witness, or any conversation or transaction between the witness and Eudy, it was excluded, and his testimony was only binding upon the defendant Palmer," but I do not think
(973) that this caution was sufficient or that the evidence, under the circumstances of the case, should have been admitted. Why do the vain thing of proving the admitted liability of Palmer, and what effect could the testimony have had but to prejudice the administrator of Eudy? It was either relevant for the purpose of charging the administrator of Eudy or it was not relevant at all. The court thought it was incompetent, and in a general way told the jury to disregard it except as to Palmer, but did not tell them which part of it was competent as to Palmer and incompetent as to Eudy's administrator. How could the jury be expected to make the discrimination? But the chief error was in submitting the testimony to the jury at all, as it was not necessary to show Palmer's liability, and the

testimony might have influenced, and no doubt did influence, the jury in returning a verdict against Eudy's administrator.

The court below permitted the witness Palmer to testify that the goods were furnished by the plaintiff, on his order, for the firm of Palmer & Eudy. The jury were afterwards instructed that the testimony could only be considered as against Palmer for the purpose of fixing him with liability.

What I have said as to the testimony of the witness Moore is equally applicable to the testimony of Palmer. He was alleged to be a member of the firm composed of himself and Eudy and was interested in the event of the action, as a recovery against Eudy would diminish his liability to the plaintiff by one-half. *Fertilizer Co. v. Rippy,* 123 N. C., 656; *Lyon v. Pender,* 118 N. C., 150. As I have said, no answer was filed by Palmer and there was no denial of or dispute as to his liability. The jury may, therefore, have been misled by the admission of his testimony. They could not very well consider it as to Palmer, for he did not deny his liability, and it is impossible to tell what influence it may have had upon the jury in passing upon the real issue involved as to the liability of Eudy's estate, notwithstanding (974) the caution of the court.

If Palmer had denied his liability, it would have been sufficient to establish it for the plaintiff to have shown by him that he ordered the goods without requiring him to state for whom he ordered them. In this case the judge could have admitted the testimony in a way so as to have charged Palmer, if he had denied his liability and it was necessary to charge him, without, at the same time, injuriously affecting Eudy's estate. The proof of a partnership as against Palmer, so as to charge him as a member of the firm, would necessarily involve the finding by the jury that there was a partnership between Palmer and Eudy, and in this way the estate of Eudy may have been prejudiced. The proof should have been so confined as to have related solely to Palmer's individual liability. If Palmer ordered and received the goods, he was liable, whether he was a partner or not. It is apparent, I think, that the testimony of Moore and Palmer was not admitted merely to show a delivery of the goods to Palmer and the value thereof.

If the jury did not base their verdict on the testimony of the witnesses Moore and Palmer, I do not see upon what testimony they found that the goods had been sold to Palmer and Eudy. The testimony of Charles Palmer, the only other witness in the case, except Ragan, who testified about an entirely different matter, related to the partnership and not to the sale and delivery of the goods.

The judge ruled out all of the testimony of the witnesses Moore and Palmer, so far as it tended to charge Eudy's estate with liability, and, having done so, no testimony remained upon which to base a verdict as to the sale and delivery of the goods to the firm, Charles Palmer, as we have said, testifying only to the partnership.

It follows, therefore, that there was no evidence of the sale (975) and delivery of the goods, so far as Eudy was concerned, and it would seem that the motion of the defendant in the court below to dismiss the complaint under the statute should have been granted, and there was error in not doing so, for which a new trial should be awarded.

DOUGLAS, J., concurs in the concurring opinion of WALKER, J.

CLARK, C. J., dissenting: This is an action to recover $235.63 for goods and merchandise sold to the defendant James Palmer and John Eudy (the testator of defendant Brown), trading and doing business as partners. One Charles Palmer testified without objection that he knew Eudy, and had on many occasions gone with him from his home to the Lindsay mine, where his father (the other defendant) was cleaning out the same; there were engaged in cleaning out the mine ten or a dozen laborers; that several times Eudy had stated to him that he and defendant James Palmer were partners in opening up and developing the Lindsay mine for sale, and that they were to bear the expenses equally and share the profits on the same basis; that Eudy did not want to be known in the transaction; that he had often heard the testator, Eudy, giving instructions to parties working in and around the mine as to what to do and how to do it.

The plaintiff testified, *without exception,* that he had repeatedly seen the testator Eudy about the (Lindsay) mine, which was being cleaned out; that he had repeatedly heard him giving orders to the employees there working under defendant Palmer; that he had repeatedly carried Eudy there, gone with him from his home, where Eudy boarded, to the mine; that the bill sued on was for goods furnished to laborers working for Palmer & Eudy, and were furnished upon the order of Palmer; that the balance due, deducting payment, was $235.63, (976) with interest from April, 1897. None of these things were "transactions or communications" between the plaintiff and deceased. *Gray v. Cooper,* 65 N. C., 183; *Cowan v. Layburn,* 116 N. C., 526; *Johnson v. Rich,* 118 N. C., 270. The evidence was competent, and the judge further told the jury they could only consider the evidence as to whom he sold the goods as affecting the liability of Palmer. It is true that the first assignment of error recites the admission of

other evidence which would be objectionable, but such recital goes for naught unless the "case on appeal" as settled sets out that such evidence was in fact admitted. *Walker v. Scott,* 106 N. C., 56; *Merrell v. Whitmire,* 110 N. C., 367; *Luttrell v. Martin,* 112 N. C., 593. Otherwise, a party could always get a new trial by reciting as facts matters which do not appear in the "case on appeal." *S. v. Dixon,* 131 N. C., 813; *Patterson v. Mills,* 121 N. C., 268.

Upon the above evidence there was certainly more than a scintilla to show that Palmer and Eudy were partners, and that the plaintiff sold the goods to Palmer to be used in the business in which, as Charles Palmer testified, Eudy admitted he was a partner. It was therefore not error to refuse to nonsuit the plaintiff.

James Palmer, defendant, testified that he and Eudy were partners and that the plaintiff furnished the goods on his order to be used by the firm in cleaning out the mine. The judge subsequently withdrew this evidence from the jury and told them not to consider it as affecting Eudy's estate "or in any way bearing upon the question whether he was a partner of Palmer and should be excluded, and should be considered by them only so far as it affected the defendant Palmer himself." The decisions are numerous and recent that if incompetent evidence is admitted the error can be cured by withdrawing the evidence and telling the jury not to consider it. *Wilson v. Mfg. Co.,* 120 N. C., 94, and cases there collected; *Crenshaw v. Johnson,* 120 N. C., 270; *S. v. Apple,* 121 N. C., 584; *Waters v. Waters,* 125 N. C., 591; *S. v. Ellsworth,* 130 N. C., 691. (977)

It is contended, however, that as Palmer had not answered, this evidence was unnecessary as to him; but the court restricted it to him, and, if unnecessary, the other defendant could not complain. In fact, it was not unnecessary as to Palmer, for though he had filed no answer the plaintiff still had to prove the delivery and value of the articles as against him, for at most the plaintiff could only have taken judgment by default and inquiry against him for failure to file answer.

Nothing is more usual than, when there are two or more defendants, for evidence to be admitted against one or more, which evidence the jury are told not to consider against the other defendants; and this is true both in criminal and civil cases. The admissions of one defendant are admissible to show a partnership as against himself "to prove his own membership, who were his copartners, and the scope of business," though incompetent against others alleged to be partners in the same action. Abbott Trial Ev., 259 (14); 2 Rice on Ev., sec. 450, citing numerous cases; 2 Greenleaf Ev. (16 Ed.), sec. 484. Even in joint trials for fornication and adultery, it is held that the admissions of one

party are competent against that person "where the jury are instructed that such admissions can only be considered upon the guilt of the party making them." *S. v. Rinehardt,* 106 N. C., 787; *S. v. Cutshall,* 109 N. C., 764, 26 Am. St., 599. So in murder, riot, and other offenses, when two or more are on trial, the admissions or confessions of one that he and the others named committed the act charged have always been admitted against him, though the jury are instructed not to consider the evidence against the other defendants.

The evidence of Palmer was competent to show the partnership as against himself, though the judge properly withdrew it from
(978) the jury and told them not to consider it against Eudy. *Fertilizer Co. v. Rippy,* 123 N. C., 656; *S. c.* 124 N. C., 651.

On cross-examination James Palmer testified that Brown, Eudy's executor (since deceased), had said he was going to pay the account sued on, and the defendant excepted. This was not a transaction or communication with one deceased to fix his estate with any liability, and was competent to rebut the plea of the statute of limitations. Brown's personal representative is not a party to this action.

The other exceptions are without merit and require no discussion.

Cited: Medlin v. Simpson, 144 N. C., 400; *Bedsole v. R. R.,* 151 N. C., 153.

LAMB v. LITTMAN.

(Filed 11 June, 1903.)

1. Witnesses—Reputation—Evidence.

The reputation of a man may be proved only by those who know it, and this applies equally whether it be his general reputation for truth and honesty or any special fitness for any employment for which he may be engaged.

2. Master and Servant—Employer and Employee—Vice-principal—Fellow-servant.

A vice-principal is one who has such a control over those who act under him that they have a just reason to believe that a failure or refusal to obey the superior will or may be followed by a discharge.

3. Evidence—Negligence.

In an action by an employee for injuries sustained by being pushed against machinery, it is competent as explaining the nature of the injury to show that the machine was not cased.

4. Evidence—Negligence—Harmless Error.

In an action by an employee for injuries sustained by being pushed against machinery, evidence that the machinery was second-hand is irrelevant, and if admitted is harmless.

ACTION by W. T. Lamb against I. Littman, heard by *Shaw, J.,* (979) and a jury, at May Term, 1902, of ROWAN. From a judgment for the plaintiff, the defendant appealed.

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

DOUGLAS, J. Every legal question essential to the determination of this case was practically decided in the former opinion of this Court, reported in 128 N. C., 361, 53 L. R. A., 852, which is the law of this case.

The first class of exceptions relied upon by the defendant are to such parts of the evidence and the charge as relate to the character of Burrus among mill hands. The reputation of a man can be proved only by those who know it, and this applies equally whether it is his general reputation for truth and honesty or any special fitness for any employment for which he may be engaged. Mill owners would naturally know more of his reputation as a skilled mechanic or operative, while the operatives themselves would have peculiar facilities for ascertaining his character as a boss with relation to those under him. In its former opinion this Court says, on page 363: "In the case now being considered there is no evidence of the unskillfulness of the boss, Burrus, but the evidence shows that he was unfit and incompetent to perform the duties of supervising children and the help under him by reason of his cruel nature and high temper, demonstrated by his treatment of the plaintiff on the day before as well as on that of the injury, which had become so well known as to establish for him a general reputation extending back for six or more years in the divers mills and towns in which he had worked. It is clear that the master would have been responsible for injuries inflicted upon the servants by him, had he (the master) known of such traits of character; and it is equally clear that he could have obtained (980) the information had he seen fit to inquire; or, having inquired, knowingly and voluntarily assumed the responsibility in employing him and placing him in that responsible position." The second exception was to the charge of the court relating to the doctrine of fellow-servants as applied to Burrus. The effect of our former opinion upon substantially the same facts was to hold that Burrus was a vice-principal. He was admittedly the superintendent or boss of the spinning-room where

the plaintiff, a ten-year-old boy, was employed as a floor sweeper. The defendant contends that as he did not have authority to hire and discharge hands, he could not be a vice-principal. It is not absolutely necessary for a vice-principal to have the authority to hire and discharge. In some exceptional cases the relation might exist without such power; but in any event the result is practically the same if it is understood that a disobedience of his orders will lead to a discharge. The mere form of requiring the boss to recommend a discharge, which will follow as a matter of course, does not change the legal effect where there is no change in the practical result. The rule is thus stated in *Turner v. Lumber Co.*, 119 N. C., 387: "The test of the question whether one in charge of other servants is to be regarded as a fellow-servant or a middleman is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged." Citing *Mason v. R. R.*, 111 N. C., 482, 18 L. R. A., 845, 32 Am. St., 814; *S. c.*, 114 N. C., 718; *Shadd v. R. R.*, 116 N. C., 970; *Patton v. R. R.*, 96 N. C., 455; *Logan v. R. R.*, 116 N. C., 940, 951. In this case it is also expressly held that, "It is not essential that it should always appear that such authority is expressly given." If the discharge followed as a matter of course, its formal method would make but
(981) little difference to the employee. The efficacy of the principle lies in the coercive power existing where a subordinate depends directly or indirectly upon the will of another for his daily bread.

These principles are expressly recognized by the entire Court in *Ward v. Odell*, 126 N. C., 946, the division of opinion being entirely upon another point. See, also, Bailey's Master's Liability, 341; McKinney Fellow-servant, sec. 14.

The third class of exceptions rely upon the contention that Burrus was not acting within the scope of his employment when he injured the plaintiff. This also was decided in favor of the plaintiff upon a similar statement of facts at the former hearing, as will be seen from the above extract from the opinion of the Court.

The fourth exception—or rather class, as the exceptions are divided by the defendant into four classes in accordance with the respective principles upon which they depend—is to the admission of testimony tending to prove that the machine was second-hand and uncased. The defendant testified that it was cased, and other witnesses testified, without objection, that it was cased and uncased. We see no objection to the plaintiff testifying that the machine was uncased, as explaining the nature of the injury with its attending circumstances. The testimony as to the machinery being new or second-hand was irrelevant, but we

cannot see how it could do any harm, as it would have injured the plaintiff in either event. It is just as dangerous to be shoved into new machinery as into old; and the plaintiff would have been entitled to recover for an injury received by being thrown against anything else. The other miscellaneous exceptions are without merit and apparently not relied on by the defendant. The judgment is

Affirmed.

Cited: *Beal v. Fiber Co.*, 154 N. C., 155; *Alley v. Pipe Co.*, 159 N. C., 330; *Walters v. Lumber Co.*, 163 N. C., 542.

(982)

STATE v. GOODE.

(Filed 24 February, 1903.)

1. Arguments of Counsel—Improper Remarks of Prosecuting Attorney.

Where an attorney for a defendant comments upon the fact that the State had not subpœnaed certain persons having knowledge of the crime, it is error to allow the solicitor to state that the witnesses were subpœnaed by the defendant and were in court, there being no evidence of these facts.

2. Homicide—Manslaughter—Evidence—Sufficiency.

The evidence in this case is sufficient to be submitted to the jury as to the guilt of the defendants of manslaughter.

3. Homicide—Evidence—Reasonable Doubt.

Where two persons are charged with being the cause of the death of a person, but not with conspiracy, the jury should acquit if they have a reasonable doubt as to which one inflicted the injury.

INDICTMENT against Demus and Helen Goode, heard by *Jones, J.*, and a jury, at September Term, 1902, of NORTHAMPTON. From a verdict of guilty of manslaughter and judgment thereon, the defendant Demus Goode appealed.

Robert D. Gilmer, Attorney-General, for the State.
Peebles & Harris for defendant.

CONNOR, J. The defendant Demus Goode was, together with Helen, charged with the murder of Estelle Stancell. The solicitor said to the court that he would ask for a verdict of murder in the first degree. The court, at the conclusion of the argument, withdrew from the jury the

consideration of murder in the second degree. The defendants were convicted of manslaughter. The judgment was suspended as to Helen, and pronounced as to the defendant Demus, from which he appealed.

It was shown in evidence that the deceased was about eight years of age; her parents were dead; Demus Goode took her about six
(983) months prior to her death. Mary Stancell, a witness for the State, testified that she went to the house of the defendant the day the child died. Some one asked the defendant Helen how the child was. She said she was on the bed. Margaret Stevenson asked if she were dead, and felt her body. She was cold. The defendant said nothing. Demus was in the house part of the time. Helen heard them say she was dead. Witness noticed scratches on face and on breast. Margaret said, "Here is a scar on breast made when she fell downstairs." Stairs are 6 or 7 feet high. Scar on breast looked like torn places, like she had been stabbed. Burn on side of leg. Child was thin. It was not concealed. After its mother's death, child went to the defendants. They were no kin to it; defendant Helen said that the child had drunk molasses and it had affected her bowels; also, that she had fallen from the loft. She had scratches on her face, looked like "jobbed places." John Stancell, her uncle, and Mary Stancell, aunt of the child, and several others were present at the conversation. There was no attempt to have a secret burial.

W. W. Davis testified that defendant lived on his land; that child was puny; had scar on cheek. The morning the child died and before it died, Demus went to witness's house and said the child had made a fire and got burned. The child's mother died of consumption. Demus said that the child's bowels were out of fix and got some medicine from witness. Witness lived in sight of defendant's house and passed there frequently; never heard of child's being treated cruelly by defendants.

James S. Grant, the coroner, testified that he saw the body of the child a week after it was buried—it was exhumed; that it was terribly scarred over the whole body, looked like it had been whipped all over.

It was almost a skeleton, was very poor. Demus said that the
(984) cut on the head was made by a fall; said she got up and made a fire the night before she died; said he did not know how the scars came on her body. Witness said the scars looked like they were from four months to three days old.

Dr. W. H. Lewis testified that he saw the body about a week after it was buried; it was not decomposed; it was very thin; there was a wound on the head—old wound on top of head, was made some time before the child died. There were on the body a number of old and a number of new scars, looked like severe whipping; there were twenty-

five recent scars and a great number of older ones; child looked as if badly nurtured. Witness could not say that any one or all of the injuries caused her death. All the wounds would or might cause its death. The defendants offered no testimony.

Defendant's first exception: One of the defendant's attorneys in his argument commented upon the fact that the solicitor did not subpœna as witnesses an uncle and aunt of the child, who were present when it died. The solicitor replied, and was permitted to state, that these witnesses were in the courtroom, subpœnaed by the defendants, and could have been called by the defendants. Defendants objected and, upon his Honor's refusal to stop the solicitor, excepted.

In this there was error. There was no evidence that the persons referred to were present or that they had been subpœnaed by the defendants. The defendant's counsel had not said so.

It is well settled by the decisions of this Court that the failure to summon witnesses, who are shown to have been present at conversations regarding the matter in controversy or have knowledge in respect to controverted facts or questions in issue, is a proper subject for comment by counsel; or a failure to examine witnesses who have been summoned or sworn is likewise a proper subject of comment. *Rodman, J.,* in *S. v. Jones,* 77 N. C., 520, says: "We think the solicitor had (985) a right to comment upon the fact that the defendant, *after having sworn Whitley* as a witness, declined to examine him."

In *S. v. Kiger,* 115 N. C., 746, it appeared that the defendants had summoned ten witnesses and had not called them. Comment upon such fact was held proper.

The defendants' case is distinguished from these in that there was no evidence of the fact stated by the solicitor. The defendants' counsel had stated no fact in regard to the matter. It was in evidence on the part of the State that the persons referred to were present at or about the time the child died, and conversations regarding the cause of its death were with the defendants. His comment was, so far as we can see, based upon the assumption that the persons had not been summoned by the State. This did not open the door to the solicitor to make the statement complained of. It would have been entirely competent for him, by way of reply, to have suggested that the defendants had equal opportunity with the State to have summoned these persons. His Honor, in permitting the solicitor to state that they had been summoned and were then present, clearly violated the rule laid down by this Court in *S. v. O'Neal,* 29 N. C., 251, in which it is said: "It is the right and duty of the presiding judge, if counsel state that facts are proved upon which no evidence has been given, to correct the

mistake; and he may do so at the moment or wait until he charges the jury." His Honor not only failed to do either, but, after objection by defendants' counsel, declined to do so. We may not speculate upon the effect the statement of the solicitor made upon the minds of the jury. It was error to permit it, and calculated to prejudice the jury against the defendant. For this error he is entitled to a new trial.

While this ruling is sufficient to dispose of this appeal, we think it proper to notice two other exceptions appearing in the record, which were argued by the Attorney-General and the defendant's coun-
(986) sel. The defendants requested the court to charge the jury that if they believed the evidence they will find the defendants not guilty. His Honor declined to so instruct the jury, but did charge them that if the defendants undertook to act *in loco parentis* to the child, Estelle Stancell, and that if they were so grossly careless and negligent in their care of the child, as a result of which the child suffered cruel and unusual punishment so that her death ensued, they would be guilty of criminal negligence, and the jury should convict of manslaughter; that if the defendants or either of them treated the deceased in a grossly cruel and negligent manner or in such manner as to show a wanton and reckless behavior and total disregard of the rights of others, or if they inflicted cruel and unusual punishment out of proportion to the offense committed, and the death of the deceased resulted from such cruel and negligent treatment, the defendant guilty of such cruel and negligent treatment would be guilty of manslaughter. If both the defendants were guilty of such treatment towards the deceased, and death resulted therefrom, then their verdict would be guilty as to both.

There was ample evidence to be submitted to the jury, and his Honor properly refused to instruct them as requested. The testimony, if true, shows that a brutal and criminal homicide had been committed, and that an infant of eight years, without parents living, was the victim. The defendant has no cause to complain of the law in that respect laid down to guide the jury. It is by no means clear that the court should not have instructed the jury that there were phases of the testimony which, if true, constituted murder at least in the second degree. It is difficult to conceive how bruises, scratches, and wounds, such as those described by the coroner and Dr. Lewis, could have been inflicted upon the body of the deceased child as a punishment, or otherwise
(987) than as an exhibition either of a brutal passion or a wicked and malicious heart fatally bent upon mischief. The condition of the wounds shows that a course of systematic cruelty had been practiced upon the helpless victim. One witness says that they appeared to have been from four months to three days old. Dr. Lewis says the wound

on the head was an old one. The conduct of the defendants at the time of the death of the child showed a callous indifference to its condition and suffering. When asked how the child was, Helen said, "She is on the bed." She was then cold in death. "The exposure or neglect of an infant or other dependent person resulting in death, if an act of mere carelessness wherein danger to life does not clearly appear, the homicide is only manslaughter; whereas if the exposure or neglect is of a dangerous kind, it is murder." 2 Bishop New Criminal Law, star page 764.

We find no error in the instructions given by his Honor to the jury in regard to the burden of proof, or in the manner in which they should consider circumstantial evidence, or the benefit to which the defendants were entitled of a reasonable doubt.

The defendants requested the court to instruct the jury that if the jury are in doubt as to which one of the defendants struck the blow or blows causing the death of the deceased, and have reasonable doubt as to whether Demus Goode inflicted the injury or as to whether Helen Goode inflicted the injury, then their verdict should be not guilty as to both. In response to this prayer his Honor charged the jury: The jury will find from the evidence beyond a reasonable doubt what each of the defendants did, and from the facts so found the jury will determine under the charge of the court whether or not such defendant is guilty. The evidence of one should not be used against the other.

The language of the prayer is taken from and approved by this Court "as an abstract proposition of law," in *S. v. Finley,* 118 N. C., 1161, 1170. The defendants were not charged in the indictment (988) with conspiracy to kill or cause the death of the deceased. There was no evidence of the relation which the defendants bore towards each other, or the age of Helen.

As the case goes to the court below for a new trial, we deem it proper to say that the court should have given the instruction asked, and proceeded to explain to the jury, in the light of the testimony and its several phases, the law in regard thereto. If the jury should find that the deceased came to her death from criminal neglect to provide food or medicine, the question would be presented as to the liability of the defendant Demus and his relation to the child; also, to what extent Helen was responsible for the criminal negligence of Demus. If, on the contrary, they should find that the child came to its death by blows and positive acts of cruelty, they should be called upon to ascertain which, if either, of the defendants inflicted such blows, and how, if at all, the other was connected with or related to the crime. We do not see how it is possible that a child of eight years of age could by disobedi-

ence or otherwise merit such punishment as is indicated by the wounds found upon its body. As was well said by the Attorney-General, happily for the good name of the State no similar case is to be found in our Reports. In view of the several phases of the testimony upon which the guilt or innocence of the defendants, or either, is dependent, we do not think the charge as given is fully responsive to the prayer, or a compliance with the rules laid down by this Court, or the provision of the statute. The Code, sec. 413; *S. v. Dunlop,* 65 N. C., 288; *S. v. Jones,* 87 N. C., 547; *S. v. Boyle,* 104 N. C., 800.

PER CURIAM. There must be a *venire de novo.*

Cited: *S. v. Greer,* 162 N. C., 652; *S. v. Orr,* 175 N. C., 776.

(989)

STATE v. SPIVEY.

(Filed 24 February, 1903.)

1. Jury—Juror—Qualifications—The Code, Secs. 1728 and 400.

A juror is not disqualified by having a suit pending and at issue in court, unless it is to be tried at the same term at which he is drawn to serve.

2. Homicide—Murder—"Cooling Time"—Provocation.

The doctrine of "cooling time" does not apply where there is no legal provocation.

3. Homicide—Premeditation.

Where the purpose or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design be formed any definite length of time before the killing.

4. Homicide—Insanity—Instructions.

The charge on insanity—that defendant should show to the satisfaction of the jury that at the time of committing the deed he was insane, and did not know right from wrong, or did not know he was doing wrong; that it would not be sufficient for the jury to be satisfied that he was a man of weak mind, but they should be satisfied that he was insane, and did not know right from wrong, before they could acquit him on the plea of insanity; and that if they should be satisfied from the evidence that he was insane, as the court had explained insanity, they should acquit—will be held sufficient to make the jury understand their duty; such charge being prefaced with the statement that defendant admits the killing, but says that at the time he killed deceased he was insane, and that his mind was so diseased that he did not know what he was about, or was not conscious of doing wrong at the time of committing the deed, or could not distinguish between good and evil and did not know what he did.

5. Homicide—Insanity—Issues.

In an indictment for murder, there being no allegation that the prisoner was insane at the time of the trial, no issue as to insanity need be submitted.

6. Homicide—Manslaughter—Instructions.

In an indictment for murder, an instruction that there is no evidence of manslaughter is proper where there had been no fight between the parties, no battery or assault upon the prisoner by the deceased, no legal provocation, and even if the language used by the deceased just before he was killed could be perverted into legal provocation, then the cruel and excessive violence used by the prisoner was out of all proportion to the provocation.

INDICTMENT against Vance Spivey, heard by *Jones, J.*, and a (990) jury, at August Term, 1902, of HALIFAX. From a verdict of guilty of murder in the first degree and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
T. C. Harrison for defendant.

MONTGOMERY, J. The first exception is to the refusal of his Honor to quash the bill of indictment on the ground that one of the grand jurors, who acted in finding the bill, had a suit pending and at issue in the court. The summons was issued and made returnable to the term at which the bill was found, but no pleadings had been filed. The cause was not at issue when the bill was found and the case tried, and even if it had afterwards, at the same term, been brought to issue, under the decision of this Court in *S. v. Smarr,* 121 N. C., 669, the exception could not be sustained, as the case would not be for trial until the next term of court. The Code, sec. 400. The object of section 1728 of The Code is to disqualify one to serve as a juror who had a suit to be tried at the same term at which he is drawn to serve as a juror.

The other exceptions are to the charge of the court. The first of them is "that his Honor failed to charge the jury that from the evidence there was not sufficient cooling time between the time that the deceased left the cell and his return, when the killing was done." The prisoner and the deceased were convicted criminals, sentenced to terms in the State's Prison and at the time of the (991) homicide confined in the quarters prepared for them on one of the State's farms in Halifax County. They slept in the same box (bunk), and to get in or out of the bed the deceased had a habit of stepping over or across the prisoner, who occupied the front berth.

The deceased, on the morning of the homicide, in getting out of his bed, was threatened by the prisoner and told that if he repeated his act he (the prisoner) would kill him. The deceased went out of the room, remained five minutes, and in getting back into his place in the box across the prisoner, remarked to the prisoner, "You trifling, one-armed scoundrel, if killing is what you want, you can get all you want. I am a killing man." The prisoner himself testified that he had several times before threatened to kill the deceased if he stepped over him again, and that he had prepared and hid under his bunk a piece of iron 18 inches long and about ¾ of an inch thick, weighing about 2 pounds, with a nut screwed on the end. From the evidence it appeared that he struck the deceased seven licks over the head and face, causing death.

In the light of the evidence in this case the doctrine of "cooling time" does not apply. The deceased did not offer to strike the prisoner, and therefore gave him no legal provocation. "Words of reproach and of insult, however grievous, do not make legal provocation, nor do indecent or provoking actions or gestures expressive of contempt and reproach, unless accompanied with indignity to the person, as by a battery, or an assault at least. . . . In the absence of such provocation, there is in the eye of the law no adequate cause for such furious state of mind of the prisoner and excessive heat of blood as will mitigate the crime from murder to manslaughter. In such a case there is no occasion for cooling time." *S. v. McNeill,* 92 N. C., 812.

The third exception is, "That the court charged the jury that (992) it would not be necessary for such fixed design to be formed a definite time before the killing." The instruction of his Honor on the question of murder in the first degree was full and clear and correct. He said in part: "An act is done wilfully when done intentionally and on purpose. By premeditation is meant thinking out beforehand; and when one thinks over doing an act and then determines or concludes to do it, he has premeditated the act. Malice, in the ordinary sense, means ill-will or hatred toward another; but in its legal sense it signifies a wrong act done without just cause or excuse. Before you can convict the prisoner of murder in the first degree, it is necessary for the State to show from the evidence, beyond a reasonable doubt, that the prisoner, prior to the time of the killing, formed the purpose or design to kill the deceased, and that this design to kill was formed with deliberation and premeditation, and that in pursuance of said design the prisoner killed the deceased. It would not be necessary for such fixed design to be formed any definite time before the killing. If it was formed but a moment before the killing it would be sufficient; but if formed at the time of the killing it would not be suffi-

cient to make murder in the first degree; for it is essential to constitute murder in the first degree that the fixed purpose or design to kill should have been formed at some time before the killing."

The fourth and fifth exceptions may be treated together. They were directed to those parts of his Honor's charge on the question of the plea of insanity on the part of the prisoner. He instructed the jury "that the prisoner should show to the satisfaction of the jury that at the time of committing the deed he was insane, and did not know right from wrong, or did not know he was doing wrong at the time of committing the deed. It would not be sufficient for the jury to be satisfied that he was a man of weak mind, but they should be satisfied that he was insane and did not know right from wrong, before (993) they could acquit the prisoner on the plea of insanity." The jury was further instructed that "if they should be satisfied from the evidence that the prisoner was insane," as he had explained insanity, then they "need not proceed further, but return a verdict of not guilty; but if you are not so satisfied, you will proceed to determine from the evidence of what degree of homicide the prisoner is guilty." The argument on that exception to that part of the charge was that it should have been fuller and more elaborate, and such a charge as was given in *S. v. Potts,* 100 N. C., 457. The charge in that case was almost exactly like that in *S. v. Haywood,* 61 N. C., 376.

There, the instruction was "that if the prisoner at the time he committed the homicide was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if, on the contrary, the prisoner was under the visitation of God and could not distinguish between good and evil and did not know what he did, he is not guilty of any offense against the law, for guilt arises from the mind and wicked will." *Pearson, C. J.,* in the opinion of the Court, said: "We fully approve the charge of his Honor upon the subject of insanity. It is clear, concise, and accurate, and as it is difficult to convey to the minds of jurors an exact legal idea of the subject, we feel at liberty to call the attention of the other judges to this charge."

The charge in the case before us falls far below that in the case last mentioned, and it does not meet our full approval. But we are inclined to think that the jury understood their duty, especially as his Honor, stating the prisoner's contention, had prefaced his charge on insanity with the words, "The prisoner admits the killing, but says that at the time he killed the deceased he was insane, that his mind (994) was so diseased that he did not know what he was about, or was not conscious of doing wrong at the time of committing the deed, or

could not distinguish between good and evil and did not know what he did." The exception is not sustained.

The prisoner's counsel argued in his brief that his Honor should have submitted first to the jury an issue of insanity, as if the prisoner's present insanity was alleged; but the record in the case shows that the plea of insanity made no averment that the prisoner was insane at the time of the trial, and on that account could not proceed with his trial. *S. v. Haywood,* 94 N. C., 847, was a case in which the present insanity of the prisoner was alleged.

The last exception was that his Honor charged the jury "there is no evidence of manslaughter in this case." We think that his Honor was right in giving that instruction. As we have seen, there had been no fight between the parties, no battery or assault upon the prisoner by the deceased, no legal provocation of any kind given; and even if the language used by the deceased just before he was killed could be perverted into legal provocation, then the cruel, brutal, and excessive violence used by the prisoner was out of all proportion to the provocation.

On the question of self-defense, however, his Honor gave the prisoner every advantage and benefit. He said: "If you are satisfied from the evidence that when the deceased left the house and returned and got near the bunk of the prisoner he said, 'You trifling, one-armed scoundrel, if killing is what you want, I am a killing man,' and made a leap for his box, and the prisoner had good reason to believe that he was about to suffer death or great bodily harm at the hands of the deceased, and struck and killed him for the purpose of saving himself from such apparent danger, and for no other purpose, he would have the right to strike and kill the deceased." We are not declaring (995) that that charge was just to the State on the evidence in the case; we are only saying that the prisoner got the benefit of the plea of self-defense when the evidence would hardly seem to justify the instruction. The law in respect to the exceptions in this case, except that on the question of insanity, has been so often passed upon by the adjudications of this Court that it seems almost trifling to seriously bring them up again for review. We have had to notice them because human life was concerned in our decision.

Affirmed.

Cited: *S. v. Lipscomb,* 134 N. C., 694; *S. v. Teachey,* 138 N. C., 598; *S. v. Exum, ib.,* 618; *S. v. Daniel,* 139 N. C., 552; *S. v. Banks,* 143 N. C., 658; *S. v. Hopkins,* 154 N. C., 623; *S. v. Terry,* 173 N. C., 765; *S. v. Walker, ib.,* 782.

STATE v. VICK.

(Filed 24 March, 1903.)

1. Jury—Juror—Competency.

Where a juror in a capital case states that he is opposed to capital punishment and has religious scruples against acting as a juror therein, the trial court should excuse him.

2. Jury—Juror—Competency—Challenges.

The trial judge may excuse a juror, before the jury is impaneled, although the solicitor has passed him to the prisoner and has not challenged him for cause.

INDICTMENT against Fred Vick, heard by *Robinson, J.*, and a jury, at November Term, 1902, of WAYNE. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. C. Munroe for defendant.

MONTGOMERY, J. The prisoner was convicted of a capital felony—rape. The only question brought up by the appeal for decision relates to the competency of one of the jurors. It appears from (996) the record that the juror J. B. Cox, one of the special venire, had been asked by the solicitor for the State whether he had formed and expressed the opinion that the prisoner was not guilty, and was passed to the prisoner. The juror then of his own accord stated to the court that he did not think he was competent to sit upon the case, for the reason that he was opposed to capital punishment; that he had religious scruples against serving as a juror in a capital case; that it was contrary to the doctrine and rules of the religious denomination of which he was a member for any of its members to act as jurors in capital cases; that his own opposition to and scruples against, and the doctrines and rules of his church against any of its members acting as jurors in capital cases, were founded upon opposition to capital punishment solely. His Honor, against the protest of the prisoner, decided as a matter of law that the juror J. B. Cox was not a competent juror, and ordered him to stand aside. The prisoner excepted. He exhausted all his challenges and was compelled to accept a juror to whom he objected.

It is ordained by section 13, Article I, of the Constitution 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 petty misdemeanors, with the right of appeal." Good and lawful men within the meaning of the

constitutional provision are such as have been found by the commissioners of the several counties to have paid tax for the preceding year, and are of good moral character and sufficient intelligence. The Code, sec. 1722. Of course, that statutory provision has reference to the qualifications of jurors in the general sense. It cannot mean that every person who has paid his tax for the preceding year and is of good moral character and sufficient intelligence can be a competent (997) juror in the trial of each and every particular action. If that could be so, then kinship, interest, partiality, prejudice, non-residence, etc., would not disqualify a man for jury service, provided he possessed the statutory qualifications. The great object of trial by jury is to secure a fair and impartial trial, and to exclude the classes above referred to from jury service in particular cases a system of challenges for principal cause or to favor has grown up. The matters which constitute challenges are not prescribed by statute in our State, except in one instance, and that is the provision of section 1728 of The Code: "If any of the jurors drawn have a suit pending and at issue in the Superior Court, the scrolls with their names must be returned into partition No. 1 of the jury box." By our law the competency or incompetency of jurors is left to the decision of the courts. Under section 1199 of The Code it is provided among other things that "in all trials, whether for capital or inferior offenses, the defendant may have the aid and assistance of counsel in making challenges to the jury, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors." And in section 405 of The Code, amongst other things, it is declared that the judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions. The rulings of law by the judges of the Superior Courts, however, on challenges for cause are subject to review by this Court. Their findings of fact, though, are conclusive; so, also, are their findings of fact and law upon challenges to *the favor*.

In *S. v. Green*, 95 N. C., 611, *Ashe, J.*, for the Court said: "But the challenge in these cases (*S. v. Jones*, 80 N. C., 415; *S. v. Boon*, 80 N. C., 461) was not strictly a challenge for cause, but a challenge to the favor, when the party has no particular cause to challenge, but objects that the juror is not indifferent on account of some suspicion of partiality, prejudice, or the like. In such cases the validity (998) of the objection was left at common law to the determination of triers whose office was to try whether the juror was favorable or unfavorable. The method of which proceeding was if the first man called be challenged, two indifferent persons named by the court constituted the triers; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next,

and when another is found indifferent and sworn, the two triers shall be superseded and the two sworn on the jury shall try the next. 3 Blk. Com., 363. Their finding was conclusive. But by statute in this State the court is constituted the trier. The Code, secs. 405, 1199. And where the challenge, as in this case, is to the favor, its determination is not reviewable. *S. v. Kilgore,* 93 N. C., 533."

In the case before us the fact that the religious denomination of which the juror was a member opposed capital punishment would not be sufficient of itself to disqualify the juror if he himself did not participate in that feeling of opposition. But he stated that he, as an individual, opposed capital punishment, and that he had religious scruples against acting as a juror in capital cases.

Whether the juror's scruples were the subject for challenge for cause or a challenge to the favor, it is unnecessary to decide, although in *S. v. Bowman,* 80 N. C., 432, the same matter seems to be treated as one of challenge to the favor. That case is decisive of this, and is against the prisoner's contention. *Judge Ashe* for the Court said there: "A juror was called who stated that he had conscientious scruples against capital punishment . . . but if the evidence satisfied him beyond a reasonable doubt that the prisoner was guilty, he could bring in a verdict of guilty, yet it would hurt and do violence to his conscience. He was challenged for cause by the State, the challenge was allowed, and the prisoner excepted. We think there was (999) no error in allowing the challenge, for the juror was clearly exceptionable. It is the object of the law and the duty of the court to see that the prisoner has a fair trial, and at the same time should guard the interest of the public; and to that end the jury impaneled to pass upon the issue between the prisoner and the State should be impartial and competent. A man who has conscientious scruples against capital punishment, no matter how much disposed to discharge his duty, would be an unsafe juror, because he would naturally be influenced by his prejudices and go into the jury box with such a bias in favor of the prisoner as would render him incompetent to do justice to the State. Therefore, he has been held to be an incompetent juror. *People v. Daman,* 13 Wend., 351; *Com. v. Fisher,* 17 Serg. and Rawle, 155."

The same doctrine is the general doctrine laid down by the courts in this country: "Though no such ground of challenge is to be found stated in the *English* cases, in the United States, since the early part of the nineteenth century, the fact that one has conscientious scruples against the infliction of capital punishment has been regarded as disqualifications furnishing ground for challenge by the prosecution on a trial for offenses which may be punished by death." 17 A. and E. Enc., 1134.

It makes no difference that the solicitor for the State had passed the juror to the prisoner. The jury had not been impaneled. In *S. v. Adair,* 66 N. C., 298, it appeared that after the jury was completed and accepted by the prisoner and sworn, but before they were impaneled, the court was informed that one of the jurors was related to two of the prisoners, which fact was not known when the jurors were sworn. The court said, there, that as the jury was not impaneled and charged with the case, it was within the discretion of his Honor to allow the State the benefit of a challenge for cause, so as to
(1000) secure a jury indifferent as between the State and the prisoners. To the same effect, *S. v. Boon,* 80 N. C., 461; *S. v. Vann,* 82 N. C., 631; *S. v. Fuller,* 114 N. C., 885.

It was not necessary for the State to have challenged the juror for cause. In *S. v. Jones,* 80 N. C., 415, this Court said: "The juror stated that he had formed and expressed the opinion that the prisoner was not guilty. He was therefore not an impartial juror, and, without a challenge by the State, it was the right and duty of the court to stand aside such a juror at any time before the jury were impaneled and charged with the prisoner." In that case the juror had been passed to the prisoner.

In the light of these decisions, it is immaterial that the juror voluntarily made his statement. *People v. Daman,* 13 Wend., 351.

No error.

Cited: S. v. Burney, 162 N. C., 615.

STATE v. MARSH.

(Filed 31 March, 1903.)

1. Arrest of Judgment—Indictment—Appeal.

A motion in arrest of judgment for defects in the indictment may be made in the Supreme Court, though no objection was made thereto in the trial court.

2. Indictment—Rape—The Code, Secs. 1101, 1183.

An indictment for rape must allege that the act was done forcibly and against the will of the prosecutrix, or words equivalent thereto.

INDICTMENT against John Marsh, heard by *Timberlake, J.,* and a jury, at November Term, 1902, of UNION, upon the following bill:

"The jurors for the State upon their oaths present that John Marsh, late of the county of Union, on 27 October, 1902, with force
(1001) and arms at and in the county aforesaid, in and upon one Alice Carelock, in the peace of God and the State then and

there being, unlawfully, wilfully, violently, and feloniously did make an assault, and her, the said Alice Carelock, then and there unlawfully, wilfully, and feloniously did ravish and carnally know, against the form of the statute in such case made and provided and against the peace and dignity of the State."

From a verdict of guilty and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
Redwine & Stack and Armfield & Williams for prisoner.

CLARK, C. J. The prisoner's counsel moves in this Court in arrest of judgment for defect in the indictment, which is set out above in the statement of the case. This he had a right to do, though no objection on that ground was taken in the court below. *S. v. Watkins,* 101 N. C., 702; *S. v. Caldwell,* 112 N. C., 854; Rule 27 of this Court.

The Code, sec. 1101, defines rape as the "ravishing and carnally knowing any female of the age of ten years or more, forcibly and against her will," with the further statement as to what constitutes rape when the female is under that age. All the authorities concur that the word "ravish" is indispensable. Hale P. C., 628; 2 Rawle's Bouvier Law Dict., 825; Coke Litt., 184, note p.; *Gougleman v. People,* 3 Parker, 15. It takes its place with "feloniously," "burglariously," and "malice aforethought," which have been held indispensable (*S. v. Arnold,* 107 N. C., 861; *S. v. Barnes,* 122 N. C., at p. 1036) wherever appropriate, because they have no synonyms. 2 Hawkins P. C., ch. 23, sec. 77. As to the words "carnally know," there (1002) are authorities which hold that they are not indispensable, being implied in the word "ravish" (Wharton Cr. Pl. and Pr., 9 Ed., sec. 263), but there are others that rather intimate that these words should be also used. The word "feloniously" is, of course, indispensable (*S. v. Scott,* 72 N. C., 461), as, indeed, it is in all indictments for felonies. *S. v. Bunting,* 118 N. C., 1200.

But all three of the above terms are used in the indictment in this case. The defect alleged is the absence of the words "forcibly" and "against her will." As to the word "forcibly," in *S. v. Jim,* 12 N. C., 142, it was held that an indictment omitting both terms "forcibly" and "against her will" was defective. In *S. v. Johnson,* 67 N. C., 55, it was held that the omission of the word "forcibly" was not fatal when the charge was "against her will did feloniously ravish," the Court saying through *Reade, J.,* that any equivalent word would answer in lieu of "forcibly"; that though the word "ravish" would seem to imply force, yet that word is not an express charge of force, stand-

ing alone, but that the addition thereto of the words "feloniously" and *"against her will"* was sufficient under our statute as an express charge of force. In *S. v. Powell,* 106 N. C., 635, where both the words "forcibly" and "against her will" were omitted, it was held, following *S. v. Jim, supra,* that the bill was defective. This last case was for an assault with intent to commit rape and was overruled in *S. v. Peak,* 130 N. C., 711, but only on the ground that, in an indictment for assault to commit rape, it was not necessary to describe rape in the words which must be used to charge the offense of rape itself.

Thus, on a review of our authorities, it will be seen that it has been held that the absence of both "forcibly" and "against her will" is fatal, but that forcibly can be supplied by any equivalent word; that it is not supplied by the use of the word "ravish," but it is (1003) sufficiently charged by the words "feloniously and against her will." In all the cases above reviewed, where the words "against her will" are omitted, the bill was held defective. No doubt, the words "against her will" can be supplied by an equivalent as well as the word "forcibly," but we do not find such equivalent in this bill. The words "unlawfully, wilfully, and feloniously" did "ravish and carnally know," do not charge it was "against her will," except by implication, and it is held in *S. v. Johnson, supra,* that they do not even sufficiently charge that the act was "forcibly" perpetrated in the absence of the words "against her will."

It is a subject of regret that a trial of so serious a nature, occupying so much of the public time, should thus go for naught, but we do not feel at liberty to overrule the above repeated decisions of this Court. Those decisions were so easily accessible and, indeed, were so well known to the draftsman of this bill that the omission of the words "against her will" must have been accidental. But we will repeat here what was said in *S. v. Barnes,* 122 N. C., at p. 1038: "The accustomed and approved forms are accessible, and should be followed by solicitors until (as with murder, perjury, and in some other instances) they are modified and simplified by statute"—further adding that solicitors would best serve the object of the statute (The Code, sec. 1183) passed to disregard refinements and informalities and to secure trials upon the merits "by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations."

The form set out in 1 Archbold Cr. Pl. and Pr., 999, is (after charging the assault) "and her, the said C. D., then violently and *against her will* feloniously did ravish and carnally know." This form, while omitting "forcibly," retains, it will be noted, the words "against

her will," and is substantially the bill that was sustained in (1004) *S. v. Johnson,* 67 N. C., 55.

The Attorney-General cites us to the following foreign authorities which sustained indictments omitting the words "against her will." In *Harman v. Com.,* 27 Pa. (12 S. and R.), 69, it was held "not necessary to charge that the offense was committed *forcibly and against the will* of the woman," that matter being embraced "in the charge *feloniously did ravish and carnally know," Tilghman, C. J.,* citing English authorities freely to sustain his ruling. The same ruling exactly is made in *Gibson v. State,* 17 Tex. App., 574. In *Leoni v. State,* 44 Ala., 110, the Court sustained an indictment charging simply "before the finding of this indictment G. L. forcibly ravished E. L.," and in *O'Connell v. State,* 6 Minn., 190, the Court sustained an indictment, "did feloniously ravish C. D." In these last two cases no assault is charged and the indictments are drawn under statutes simplifying the form, and which our Legislature, it may be, might also adopt to prevent such instances as this, for it gives full information to the prisoner; but we cannot do this. The adoption of simple forms of indictment for murder, perjury, etc., was by action of the Legislature, not of the courts. As the prisoner has not been in jeopardy, he may still be put to trial upon a proper bill. *S. v. Lee,* 114 N. C., 844; *S. v. England,* 78 N. C., 552, and other cases collected in Wharton Cr. Pl. and Pr. (9 Ed.), secs. 507, 457.

Judgment arrested.

Cited: *S. c.,* 134 N. C., 184; *S. v. Moore,* 166 N. C., 289.

(1005)

STATE v. BARRETT.

(Filed 31 March, 1903.)

1. Evidence—Homicide—Self-defense—Instructions.

It is error for the trial court to instruct as to self-defense that it is incumbent on the prisoner to show that it was *necessary* to shoot the deceased in order to protect his life, or to save himself from serious bodily harm, although a proper instruction relative to self-defense had been given in a prior part of the charge.

2. Jury—Misconduct—Sermon—Trial.

Where a prisoner and his counsel consent to the attendance of the jury at church, and the minister in his sermon says nothing calculated to influence the jury in the decision of the case, such attendance is not

3. Homicide—Instructions—Murder in the Second Degree—Malice—Burden of Proof.

In an indictment for homicide the defendant is required only to "satisfy the jury" of the existence of facts sufficient to reduce the killing to manslaughter or to establish a plea of self-defense—not to satisfy them by "stronger proof" or "greater proof."

INDICTMENT against Walter Barrett, heard by *Robinson, J.*, and a jury, at December Term, 1902, of MOORE. From a verdict of guilty of murder in the first degree and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, and W. B. Jones for the State.
H. F. Seawell for defendant.

WALKER, J. The prisoner was indicted in the court below for the murder of Essex Williams and was convicted of murder in the first degree. Several exceptions were taken by him to the rulings of the court during the trial and to the charge, but we deem it necessary to consider only one of them at length; and in order to show the grounds (1006) of this exception and the reason of our decision, it will be sufficient to state that there was evidence introduced on the part of the State tending to show a case of murder in the first degree, and on the part of the defendant there was evidence tending either to reduce the grade of the homicide to manslaughter or to show that the defendant killed the deceased in self-defense.

At the request of the defendant the court charged the jury as follows:

1. "If the jury shall find from the evidence that, after the fight in Mary Jane Williams' room, the prisoner and his wife went into their room and while in there they heard or thought they heard the deceased and his wife go out at the window, and then the prisoners started through the room to the back room for their effects, preparatory to removing from the premises, and when the prisoners were in the room of the deceased, the deceased suddenly made an assault on the prisoner Walter Barrett with a gun and the prisoner reasonably believed that he was in imminent danger of his life, he had the right to shoot to save himself, and if he shot and killed the deceased under these circumstances he would be guilty of no crime, and the jury should say for their verdict 'Not guilty.' "

2. "If the jury shall find from the evidence that the prisoner Walter Barrett, after he had been ejected from the room, saw the wife of the deceased hand a gun to the deceased, and the prisoner reasonably believed that the deceased was going to assault him with the gun, the

prisoner had the right to arm himself with a pistol for his own protection."

After giving these instructions, among others requested by the prisoner, but not material to be mentioned, the court in its general charge instructed the jury that "the prisoner having admitted that he shot the deceased, if the State had satisfied them from the evidence beyond a reasonable doubt that the shots fired by the prisoner (1007) caused the death of the deceased, the law presumes malice from the mere use of a deadly weapon, and denominates the offense murder in the second degree, and casts the burden on the prisoner of satisfying the jury by the stronger proof of such facts and circumstances as will disprove the presumption of malice and reduce the grade of the offense from murder in the second degree to manslaughter, which is the unlawful and felonious killing without malice, either express or implied, or to show by the greater proof such facts and circumstances as will justify the killing on the plea of self-defense, that is, that it was necessary for the prisoner to shoot in order to protect his life or save himself from serious bodily harm." To these instructions the prisoner excepted, and we are of the opinion that in one respect his exception is well taken.

It will be observed that in the two instructions given by the court at the prisoner's request the jury were told that it was quite sufficient to acquit the prisoner if they should find that, at the time of the homicide or when the fatal shot was fired, he reasonably believed or apprehended that the deceased was about to assail him with a gun or that he was in imminent danger of his life, and yet when the court gave that part of its charge relating to self-defense, the jury were instructed that, before the prisoner could claim an acquittal upon the ground that he did kill the deceased in self-defense, it was incumbent upon him to show that it was *necessary* that he should shoot the deceased in order to protect his life or to save himself from serious bodily harm.

In some of the early cases expressions may be found which would seem to indicate that a case of self-defense is not made out unless the defendant can satisfy the jury that he killed the deceased from necessity, but we think the most humane doctrine and the one which commends itself to us as being more in accordance with the enlightened principles of the law is to be found in the more recent decisions of this Court. It is better to hold, as we believe, that (1008) the defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under the evidence and proper

instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken; provided, always, as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness. We think that the foregoing principle has been clearly stated and adopted by this Court in several cases. In *S. v. Scott,* 26 N. C., 409, 42 Am. Dec., 148, this Court says: "In consultation, it seemed to us at one time that the case might have been left to the jury favorably to the prisoner on the principle of *Levet's case,* Cro. Cas., 538 (1 Hale, 474), which is, if the prisoner had reasonable grounds for believing that the deceased intended to kill him and under that belief slew him, it would be excusable, or at most manslaughter, though in truth the deceased had no such design at the time." And in *S. v. Nash,* 88 N. C., 618, the Court cites and approves the passage just quoted from *S. v. Scott,* and then makes the following extract from *Com. v. Selfridge,* Harrigan and Thompson Cases on Self-Defense, p. 1: "A, in the peaceful pursuit of his affairs, sees B walking towards him (1009) with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head before or at the instant the pistol is fired, and of the wound B dies. It turned out in fact that the pistol was loaded with powder only, and that the real design of B was only to terrify A." The judge inquired, "Will any reasonable man say that A is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Cr. Law, sec. 1025(g), and note; Wharton Law of Homicide, 215 *et seq.*

In *S. v. Nash,* 88 N. C., 618, the Court further says: "But it may be objected that the defendant acted too rashly; before he resorted to the use of his gun he should have taken the precaution to ascertain the fact whether his child had been actually shot. But that doctrine is

inconsistent with the principles we have announced. If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger actually existed and was imminent. Taking, then, the fact to be that the trespassers had fired into defendant's house and shot his child, and the firing continued, there was no time for delay. The case required prompt action. The next shot might strike himself or some other member of his family. Under these circumstances the law would justify the defendant in firing upon his assailants in defense of himself and his family. But, as we have said, the grounds of belief must be reasonable. The defendant must judge at the time of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief. And here the error is in the court's refusing to receive the proposed evidence, and submitting that question to the consideration of the jury." (1010)

So in *S. v. Matthews,* 78 N. C., 534, this Court quotes with approval Foster's Crown Law, as follows: "It is stated in all of the authorities, and cannot be doubted, that if a man who is assailed believes, and has reason to believe, that, although his assailant may not intend to take his life, yet he does intend and is about to do him *some enormous bodily harm,* such as maim, for example, and under this reasonable belief he kills his assailant, it is homicide *se defendendo* and excusable. It will suffice if the assault is felonious." Foster, 274.

The prisoner requested the court to charge the jury in accordance with this reasonable principle, and the court had given the special instructions, but in the general charge it changed the same materially by omitting therefrom the most important portion and requiring the prisoner to satisfy the jury that there was, at the time he fired the pistol, an actual necessity for killing the deceased. The jury, therefore, were left in doubt and uncertainty as to what was the true rule of law by which they should be guided in passing upon the prisoner's plea of self-defense; and the last instruction, which we may assume made the greater impression upon the jury, called for more proof from the prisoner than the law required of him. He was therefore placed at a disadvantage and consequently embarrassed and prejudiced in his defense.

There is a marked difference between an actual necessity for killing and that reasonable apprehension of losing life or receiving great bodily harm, which is all that the law requires of the prisoner in order to excuse the killing of his adversary; and it was just this difference that may have caused the jury to decide against the prisoner upon this most important issue in the case.

In *Edwards v. R. R., ante,* 99, this Court has said: "It is well settled that when there are conflicting instructions upon a ma-
(1011) terial point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly or when incorrectly. We must assume in passing upon the motion for a new trial that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous." *Williams v. Haid,* 118 N. C., 481; *Tillett v. R. R.,* 115 N. C., 662.

We do not think that there was any error in the other rulings of the court to which exceptions were taken.

The defendant's third prayer for instruction was properly refused, as there was some evidence for the consideration of the jury upon the question of murder in the first degree, and certainly more than a mere scintilla.

What the woman, Mary Williams, said and did at the house in regard to the chair, when the jury went with the judge and counsel for the State and prisoner, with the full consent of the latter, was not material or harmful. The question was not whether that was the particular chair upon which the deceased's gun fell just as he was shot by the prisoner or whether the chair was large or small, but whether there was a gun on a chair near the window, which would tend to show that the deceased had a gun at the time he was shot.

Nor do we think that there was anything said or intended to be said by the minister in his sermon at the church which was at all prejudicial to the prisoner. He and his counsel consented that the jury might attend divine services at the church, in charge of an officer. The text of the sermon was announced before the jury entered the church, and we see nothing in the learned discourse, after a most careful perusal of it, which was in the least calculated to influence the minds of the jury in the decision of the case they had in charge. We have no idea that it was the purpose of the minister to refer
(1012) to the case either directly or indirectly. As was said by another court in a case where a similar point was presented: "The preacher was speaking of a spiritual matter and his whole application was spiritual. No reasonable man would be influenced in the performance of his duties as a juror in the slightest degree by what was said. Counsel for the accused in open court consented that the jurors might attend church. He knew that they must hear something, and his consent carried with it a consent that they should hear anything that was a proper and ordinary enunciation from a Christian pulpit. They heard nothing more." *S. v. Kent,* 5 N. D., 564, 35 L. R. A., 518.

We have briefly referred to these last three exceptions, as we thought it proper to do so under the circumstances, although the matters complained of are not likely to be presented at another trial of the case.

There is one part of the charge to which we desire to call special attention. The court told the jury that in order to reduce the degree of homicide from murder in the second degree to manslaughter or to establish the plea of self-defense, where the prisoner in killing the deceased used a deadly weapon, from which the law implied malice, the prisoner must satisfy the jury by "the stronger proof" or by "the greater proof" of the facts and circumstances which reduced the killing from murder to manslaughter or which established the plea of self-defense. While we do not decide in this case, as we are not called upon to do so, that the use of the words "stronger proof" or "greater proof" was reversible error, we desire to direct attention to the fact that the charge in this respect is not in accordance with the suggestions of this Court in *S. v. Ellick,* 60 N. C., 450, 86 Am. Dec., 442; *S. v. Willis,* 63 N. C., 26, and *S. v. Carland,* 90 N. C., 668. It is well not to depart from established forms and precedents which are the products of the wisdom and wide experience of the sages of the (1013) law. It is said in the cases just cited that the prisoner must satisfy the jury, neither beyond a reasonable doubt nor yet by a preponderance of testimony, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense. We are not prepared to say whether the jury can become satisfied of the existence of a fact unless the evidence in favor of its existence is stronger or preponderates over that against its existence. But what we do say is that it is best to follow settled forms in the trial of causes.

We forbear to comment on the testimony or to refer to it further than has been necessary to present the exceptions in the case intelligently. We think the prisoner is entitled to another opportunity to establish his defense, if he has one, and for that purpose, and because by reason of the error of the court in its charge to the jury which we have indicated he has been prejudiced in his effort to do so, a new trial is awarded.

PER CURIAM. New trial.

Cited: *S. v. Capps,* 134 N. C., 627; *S. v. Clark, ib.,* 702, 704, 714; *Chaffin v. Mfg. Co.,* 135 N. C., 101; *S. v. Morgan,* 136 N. C., 632; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Rowe,* 155 N. C., 447; *S. v. Price,* 158 N .C., 650; *Hoaglin v. Tel. Co.,* 161 N. C., 299; *S. v. Blackwell,*

162 N. C., 683; *S. v. Gupton,* 166 N. C., 264; *S. v. Johnson, ib.,* 396; *S. v. Ray, ib.,* 434; *S. v. Pollard,* 168 N. C., 121; *S. v. Heavener, ib.,* 164; *Champion v. Daniel,* 170 N. C., 334; *S. v. Davis,* 175 N. C., 729; *Kimbrough v. Hines,* 180 N. C., 279.

(1014)

STATE v. PARKER.

(Filed 7 April, 1903.)

1. Jury—Drawing—Challenges—Quashal—The Code, Sec. 1101—Arrest of Judgment.

That a special venire had been drawn by a boy over ten years of age, and five of the venire had served as jurors, should have been taken advantage of by a challenge to the array or a motion to quash the panel before the jury were sworn, and not by a motion in arrest of judgment.

2. Evidence—Examination of Prisoners—Witnesses—The Code, Secs. 1145-1149.

Any admission or confession made by a prisoner while under oath before a committing magistrate, whether reduced to writing or not, or made in the presence of witnesses, should not be received in evidence.

3. Evidence—Examination of Prisoners—Witnesses—The Code, Secs. 1145-1149.

Where the record of a committing magistrate merely states that the prisoner was cautioned and the trial court holds such admission competent, with no other evidence before him except this statement, it is error, as the trial judge should have found as a fact whether the proper caution was given to the prisoner.

INDICTMENT against John Parker, heard by *McNeill, J.,* and a jury, at August Term, 1902, of DURHAM. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Jones Fuller for defendant.

WALKER, J. The defendant was indicted for unlawfully and carnally knowing and abusing a female, under the age of ten years, the indictment having been drawn and found under section 1101 of The Code, by which the offense is made a capital felony. The defendant was convicted, and to the judgment pronounced he excepted and appealed.

He assigns two errors as having been committed by the court during the course of the trial. A special venire of twenty-five freeholders

was summoned under the order of the court, whose names (1015) were drawn from the jury box, in the presence and under the direction of the court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant.

After the verdict of guilty had been returned by the jury, the defendant through his counsel moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age and that five of the venire had served as jurors in the case.

The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment. Even if the motion be treated as substantially one for a *venire de novo* (and in a case of this magnitude we would be so disposed to treat it, at least with the consent of the Attorney-General, provided that there was real merit in the motion), it could not be sustained, as the proper method of taking advantage of the irregularity is by a challenge to the array or by a motion to quash the panel before the jury are sworn and charged with the case. As this was not done, there was a waiver of the objection and the defendant forfeited his right to insist upon it thereafter.

The regulations and requirements concerning the drawing of a jury or of a special venire may be directory, but they should be strictly observed. A failure, though, to follow the directions of the statute will not invalidate the panel in the absence of bad faith or corruption, or other adequate cause for setting it aside. *S. v. Perry,* 122 N. C., 1018; *S. v. Dixon,* 131 N. C., 810. In *S. v. Underwood,* 28 N. C., 96, where the grand jury was drawn by a boy of 13 years (1016) of age, it was contended that such illegal drawing might have affected the composition of the petit jury, the prisoner moved for a new trial and also in arrest of judgment, and the Court held that the objection, if a valid and sufficient one at any time, should have been made after the petit jury were sworn, and should be in the form of a challenge to the array.

We believe the general rule to be that where the objection is to the whole list or panel, it must be taken by challenge to the array or by motion to quash the panel, which must be made as soon as the facts which warrant it become known; and it is generally held that the challenge or objection must be interposed before entering on the formation of the jury and before the interposition of challenges to the polls, or before the jury has been completed or made up or have been sworn, or before entering on the trial; and it is certainly too late after

trial and verdict on a motion for a new trial. 12 Enc. Pl. and Pr., 424; *S. v. Speaks,* 94 N. C., 865; *S. v. Boone,* 82 N. C., 637; *S. v. Douglas,* 63 N. C., 500. The court, therefore, did not err in overruling the motion to arrest the judgment.

But we think there was error committed by the court in the admission of testimony to which the defendant duly objected, which entitles him to a new trial. The defendant testified in his own behalf after the State had closed its evidence, and on the cross-examination the solicitor was permitted to ask him if his statement during the trial below did not contradict that made at the preliminary hearing before the committing magistrate, and proposed to call his attention to certain statements of the defendant contained in the evidence before the magistrate, which had been reduced to writing and signed and sworn to by him. It appeared that the defendant had been sworn before he testified at the investigation before the magistrate and that
(1017) his testimony was taken in the presence of other witnesses. It is also stated in the case that he was examined by the magistrate "after being cautioned." That is all. It does not appear in what way he was cautioned or what was said to him by the magistrate before he testified.

It is provided by the statute, The Code, secs. 1145-1149, that after examining the complainant and the witnesses for the prosecution, the magistrate shall then proceed to examine the prisoner. The examination shall *not be on oath,* and before he is examined the prisoner shall be informed of the charge against him and shall be allowed reasonable time to send for and advise with counsel. At the commencement of the examination the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice at any stage of the proceeding. Answers shall be read to the prisoner, when he may correct or add to them, and when made conformable to what he declares is the truth they shall be certified and signed by the magistrate. After the examination of the prisoner is completed, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner.

The provisions of this statute, which is substantially a copy of that of 11 and 12 Vict., which was itself an amendment and enlargement of the earlier statutes of 2 and 3 William and Mary and 7 Geo. IV on the same subject, have received a uniform interpretation so far as they affect the particular question under consideration. It was intended by them to safeguard the rights of the prisoner as guaran-

teed by the law, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. This provision of the law should at all times and (1018) under all circumstances be rigidly observed. It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. We must hold, therefore, as it has always been determined by this and other courts, that any admission or confession made by the prisoner before the committing magistrate, whether reduced to writing or not, which was made while he was under the compulsion of an oath, was not voluntary and should not have been received in evidence, nor should the solicitor have been allowed to refer to it or to comment upon it or to use it either directly or indirectly for the purpose of contradicting the defendant on the cross-examination of him. *S. v. Broughton,* 29 N. C., 96, 45 Am. Dec., 507; *S. v. Matthews,* 66 N. C., 106; *S. v. Young,* 60 N. C., 127.

The rule in regard to the confession of a prisoner made while under oath was so strictly enforced in England that, when the magistrate returned his examination in writing to the court and it was therein stated that the prisoner was sworn, the prosecution was not allowed to contradict this averment. *Reg. v. Pikesly,* 9 C. and P., 124; *Rex v. Rivers,* 7 C. and P., 177; *Rex v. Smith,* 1 Starkie N. P., 242. This is not the rule here, and it is merely referred to in order to show with what strictness the rule was sometimes enforced and how careful the courts have been to see that the prisoner, at the time his statement was made before the magistrate, was absolutely free and unrestrained.

It does not appear in this case that the prisoner was cautioned as required by the statute, that is, in the manner therein prescribed. It merely appears that "he was cautioned," but in what this caution consisted, whether he was advised as to his rights or told by the magistrate that he was at liberty to refuse to answer any question put to him and that his refusal to answer could not be used (1019) against him at any stage of the proceedings, or what was said to him in this connection, in no way appears.

The prisoner objected to the use of this written statement by the solicitor on two grounds: 1. That the statement was taken while he was under oath. 2. That it was taken in the presence of other witnesses. The defendant did not specially assign, as one of the grounds of objection, that he was not properly cautioned by the magistrate, but we think it sufficiently appears that the objection was really directed against the statement itself as having been procured in

violation of the statute, and we have so treated it, as we are disposed in cases of this kind to be somewhat liberal in our construction of what has been said and done, so as to ascertain the real contention of counsel and to decide the case upon its substantial legal merits without too much regard for mere matters of form.

The judge should have found as a fact whether the proper caution was given to the defendant before he testified or made his statement at the trial before the magistrate; but instead of doing so, it appears from the case that no inquiry whatever was made into the matter, and the court made its ruling upon the bare statement that the prisoner "had been cautioned." That, in our opinion, was not sufficient.

Mr. Archbold says: "This statute was enacted as a humane provision of the English law to prevent a prisoner from committing himself by any unadvised admission, which otherwise in his confusion and agitation, arising from the proceeding against him, he might make without calculating on its consequences. It is in the true spirit of fairness toward the prisoner which distinguishes the administration of criminal justice in this country from its administration in any (1020) other country in Europe." Arch. Cr. Pr. and Pl. (6 Ed.), pp. 131, 132.

The defendant was entitled to have the statement excluded from the consideration of the jury, when his objection to it was made, for the reasons we have given; and in failing to exclude it the court erred to the prejudice of the defendant.

The verdict must, therefore, be set aside and a new trial awarded.

PER CURIAM. New trial.

Cited: S. v. Simpson, 133 N. C., 678; *S. v. Parker,* 134 N. C., 213; *S. v. Lipscomb, ib.,* 697; *S. v. Vaughan,* 156 N. C., 616; *S. v. King,* 162 N. C., 581; *S. v. Lewis,* 177 N. C., 558.

STATE v. MAY.

(Filed 7 April, 1903.)

1. Abandonment—Husband and Wife—Failure to Support—Indictment—The Code, Secs. 970 and 972—Laws 1889, Ch. 504—Laws 1899, Ch. 83.

An indictment against a husband for abandoning his wife must aver his failure to support her.

2. Verdict — Indictment — Counts — Evidence — Instructions — Argument of Counsel—Trial—Presumptions.

Where an indictment contains two counts, but the evidence, instructions of the trial judge and the argument of counsel refer to one count only, it will be presumed that the verdict followed the trial and related to such count.

3. Indictment—Counts.

A defective count in an indictment cannot be aided by reference to another count.

INDICTMENT against Frank May, heard by *Neal, J.,* and a jury, at June Term, 1902, of GUILFORD. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
John A. Barringer for defendant. (1021)

DOUGLAS, J. The defendant was indicted under section 970 of The Code for abandonment, in the following words: "The jurors for the State upon their oaths present that Frank May, late of said county of Guilford, on ..... January, 1902, at and in the county aforesaid, unlawfully and wilfully did abandon his wife, one Mary May, and the children which he, the said Frank May, upon the body of his said wife had theretofore begotten, contrary to the statute in such cases made and provided and against the peace and dignity of the State."

There was a second count in the bill of indictment charging the defendant, under section 972 of The Code, with neglecting and refusing to provide adequate support for his wife and children while living with them; but it is evident from the record that the defendant was tried on the first count alone. As far as we can see, the entire evidence, the judge's charge, and the argument of counsel referred only to that count, and we must therefore presume that the verdict followed the trial. *S. v. Long,* 52 N. C., 24; *S. v. Leak,* 80 N. C., 403; *S. v. Thompson,* 95 N. C., 596; *S. v. Gilchrist,* 113 N. C., 673.

Section 970 of The Code is as follows: "If any husband shall wilfully abandon his wife without providing adequate support for such wife and the children which he may have begotten upon her, he shall be guilty of a misdemeanor." This action was amended by chapter 504, Laws 1889, by bringing the offense within the jurisdiction of a justice of the peace, but this amendment was subsequently repealed by chapter 83, Laws 1893. *S. v. Woolard,* 119 N. C., 779.

A comparison of the indictment with the section of The Code under which it was drawn shows a fatal defect, inasmuch as it charges a

(1022) simple abandonment, without a failure to support. In legal effect, it charges no offense whatever, because it fails to charge the acts necessary to constitute an offense. *S. v. Hopkins*, 130 N. C., 647. The first count cannot be aided by reference to the second count. It is settled that "a count in a bill of indictment must be complete in itself, and contain all the material allegations which constitute the offense charged." *S. v. Phelps*, 65 N. C., 450.

What we have already said is sufficient for the determination of the case at bar, and hence it becomes unnecessary for us to consider the remaining exceptions. We do not wish, however, to be considered as overruling them, as at least one of them might give us serious trouble were it essential to this appeal. The judgment of the court below is

Arrested.

Cited: *S. v. Gregory*, 153 N. C., 648; *S. v. Toney*, 162 N. C., 636; *S. v. Smith* 164 N. C., 479; *S. v. Wiggins*, 171 N. C., 818; *S. v. Poythress*, 174 N. C., 813; *S. v. Beam*, 181 N. C., 599.

STATE *v.* UTLEY.

(Filed 7 April, 1903.)

1. Homicide—Murder in the Second Degree—Manslaughter—Burden of Proof—Harmless Error.

In an indictment for murder, if the trial court instructs correctly as to the degree or quantity of proof necessary to reduce the crime of murder to manslaughter, and later lays down a contradictory rule by saying that the mitigating circumstances must be proved beyond a reasonable doubt, it is harmless error, there being no evidence tending to reduce the crime to manslaughter.

2. Jury—Jurors—Special Veniremen—Challenges.

In an indictment for murder, where the State stands aside a number of the special veniremen, it is not error for the trial court, after the special venire is exhausted, to have the names of those stood aside placed in a hat and drawn again, instead of having them called in the order in which they had been stood aside.

3. Evidence—Homicide—Declarations.

In an indictment for murder, evidence that the accused said immediately after the shooting, "That was a good shot, wasn't it, with my left hand?" is competent.

4. Evidence—Homicide—Opinion Evidence.

In an indictment for murder a witness may state that the prisoner shortly before the killing seemed mad at the deceased.

INDICTMENT against E. L. Utley, heard by *Cooke, J.*, and a (1023) jury, at January Term, 1903, of CUMBERLAND. From a verdict of guilty of murder in the second degree, the defendant appealed.

Robert D. Gilmer, Attorney-General, and N. A. Sinclair and H. L. Cook for the State.

Thomas H. Sutton and Hinsdale & Hinsdale for defendant.

MONTGOMERY, J. The objections of the prisoner to the charge of the court are embraced in the exceptions, expressed in different forms, to those parts which excluded expressly the theory of self-defense and thereby prevented the finding by the jury of a verdict of not guilty, and to those parts which involved the treatment of the law concerning manslaughter as considered in the view of a reduction through mitigating circumstances of the crime of murder. Included in the above is an exception to the rule laid down by his Honor as to the degree and quantity of the proof necessary to show matter of excuse or mitigation.

We will consider the last exception first in order, for the reason that from our point of view the decision of that question and its bearings will settle the chief matter involved in the appeal.

His Honor, in three separate and distinct parts of his charge, laid down to the jury the correct rule—one long established by the precedents of this Court—as to the degree or quantity of proof necessary to show matter of excuse or mitigation, or, in other words, to reduce the crime of murder to that of manslaughter. He told the jury, as we have said above, three times, that when the killing with a deadly weapon is proved or admitted by the prisoner, the burden of showing mitigating circumstances is on the prisoner, who must prove them, not by a preponderance of testimony or beyond a reasonable doubt, but to the satisfaction of the jury. That was the cor- (1024) rect rule as decided by this Court in numerous cases from *S. v. Willis*, 63 N. C., 26, down to and including cases in the last volume. But in another part of his charge he laid down a rule contradictory of the true one. He instructed the jury: "If you shall find beyond a reasonable doubt that the prisoner, at the time he entered the hall for the last time from the street, had no malice against the deceased or intent to kill the deceased, and there was an altercation of words, as testified to by the witness Sim Councill, and that it was in conse-

quence of this altercation of words that both the prisoner and the deceased became angry and both drew their weapons, and no unfair advantage was taken by the prisoner or the deceased, and it was a fight upon equal terms and they were upon equal terms, then the prisoner would be guilty of manslaughter for the slaying of the deceased."

One of the grounds of the prisoner's exception to that part of the charge was that the prisoner was required to prove mitigating circumstances, not to the satisfaction of the jury, but beyond a reasonable doubt. The exception was well taken, because the instructions were contradictory and we cannot tell which the jury acted upon; and unless the error was harmless a new trial will be granted. It was not harmless error if in any aspect of the case the jury could have rendered a verdict of manslaughter under the law.

The question, then, is, the killing of the deceased with a deadly weapon having been found, was there any evidence in the case tending to reduce the crime which the law by presumption fixed upon the prisoner—murder in the second degree?

The discussion of this matter makes it necessary to state the substance of the evidence on this point. The deceased was employed as night clerk in the Hotel Lafayette in Fayetteville, and on the
(1025) early morning of 24 October, 1902, was on duty at his proper place in the hotel. Some time between 11:30 o'clock and 12:30 o'clock of that morning the prisoner in an intoxicated condition came down from his room and asked the deceased to let him have $5. The deceased said: "I have not got it; you can't get it." He said he could not get the money. The prisoner then said, "I will have it," and at the same time pulled out his pistol and cursed him, and added, "I will have Mac to fire you in the morning." The deceased then went to the desk back of the office where the register was, and was looking down in the money drawer when the prisoner fired his pistol. The deceased said, "Mr. Utley, what do you mean?" Verna Moore, who was with the prisoner, said to the prisoner, "Ed, did you shoot at him?" The prisoner said, "No, I shot over him to scare him." At that time, according to the evidence of Moore, two guests arrived at the hotel (about 12:30 o'clock, according to their evidence), and the deceased saw them to their rooms. About the time they had gotten between the first landing and the hall upstairs the prisoner shot his pistol several times across the lobby towards the poolroom in the direction where the stairs went up, not shooting at any person, but at the wall, filling it full of balls. After that time, Utley and the witness Moore went up to Utley's room. Moore testified that after they got to Utley's room, Utley said, "He has gone after Benton," and then,

further, he said and repeated, "I called him a son of a b——, didn't I?" Moore said further that after they got to Utley's room he got a bottle of whiskey and Utley got some cartridges out of a trunk or valise beside his door. Moore said to the prisoner, "Ed, don't get the cartridges; you might shoot me." He answered, "No, I won't shoot you." Utley further said, "That man would not let me have $5 on my check," and something else about raising some money. Moore further testified that he and Utley left the room and went downstairs; that about that time Hollingsworth came in and then (1026) Benton. A witness (Jones) who was living at the hotel and occupied the room adjoining the prisoner's, a door between, testified that the conversation between Moore and Utley kept him awake and he read until about 12 o'clock. They left the room, and some time after that he heard pistol shots like they were in the hotel. Then Moore and the prisoner came back to the room, which attracted his attention, and he heard what they said. He testified that he heard the prisoner say he had plenty of cartridges and was going to load his pistol. Whereupon Moore said, "Ed, don't do that; you might kill me"; that then the prisoner said, "No, Verna; I am not going to kill you." Then the prisoner said, "Just think, that God damned scoundrel would not give me $5 on my check when I can raise more cash money today than any man in Fayetteville." The prisoner then said, "I called him a G—d d——d son of a b——h. I called him a G—d d——d son of a b——h, didn't I?" and Moore said, "You called him that." The witness Jones further testified that he heard the prisoner say that he was going down, and if any man said a word to him he was going to fill that office full of balls. That witness said further that the prisoner seemed to be mad with the man who would not let him have the $5; that he spoke as if he was insulted.

J. H. Benton, a witness for the State, testified that at the time of the homicide he was a policeman of the town of Fayetteville, and that he saw the deceased for the first time on that morning at the Coast Line passenger depot, somewhere between 12 and 1 o'clock; that afterwards he went to the hotel, immediately following the deceased; that the witness then, with the prisoner and others, went into a small back room, where the water-cooler was, and talked a while, taking a drink of whiskey in the meanwhile; that the prisoner was abusing Hollingsworth a little—just an ordinary conversation; that Hollingsworth was in the office part of the building behind his desk at (1027) the counter; that he heard him, he thought, use some very harsh words towards Hollingsworth. The witness said: "A little after that, Utley and myself went to the front door. I said, 'I believe

I will go back to the depot. You go upstairs and go to bed.' He spoke like he was going to do it. I walked possibly a few steps in front of the barber-shop, and then went across the street and got in front of the bank. Just as I got there I saw Hollingsworth come to the front door. I went back to the hotel. Then I walked on down street. As I got between the hotel corner and Graham's bookstore, I heard some one coming down from Donaldson Street towards your office, Judge Shaw. I walked possibly as far as Clark's store; a gentleman came up to me and said 'Where are you going?' That was Utley. I said I thought I would go down to see my friend Wicker, a policeman at the market-house. We walked on five or six steps. Utley said, 'I believe I will go back.' He then came up towards the hotel. I proceeded about three or four steps and crossed the street again, going in front of the bank opposite the hotel. Just as I got there, I heard very rapid shooting." The witness further said that he went into the hotel, and as he went in he saw the prisoner about halfway between the bottom of the steps and the first landing going up the steps; that no one else was there. And that he saw a colored man, Simeon Councill, run out of the hotel at the time of the shooting.

A. B. Black, a witness for the State, testified that about 12:15 he was in the washroom where the water-cooler was, with the prisoner and others, and he heard him say: "Old man Hollingsworth is a son of a bitch." That witness continued: "That was the only thing I heard him say, in an off-hand manner—not in a threatening manner at all."

All of the evidence was to the effect that the prisoner's right hand was disabled and that the pistol firing was from his left hand; (1028) and Benton, the policeman, said that a minute or two after the killing he and the prisoner went to where the body of Hollingsworth was lying on the floor, and that the prisoner said, "It was a damned good shot, Mr. Benton, wasn't it, with my left hand?"

Simeon Councill, who was night porter at the hotel, said: "I was in the hotel just before the killing. I was night porter. When Mr. Utley came into the office I was standing near the door. He told me he had been shooting his gun in the office and showed me the ball holes in the steps near the poolroom door. He talked in good humor to me. I did not go out of the office. He looked over towards where Mr. Hollingsworth was and said he was going to have Castaret turned off in the morning. Mr. Hollingsworth was standing at the lower corner of the desk near the wine-room. Mr. Utley was then standing near the cigar stand and just in front of it. I was also near the cigar stand. The cigar stand is near the poolroom door and opposite the desk. Mr.

Utley cursed him and called him several times (the epithet too obscene to be mentioned) and went on across the room towards him, cursing and pointing the finger of his right hand at him, with his left hand in his coat pocket. His right hand had some cloth around it on account of a dogbite. Mr. Hollingsworth said: 'I don't care if you do have me turned off.' He said that because Mr. Utley had said, 'I'm going to have you turned off in the morning.' When Mr. Utley got near the counter, 11 feet off, he used the same epithet (which, as we have said, is too obscene to mention), and then Mr. Hollingsworth pointed the pistol at him and I ran out of the door. I did not see Mr. Utley take his pistol out of his pocket and did not see his pistol till after the killing. It was about as far as from here to Mr. Bolton. I did not see Mr. Utley take his hand out of his pocket. I heard the report of the pistol shots after I got out of the door. I was standing right at the door when I started out just before I left the office.
I did not see what he was doing as I started to run out of the (1029) office, but the last time I saw him his left hand was in his pocket. I did not take notice of his right hand then. I did not see any one in the office at the time except Mr. Utley and Mr. Hollingsworth. As I went to run, going up the street, Mr. Benton came across the street from the bank and he halted me. I had seen Mr. Utley on the day of the killing and the day before. He was drinking one of the days, I think the day the dog bit him, the day before the killing."

The remaining evidence of that witness is not material, except that part of it embraced in the witness's examination before the coroner, in which he said that Hollingsworth told the witness that on the first occasion of the prisoner's firing his pistol he shot at him (Hollingsworth). Two witnesses, Duke and Fowler, testified that when the deceased took them to their rooms, about the time of the first pistol firing, he asked them if either one had a pistol, and, upon their answering in the negative, he said he had a good one, but could not get at it, and that he said further, "Well, I will go back downstairs and see if I cannot quiet those boys." Those two witnesses said when they reached the hotel and found the door locked, they looked through the glass and saw three gentlemen standing in a group in front of the safe.

There was some difference in the evidence as to the time when the prisoner first fired the pistol. The witness Moore thought it was somewhere about 11:30 o'clock, while from other witnesses it appeared to be about 12:30. The witnesses Jones and Black substantially agreed that the last firing of the pistols, when Hollingsworth was killed, was about 1:30. Jones said that the prisoner and Moore left the prisoner's room just before the first firing, about 12:15, and not very long

thereafter he heard the shots, and that the second firing, when Hollingsworth was killed, was 25 minutes to 2, and just before
(1030) that firing the prisoner went down from his room the last time.

The jury having found that the prisoner killed the deceased with a pistol, the law presumes malice, and the killing is therefore murder in the second degree. *S. v. Hicks,* 125 N. C., 636. In addition to the presumption of malice on the part of the prisoner arising from the killing of the deceased with a deadly weapon, the whole of the evidence bearing on the homicide, except the testimony of Simeon Councill, is to the effect that there was express malice in the killing. Is there anything in the evidence of Sim Councill tending to show mitigating circumstances, to reduce the crime of which the prisoner was convicted to that of manslaughter? Looking at it in the light most favorable to the prisoner, we think there is no such evidence. *S. v. Howell,* 31 N. C., 485. This homicide was the result of one continuous transaction. The whole occurred, according to some of the witnesses, within one hour's time, and according to others, within two hours' time. It commenced because the deceased did not lend the prisoner $5, and that, too, after he had told him that he could not get to the money; and from that time until the fatal shot was fired there is not a particle of evidence going to show that the catastrophe was the result of any intervening cause. It is not a case where there was an old grudge, and a sudden or an accidental meeting in which fresh provocation was offered to the prisoner, and where the rule, as laid down in *S. v. Johnson,* 47 N. C., 247, 64 Am. Dec., 582, applies; the alleged affront was on the mind of the prisoner through all the time up to the killing and the weapon prepared, according to the evidence. When everybody but Councill had left the hotel, including the policeman Benton, the prisoner, according to the evidence of Simeon Councill, without one word having been spoken to him by the deceased, or without
(1031) himself speaking one word to the deceased, advanced upon the deceased with his left hand in his coat pocket, cursing him and pointing the finger of his right hand at him, and using an epithet too obscene to be mentioned. When within 11 feet of the deceased, according to the evidence of Councill, the deceased drew a pistol and presented it at the prisoner; whereupon the prisoner with his left hand fired two shots, causing wounds in the head and shoulder, either one of which would have caused death, death from the wound in the head being instantaneous. It was contended here for the prisoner that the language used by him when he advanced upon the deceased, according to Councill's evidence, viz., "I am going to have you turned off

in the morning," was explanatory of his intention and showed that his purpose was not to kill the deceased. In the light of the whole evidence of this case that contention cannot be a sound one. There was evidence of express malice and preparation to do the deed, and the declaration that the prisoner would do another injury to the deceased on the morrow cannot be evidence of mitigation of his offense. It was an aggravation, rather. It was also contended here that the declaration of the prisoner, made after firing the first shot, according to the evidence of the witness Moore, "that he shot to scare the deceased," was evidence that he did not intend to kill him. If that was so (although the deceased said to Councill that the prisoner shot at him, the deceased) that was no evidence to be submitted to the jury on the question of mitigation, or as to the intention of the prisoner when he killed the deceased. The deceased was killed at his place of business in the discharge of his duty, never having used one offensive word to the prisoner. We think, therefore, that the error in the charge was harmless error.

From this view of the case the other exceptions to his Honor's charge and his refusal to give the special instructions requested by the prisoner's counsel need not be considered, for they relate (1032) to the phases of manslaughter and killing in self-defense.

On the trial, fourteen jurors were stood aside by the State, and when all the other veniremen had been exhausted the prisoner's counsel moved that the jurors who had been stood aside should be called in the order in which they had been stood aside. The court, in its discretion, refused the motion and ordered that the names be returned to the hat and drawn again, and the prisoner excepted. That was no ground of exception. It cannot be even plausibly argued that such a course was injurious to the prisoner. All that he could expect or demand was a fair jury, and what would be a juster plan than the one adopted by his Honor? It cannot be seen that uniformity of practice by the courts in the manner insisted on by the prisoner is more desirable than the manner adopted by his Honor. Either way is perfectly just and fair.

There were two matters of evidence excepted to by the prisoner. The witness Benton was asked: "Describe his position (that of the dead body) and what was said, if anything?" The prisoner's counsel objected upon the ground that the prisoner was under arrest and had not been properly cautioned. Whereupon the witness stated he had not held out any inducement to the prisoner to make a statement; that he had not told him it would be better to make a statement and had not offered him anything to make a statement, and that the declaration

was made in one or two minutes after the killing. The witness answered that the prisoner said, "That was a damned good shot, Mr. Benton, wasn't it, with my left hand?" The answer was objected to by the prisoner on the ground that it did not tend to prove either malice or premeditation. We think it was competent to show that the prisoner killed the deceased as well as to show that he had sufficient understanding to know what he was doing, which was contested on the trial because of intoxication.

(1033) The witness Jones was asked: "On the night that you heard the conversation between Utley and Moore, in his room, the night of the killing, state what was Utley's humor at that time?" The prisoner objected. The witness answered, "Well, he spoke as if he was insulted. He seemed to be mad with the man who would not let him have the $5." The prisoner objected upon the ground that "This witness had already told what he knew about it, and that the witness said, not that he was mad, but that he seemed to be mad." The objection was overruled, and the prisoner excepted. There is no merit in the exception.

The judgment is

Affirmed.

Cited: *S. v. Register*, 133 N. C., 750; *S. v. Kendall*, 143 N. C., 665.

STATE v. MITCHELL.

(Filed 21 April, 1903.)

Slander—Slander of Innocent Woman—Indictment—The Code, Sec. 1113.

An indictment for slander of an innocent woman must contain the averment that the defendant *attempted to destroy the reputation of an innocent woman.*

INDICTMENT against J. G. Mitchell, heard by *Coble, J.*, and a jury, at February Term, 1902, of ROCKINGHAM. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and C. O. McMichael for the State.

Scott & Reid, and Glenn, Manly & Hendren for defendant.

CLARK, C. J. Indictment for slander of an innocent woman under

The Code, sec. 1113. The indictment charges that the defendant did "unlawfully, wilfully, wantonly, and maliciously utter, publish, and speak certain words against Lucy L. Mitchell, which said words so uttered, published, and spoken by said defendant (1034) amounted to a charge of incontinency against the said Lucy L. Mitchell, she, the said Lucy L. Mitchell, being a chaste, pure, virtuous, and innocent woman." The State introduced testimony tending to prove the allegations of the bill. The defendant admitted that the prosecutrix was an innocent and virtuous woman and introduced testimony denying the speaking of any words amounting to a charge of incontinency. There was a verdict of guilty, with a recommendation of mercy. Motion in arrest of judgment in that the bill does not charge that the defendant "attempted to destroy the reputation of an innocent woman." Motion denied, and the defendant excepted. Defendant fined $5, and appealed. This is the only point presented.

The Code, sec. 1113, provides: "If any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken, which amount to a charge of incontinency, such person shall be guilty of a misdemeanor," etc. The defendant admits that the prosecutrix is an innocent woman and the verdict establishes that the defendant maliciously and wantonly spoke words in regard to her which amounted to a charge of incontinency.

In *S. v. McIntosh,* 92 N. C., 794, *Ashe, J.,* says: "The offense defined by the statute consists not in the slander of a woman by falsely charging her with incontinency, but in the attempt to destroy the reputation of an innocent woman," citing those words from *Ruffin, J.,* in *S. v. McDaniel,* 84 N. C., 803; yet this is the very allegation which is omitted from the indictment in this case. In *S. v. Edens,* 95 N. C., 695, 59 Am. Rep., 294, *Smith, C. J.,* says: "At common law verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of a (1035) want of virtue in an innocent woman made in a wanton and malicious attempt to destroy her reputation." There are no words in this bill which charge that the purpose, intent, or object of defendant in charging incontinency was to destroy the reputation of the prosecutrix. The words, "wilfully and wantonly," have not that effect. In *S. v. Malloy,* 115 N. C., 737, there was no point made on the indictment, which besides contained the words "attempt to destroy the reputation of."

As a rule, it is sufficient and best to follow the words of the statute, and if the draftsman of this bill had done so he could have much abbreviated this indictment and omitted much repetition and many unnecessary words, and would not have omitted the essential words that should have been charged.

The State relies upon *S. v. Barnes,* 122 N. C., 1031, in which it was held that the omission of the words "with intent" in an indictment for assault with intent to commit rape is not ground for arrest of judgment, when it sufficiently appears from the other words used that the intent is alleged. So, here, the omission of the words, "attempt to destroy the reputation" would not be fatal if that charge was made in other terms; but it is not, yet it is an essential element of the offense. There are other words in *S. v. Barnes,* which we have cited with approval more than once and recently again in *S. v. Marsh, ante,* 1000, to wit: "The Code, sec. 1183, was enacted to prevent miscarriages of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute." When an offense is statutory it is best as a general rule to follow its terms, neither adding unnecessary words nor (1036) omitting any material averment, both of which were done in this instance.

The following would be a sufficient indictment under this statute:

"The jurors for the State on their oath present that A. B. in the county R. did attempt wilfully and wantonly to destroy the reputation of C. D., an innocent woman, by words written (or spoken, as the case may be), which amounted to a charge of incontinency. .....Solicitor."

This is the form substantially which was approved in *S. v. Haddock,* 109 N. C., 874. In *S. v. Arnold,* 107 N. C., at p. 863, this Court in like manner settled and approved the form of indictments for murder and manslaughter. The same was done as to indictments for perjury, *S. v. Thompson,* 113 N. C., 638; *S. v. Gates,* 107 N. C., 834; *S. v. Peters, ib.,* at p. 882, and has been done also in the case of some other offenses.

"It is not necessary to set forth (in the indictment) the words by which the attempt was made." *S. v. Haddock,* 109 N. C., at p. 875, quoting *S. v. George,* 93 N. C., 568, that it is sufficient to copy the statute. In *S. v. McIntosh,* 92 N. C., at p. 797, the same rule is stated, the Court quoting *People v. Bush,* 4 Hill, 133: "In indictments for attempts it is not necessary to point out the specific means." This is followed in *S. v. Ellsworth,* 130 N. C., 690 (attempt to commit burglary), and *S. v. Peak, ib.,* 711 (attempt to commit rape). In *S. v. Harwell,* 129 N. C., 550, the solicitor saw fit, for some reason, to set out in the bill the words, and thus their legal effect became matter for consideration in a motion to quash. If not thus set out, objection could have been taken to their admission as evidence, or by

a prayer for instructions. This is preferable to making the words used a matter of perpetual record.

Judgment arrested.

Cited: *S. v. Smith,* 155 N. C., 477.

(1037)

STATE v. AUSTIN.

(Filed 21 April, 1903.)

1. Perjury—Evidence—Substantive Evidence.

Where a person on trial for perjury for swearing that he had never been indicted for being drunk, was asked on cross-examination whether a certain person had not charged him with having delirium tremens, his answer thereto is not competent as substantive evidence.

2. Instructions—Cross-examination—Evidence.

Where evidence introduced is competent only as impeaching evidence and is not material as substantive evidence, the trial judge should so instruct.

INDICTMENT against J. F. Austin, heard by *Neal, J.,* and a jury, at July Term, 1902, of RANDOLPH. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Zeb Weaver for defendant.

MONTGOMERY, J. The defendant was indicted for perjury. The false oath was charged to have been made in a case being tried in the Superior Court of Randolph County. The assignment of the perjury was that the defendant swore that he "never was incarcerated in the lock-up or city prison in the city of Asheville, or in any other prison by any officer of said city, or any other officer; that he was never intoxicated in the city of Asheville nor was ever arrested for intoxication in said city by any policeman thereof."

The defendant on the trial of the indictment offered himself as a witness in his own behalf, and testified that he had never been confined in Asheville city prison nor in any other prison; that what he swore to in the trial of the case in which the perjury was alleged to have been committed was true. On cross-examination he was (1038) asked if a Mr. Stacey, a Methodist preacher, had not charged him to his face with having *delirium tremens.* The defendant answered under objection that Mr. Stacey had so charged, but that

it was not true. This evidence was not offered in disparagement of the witness, to impeach his character and credibility, but seems to have been introduced as substantive testimony. It certainly was not competent as bearing upon the offense charged against the defendant, because of its lack of particularity as to time and place. The question was too general and broad in its scope. It does not appear where or when the accusation was made by Mr. Stacey. It might have been a competent question on the cross-examination if it had been introduced as impeaching evidence only or if his Honor had instructed the jury that it could not be used as material evidence in respect to the offense charged in the bill of indictment, but might be considered as affecting the credibility of the witness. But that was not done. As it is necessary for the court in the trial of cases to instruct the jury as to the nature of corroborative evidence or evidence contradictory of a witness and for what purposes it is admitted, so we think that when evidence on cross-examination, not material to the matter at issue, is introduced under objection, a like instruction should be given.

New trial.

WALKER, J., took no part in the decision of this case.

(1039)

STATE v. NINESTEIN.

(Filed 21 April, 1903.)

Peddlers—Hawkers—Taxation—Itinerant Merchants—Private Laws 1899, Ch. 186, Sec. 54, Subsecs. 1 and 12.

A person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a near-by town, and only delivering to those from whom he had taken orders, is not an itinerant merchant or peddler.

INDICTMENT against A. H. Ninestein, heard by *Neal, J.*, and a jury, at February Term, 1902, of ROWAN. From a judgment of guilty on a special verdict, the defendant appealed.

Robert D. Gilmer, Attorney-General, and Craige & Craige for the State.

L. H. Clement and Womack & Hayes for defendant.

DOUGLAS, J. This action was tried upon appeal from the decision of the mayor of the city of Salisbury upon a warrant charging the defendant with "engaging in the business of an itinerant merchant

and peddler, without first having paid the license tax as required by law, in violation of the charter of said city."

The jury, after being impaneled to try the issue in the case, found the following special verdict:

1. That Salisbury, in the county of Rowan, is a city duly incorporated by the General Assembly of the State of North Carolina.

2. That the charter of the said city of Salisbury, sec. 54, subsecs. 1 and 12, provides as follows:

"(1) On all itinerant merchants or peddlers offering to vend in said city, a privilege tax not exceeeding $50 a year in addition to a tax not exceeding 1 per centum on the amount of their purchases, respectively; and among such itinerant merchants or (1040) peddlers shall be included, also, all itinerant venders of medicines or other articles."

"(12) Said board of aldermen may require and provide for the payment in advance of any license tax or privilege tax in this act authorized, and any person who in such case shall engage in any business, trade, occupation, calling, or profession upon or for which in any manner any such tax is allowed to be imposed without having paid such tax shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $50 or imprisoned not more than thirty days."

3. That there is in the city of High Point, North Carolina, about .....miles from said city of Salisbury, a firm known as Ninestein & Jarratt, and the defendant in this case is the senior member of the said firm.

4. That the said firm are wholesale dealers in produce, also in oranges, bananas, lemons, fruits, melons, etc., and sell only by wholesale.

5. That the defendant herein, senior member as aforesaid, travels for said firm, going from town to town in this State as traveling salesman.

6. On Monday, 30 June, 1902, the defendant came to Salisbury, and went to various merchants doing business in the said city, and offered to sell them watermelons in wholesale lots.

7. That said Ninestein went to see no one except merchants and refused to sell to anybody else.

8. That the defenedant stated to said merchants that the melons were in High Point, in the wholesale house of Ninestein & Jarratt, and that defendant was selling for them, and that if they gave an order, that the melons would be delivered as soon as he could send in the several orders, and goods would be shipped by freight.

9. That when the negotiations of sale were pending, the purchasers stated to defendant that they would rather wait and see the
(1041) fruit and melons before buying. Defendant replied that he could not sell that way. That he would have to take their order and have it filled from High Point. That he would send the order by phone to High Point and have them loaded on afternoon freight.

10. That defendant took orders from C. J. Jeffress for 50 melons, D. M. Miller 25, and from various other merchants orders, amounting in the aggregate to 360 melons.

11. That the defendant sent the said orders to the house of Ninestein & Jarratt at High Point by phone.

12. That Ninestein & Jarratt shipped at once by freight to this defendant at Salisbury 360 melons, the waybill being marked N. & J. consignor, consignee A. H. Ninestein.

13. That said melons were, by the railway, delivered to the defendant about 9 o'clock Tuesday morning, 1 July, 1902, and he employed one Julius Malone, a drayman in Salisbury, to assist him in the delivery of the melons. This defendant went around with the said Malone in the delivery of the melons to the various purchasers; said melons were delivered, and the defendant collected for some of the sales and the drayman for the others.

14. That no sale or delivery was made except to those firms from whom orders had been taken.

15. That the tax collector of the city of Salisbury demanded of the defendant the tax of $5 as a peddler, which the defendant refused to pay.

16. That he then demanded a tax of $25 as itinerant merchant, and he refused to pay this tax.

17. That the board of aldermen, as they had the right at law to do, had fixed the tax of a peddler at $5 and of an itinerant merchant at $25.

18. That the defendant sold said melons in the manner
(1042) aforesaid without having paid any tax.

If upon the foregoing facts the court should be of the opinion that the defendant is guilty, then the jury so find; but if the court should be of the opinion that the defendant is not guilty, then the jury find him not guilty. Upon the special verdict the defendant is adjudged guilty and that he pay a fine of $25 and costs.

We think that the defendant was entitled to a judgment of acquittal upon the special verdict. It is evident that the defendant was not an itinerant merchant or salesman as defined in *S. v. Gibbs,* 115

N. C., 700. It is equally clear that he is not a peddler in the ordinary meaning of the word, which we are compelled to accept unless he comes within the statutory definition. In *S. v. Lee,* 113 N. C., 681, 37 Am. St., 649, this Court has defined peddling as "the occupation of an itinerant vender of goods who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly or in part upon their subsequent delivery." This definition, approved in *S. v. Franks,* 130 N. C., 724, 89 Am. St., 885, expressly excludes the defendant.

The only remaining question is whether he was a statutory peddler under the definition of the Revenue Act. Ordinarily the General Assembly has no power to construe an act, but when it imposes a tax upon peddlers and in the same act defines who are peddlers, it is equivalent to imposing a tax upon all persons engaged in the occupations therein specified. Section 54, chapter 9, Laws 1901, declares that "any person carrying a wagon, cart or buggy for the purpose of exhibiting or delivering any wares or merchandise, shall be considered a peddler." But the same section expressly provides that: "This section shall not apply to those who sell or offer for sale ice, fuel, fish, vegetables, fruits or any articles of the (1043) farm or dairy." This language is certainly broad enough to include watermelons. The judgment is reversed and the court below will enter a verdict of not guilty.

Reversed.

Cited: Plymouth v. Cooper, 135 N. C., 5; *Range Co. v. Campen, ib.,* 524.

STATE v. JONES.

(Filed 21 April, 1903.)

Trespass—Husband and Wife—The Code, Sec. 1120.

A husband is not indictable for a trespass on the lands of his wife after being forbidden by her.

CLARK, C. J., dissenting.

INDICTMENT against Albert Jones, heard by *Bryan, J.,* and a jury, at January Term, 1902, of WAKE. From a judgment of not guilty on a special verdict the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendant.

MONTGOMERY, J. The wife of the defendant, who was the owner of the premises on which they resided up to November, 1892, left on that day and has remained off ever since, having good grounds for believing that the defendant had been for some time living in adultery with a woman in the neighborhood. She had, before she left her home, urged upon the defendant to leave her premises, that she might live there alone, and he refused to do so. The defendant had been living on the land all the while, although shortly after having left herself she ordered the defendant to leave and not to enter again. Upon his frequent ingress and egress and refusal to leave, a warrant was issued for entering upon the land after being forbidden. He was found guilty in the court of a justice of the peace and fined.
(1044) From that judgment he appealed to the Superior Court. The above facts were found by a special verdict in the Superior Court, and upon them the court adjudged that the defendant was not guilty.

We can see no error in the judgment. Notwithstanding the fact that the wife may have good grounds to suspect the defendant husband of immoral conduct, they are still in the eye of the law husband and wife, and there has been no separation by a decree for a divorce *a mensa et thoro*. This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass.

In *Manning v. Manning*, 79 N. C., 293, 28 Am. Rep., 324, the husband and wife occupied the same house and farm, the property of the wife, and the action by the wife against the husband was an action of ejectment. He had taken possession of the property, was using it as his own, and had been appropriating the rents and profits to his own use without applying any part of the same to the wife's comfort and support. This Court held that the wife was entitled to an order for the possession of the property, but that the husband could not be ejected from the premises, for that was "a proposition fraught, as I conceive, with the most dangerous consequences to society, to wit, that a wife may under the forms and with the sanction of law, at her own will and without cause, eject her husband from her dwelling and society because the house is her separate property. I can never agree that either husband or wife can, without committing those offenses which the law designates as causes of divorce or separation, invoke the aid of the courts to render a judgment the unavoidable consequences of which would be a separation of man and wife.

Nothing less than an express or positive statute to that effect can control or destroy the highest of all the obligations imposed in the marriage relation—that man and wife shall live to- (1045) gether. Any decision of the courts, the direct or incidental result of which is to destroy the sanctity of marriage in that particular, can but weaken and undermine the surest foundations upon which the structure of society and through it of political institutions rest and command our confidence." The Court further said: "By the matrimonial contract the husband and wife are to live together, and the law, divine as well human, has, whether wisely or unwisely, made him the ruler of the household, and the understood and well defined legal duties, relations, and obligations of the marriage compact cannot be abridged or changed at the will of either, or otherwise, or for other causes than are prescribed in the statute in relation to divorce and alimony." In that case the parties were occupying together the premises; but does the fact in the present case, that the wife has abandoned her husband and their home and made her residence elsewhere, alter the principle involved in the case from which we have just quoted? Are not the purpose and effect of the present action, if successful, the separation of the husband and the wife and the destruction of the home relations? Can it be that a wife may, whenever she sees fit, leave her home and take up her residence in another place, refuse the society of her husband and indict him as a trespasser if he puts his foot upon the wife's abandoned property, the place he has made his home? Have we reached that stage of social progress when the sacred relation of husband and wife and the hallowed influences of the home are converted into mere traditions without power to influence, and dreams instead of realities? It would seem so to us if we were to hold that the indictment in this case was lawful and proper.

If the husband should commit any of those acts which the law points out as causes of divorce, the wife may effect a separation from him under the chapter of The Code on "Divorce and (1046) Alimony," and only in that way. *Taylor v. Taylor*, 112 N. C., 134, does not have application to the facts of this case. There the plaintiff, who was the wife of the defendant, brought an action against him to recover possession of her land and for an injunction to restrain him from interfering with her exclusive control and management of her property. The Court said: "The plaintiff is entitled to the possession of the land, exclusive of the husband, until a reconciliation has been effected." But the parties had been divorced *a mensa et thoro*.

No error.

CLARK, C. J., dissenting: This is a criminal action begun before a justice of the peace against the defendant for entering upon a certain tract of land, the property of his wife, after being forbidden by her so to do, and without license therefor. The Code, sec. 1120. Found guilty and fined $1 and costs, the defendant appealed to the Superior Court, where the jury found, in a special verdict, that the wife of the defendant, having good grounds to believe that her husband was, and had been for some months, living in adultery with a woman in the neighborhood, urged him to leave the premises, that she might live alone. This he refused to do; whereupon she left and has remained away ever since. She then ordered her husband to leave that tract of land and not enter on it again, but he refused to observe this order, and has since that time repeatedly been off of said land, but has always returned thereon, living there continuously, contrary to her will.

Upon these facts it was error in his Honor to hold that the defendant was not guilty. The Constitution, Art. X, sec. 6, provides that the property of any female, whether acquired before or after marriage,
(1047) *"shall be and remain the sole and separate property of such female";* the only restriction being the requirement of the written assent of the husband to conveyances by her. In *Tiddy v. Graves,* 126 N. C., at p. 622, it was held, quoting and approving the exact language of *Merrimon, C. J.,* in *Walker v. Long,* 109 N. C., 510, as follows: "This provision is very broad, comprehensive, and thorough in its terms, meaning, and purpose, and *plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried,* except in the single instance of conveying it. She must *convey* with the assent of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate."

Since the Constitution, as has thus been held uniformly, secures to the wife the *"complete ownership and control of her property as if she were unmarried"* and has "swept away any common-law right or estate the husband might at one time have had as tenant by the curtesy initiate," it follows that the defendant had no more right to enter upon his wife's land, *qua* land, and continue to reside there after being forbidden to do so than if she were unmarried. This Court has never trenched upon the above plain provision of the Constitution so as to give him a right to occupy her realty and use it for his residence, in her permanent absence therefrom, contrary to her prohibition. His occupation of the dwelling and continuous use of the prem-

ises might well prevent her getting a tenant or exercising the *complete ownership and control* guaranteed to her by the Constitution. All the Court has ever held is that when the wife is residing upon the premises the husband has the right of ingress to her and egress because of his marital right to enjoy her society. *Manning v. Manning,* 79 N. C., 293, 28 Am. Rep., 324, which is based throughout on this ground. This right, it said, he cannot be deprived of except by proceedings in divorce, either absolute or *a mensa et thoro.* (1048) But when, as here, the wife does not reside upon the premises, but has purposely removed therefrom to prevent his coming there, there is no right of ingress and egress to her. She is not there. He has no right *jure mariti* to occupy the residence when she has left it permanently, or to enter upon any of her lands (save to come to her when there) if forbidden by her so to enter. Her ownership and control are sole, and exclude, as *Merrimon, C. J.,* above says, any common-law right the husband ever had. As reiterated in *Tiddy v. Graves, supra,* the right to tenancy by the curtesy after the death of the wife is purely statutory, and then only as to property the wife does not devise. He has no right whatever as to her land while she is living. His right of ingress and egress is not as to her land, but as to her presence, and does not exist as to any premises where she is not.

In *Jones v. Coffey,* 109 N. C., at p. 518, it is stated that the husband "has the right of ingress and egress and *marital occupancy,* but can assume *no dominion* over her land or rents, except as her properly constituted agent," and in *Thompson v. Wiggins, ibid.,* at p. 510, it is said that such rights give him, as against the world, a bare seizin that makes him a freeholder, and as such eligible to sit on juries, but with *no dominion over the realty,* and with only the right of ingress and egress and occupancy, recognized by *Manning v. Manning, supra;* and that, as we have seen, is only egress and ingress to her and joint occupancy of the dwelling where she resides. In *Ex parte Watts,* 130 N. C., at p. 242, *Douglas, J.,* said that a surviving husband "had no interest whatever in the land, not even the right of curtesy, as that was destroyed by the will of the wife."

As late as *S. v. Black,* 60 N. C., 262 (1864), 86 Am. Dec., 436, this Court reaffirmed the common-law doctrine that a husband had a right to whip his wife "if no permanent injury be in- (1049) flicted," *Pearson, C. J.,* saying: "A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife *such a degree of force as is necessary* to control an unruly temper and make her behave herself." Blackstone and other authorities to same effect,

cited in *Vann v. Edwards,* 128 N. C., at top of p. 428. Ten years later, in *S. v. Oliver,* 70 N. C., 60 (1874), *Settle, J.,* says: "The courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." Though the Constitution of 1868 contain no provision as to the "rights of person" of married women, its enhancement of their status by their complete emancipation as to property rights rendered inevitable this change in the decisions. Married women were recognized as being *sui juris.* They no longer forfeited their rights by the fact of marriage.

While the "rights of person" have been thus secured to married women by judicial decision, the constitutional provision as to their property rights is equally broad and explicit, that "all their property, real and personal," whether acquired "before or after marriage, shall be and *remain the sole and separate property* of such female," with complete and absolute control over the same, even to the power of disposing of the same by will, the sole exception being (and no statute can add any further restriction) that her "conveyances" require the husband's written assent.

The effects of similar provisions elsewhere are thus clearly summed up by *Judge Cooley* in *Snyder v. People,* 26 Mich., 109, 112, 12 Am. Rep., 302: "At common law, the power of independent action and judgment was in the husband alone; now it is in the wife also, for many purposes; but the authority in her to own (1050) and convey property, and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of his rights or relieved of the obligations of head of the household, except as by their dealings an intent to that effect is indicated. . . . Her property is hers alone, but the *residence* is equally his. . . . The wife's dwelling can be considered that of the husband only while he makes it such in fact, and there is no such legal identity as can preclude her house being considered in *legal proceedings against* him as the dwelling-house of 'another' when it is no longer his abode." *A fortiori,* it cannot be *his* dwelling-house when it has ceased to be hers.

In *Martin v. Robson,* 65 Ill., 129, 16 Am. Rep., 578, it is well said, after summing up the duties and obligations of husband and wife: "These duties and obligations at common law were not the result of the arrangement of their property, but of the contract of marriage and the relations thereby created," which remain still unchanged, though "as to the separate property of the wife she is now the same

as a *feme sole*. She need not join her husband in a suit to recover it, or for trespass to it. She may even prosecute a suit against him for *any unlawful interference with her property.*"

Our Code, sec. 178, expressly provides that "when the action concerns her separate property she may sue alone," and also that she "may sue her husband" in regard thereto. *Shuler v. Millsaps,* 71 N. C., 297 (in which the Court says: "We are called upon to make a new departure, leaving old ideas behind, and adapting ourselves to the new order of things"); *McCormac v. Wiggins,* 84 N. C., 278; *Manning v. Manning,* 79 N. C., 293; *McGlennery v. Miller,* 90 N. C., 215; *Taylor v. Apple, ibid.,* at p. 346; *Barnes v. Barnes,* 104 N. C., 613.

The right of the wife "to the preservation and disposal of (1051) her separate property," says *Smith, C. J.,* in *S. v. Edens,* 95 N. C., at p. 695, 59 Am. Rep., 294, "she may now assert against her husband as well as against a stranger in an action at law, as is decided in *Manning v. Manning,* 79 N. C., 293." The "action at law" is not there restricted to the civil side of the docket, and there is no reason why it should be if the wife thinks a criminal proceeding in this case can assert and protect her right to the exclusive control of her property more expeditiously and cheaply, or is a more appropriate remedy. In the "Century of Law Reform," a most excellent collection of Twelve Lectures delivered at Lincoln's Inn by eminent lawyers, upon the present status of the law in England, it is said (p. 373) that "a wife may get an injunction restraining her husband from entering her house," and (p. 376) that a wife can take out criminal proceedings against her husband for stealing her property.

In the present case the wife cannot have a divorce, though the husband is living in open adultery, because he has not *"abandoned her* and lived in adultery as our statute requires" (*House v. House,* 131 N. C., 140), but for good cause, as the jury finds, she has left him. If, therefore, she cannot forbid him to go upon her separate property and to live there in her absence, she has lost that absolute control of her property as she had it before marriage and which a constitutional provision guarantees shall *remain* in her after marriage. If she cannot forbid him to go there, she cannot ask a court to forbid his doing so, and his character and conduct may, and doubtless would, prevent her getting a tenant for that tract of land. What self-respecting tenant would share the house with the husband and his paramour? Besides, if he has a right to occupy the house at all as husband, he has a right to the whole of it. But the Constitution forbids him any right to his wife's property. In *Manning v.*

Manning, supra, it was held that he had the right of ingress and egress to the wife's presence, though not to any dominion
(1052) over her land or occupancy of the house except in conjunction with her.

But even the right of access to her person, if contrary to her will, has since that decision been denied, though there was no divorce, in the famous *Clitheroe case* (*Reg. v. Jackson,* Law Reports, Q. B. D., 1891, 671) by a unanimous bench in the Court of Appeals in England, *Lord Chancellor Halsbury, Lord Esher,* Master of Rolls, and *Fry, L. J.,* delivering opinions. That case attracted the attention of lawyers throughout the world, and has been generally accepted as settling the right of a married woman to be free as to her person, as well as her property, from the control of her husband, unless she is willing to his companionship. He can sue for divorce if his own conduct so entitles him.

As the wife cannot by *habeas corpus* compel the husband to abide with her, so it was held in the *Clitheroe case* that the husband could not enforce the unwilling companionship of the wife. The law now recognizes the equality of rights of both parties to the marital relation, and no longer asserts the inferiority or subjection of women. The question here involved is not the propriety of husband and wife living together, notwithstanding he is living in adultery with another woman. The husband and wife are not living together, and there is no process by which the courts can make her live with him. It is not an issue of divorce, but of property rights. The sole question is, Can the husband infringe upon the wife's right to have the sole custody of her property which the Constitution has guaranteed to her, or can the courts disregard that guarantee because man and wife ought to live together? Is there any higher law than the Constitution? Besides, the husband occupying the wife's property in her absence and against her prohibition is not living with her even constructively.

(1053) Certainly, as the wife was not living on this property, the husband had no right to go there and occupy the house against the prohibition of the owner. He had no interest in the property. The wife has sole right to control it, and as fully as if she had remained single.

The judge should have sustained the action of the justice of the peace.

Cited: Jackson v. Beard, 162 N. C., 115.

STATE v. CROOK.

(Filed 28 April, 1903.)

1. Landlord and Tenant—Subrenting—Liens—Removal of Crops—Aider and Abettor—The Code, Secs. 1754, 1755 and 1759—Crops.

If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor.

2. Costs—Appeal—Case on Appeal—Judgment—Clerks of Superior Court.

Where a clerk of a Superior Court fails to send up a judgment in the transcript on appeal, the Supreme Court may refuse to allow him the costs of making and sending up the same.

3. Landlord and Tenant—Crops—The Code, Sec. 1754.

Hay is ordinarily embraced in the word "crop" as used in section 1754 of The Code. But not, it seems, when it is merely a spontaneous growth, as crab-grass, sprung up after another crop is housed.

INDICTMENT against J. W. Crook, heard by *Robinson, J.*, and a jury, at July Term, 1902, of UNION. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Redwine & Stack for defendant.

CLARK, C. J. Indictment for removing crop under The Code, sec. 1759. There was no conflict of evidence that the rent agreed was a 450-pound bale of lint cotton, that the cotton land was sub-rented by the defendant to one Bogan, that the defendant rented (1054) the land mainly for the meadow, which he himself mowed, and that he carried off the hay therefrom, and that the cotton was removed by Bogan; that no rent has been paid and no notice of removal was given. Bogan testified that he removed the cotton by order of the defendant, and the landlord testified that he never gave any consent to the removal of any part of the crop, and, on the contrary, notified the defendant not to remove anything until the rent was paid. The defendant testified he did not tell Bogan to remove the cotton, and that the landlord agreed beforehand he might remove the cotton.

The court instructed the jury, among other things, that if they should find from the evidence that the defendant removed the hay or the cotton from the land without giving the landlord or his agents or assigns five days' notice and without the consent of the landlord or his assigns and before discharging all the liens held by the landlord or his assigns, or if he aided and abetted any one else in so removing the crop from the land, then he would be guilty. The court instructed

the jury that if they should find the defendant guilty at all under the charge of the court they would say in returning their verdict whether they found him guilty of removing the hay or the cotton or whether they found him guilty of removing both hay and cotton. The jury returned a verdict of guilty of removing both the hay and the cotton. The defendant was fined $5, and appealed.

The defendant excepted to the charge that the defendant would be guilty if he aided or abetted the subtenant in removing the cotton from the land. In this there was no error, for subrenting did not release the landlord's lien upon the cotton. *Montague v. Mial,* 89 N. C., 137; *Moore v. Faison,* 97 N. C., 322. The intent in making the
(1055) removal was immaterial (*S. v. Williams,* 106 N. C., 646), and there is no exception on that ground. The jury having found the defendant guilty of unlawfully removing the cotton, even if there had been error as to the charge for removing the hay, it would have been harmless error. But as the matter is one of considerable interest to those engaged in agriculture, whether as landlords or tenants, that part of the case is also considered by us.

We pass by, as needing no comment, the refusal to charge that there was no evidence, and come to the two remaining exceptions. First, that the court refused to charge, as requested, "Hay not being a cultivated crop, if the jury should find that the defendant did not remove any article but the hay, your verdict should be not guilty." This was properly refused, both because it ignored the fact that if the landlord directed the tenant to remove the cotton the jury could not find "Not guilty," and because it is not true as a proposition either of law or fact that "hay is not a cultivated crop." By the census of 1900 it appears that the value of the hay crop of this country exceeds by more than $100,000,000 the total value of our cotton crop, and, notwithstanding the large yield from the vast unsown prairies of the West, that more than three-fourths of the hay crop is raised on cultivated land. The same census shows that six out of every seven tons of hay cut in this State are cultivated grass, only one-seventh being natural grass. Hay is not cultivated like cotton, any more than wheat is cultivated in the sense that corn is, but the court could not therefore lay down the proposition that either wheat or hay is "not a cultivated crop."

The other exception is that the court charged that "grass was subject to the landlord's lien, and that the defendant would be guilty if he removed the hay from the land." There is no presumption and no evidence that this was uncultivated hay, and the presumption of law
(1056) is that the proceedings below were correct. Neither the word "meadow" nor the word "hay" *ex vi termini* import that this was an unsown meadow or that it was natural grass. Indeed, the

general usage is that both rather indicate cultivation than the contrary. In *Reg. v. Good,* 17 Ont., 725, it is said that the word "hay" does not import whether it was hay from natural grass or from grass sown and cultivated, and from the census, as above stated, it appears that the great bulk of hay is in fact cultivated grass. As to "meadow," John Milton, that great master of our English tongue, understood its ordinary meaning to be a cultivated and tended grass plat, for in *l'Allegro* he speaks of

"Meadows *trim,* with daisies pied";

and the law writers take the same view. Black's Law Dictionary defines "meadow" as "a tract of low or level land producing grass, which is mowed for hay—*Webster.*" In *Barrows v. McDermott,* 73 Me., at p. 452, the Court held that the word "meadow," in the absence of evidence, means cultivated land growing grass sowed thereon.

But take it that the evidence showed that this was hay mown on a natural meadow, the landlord's lien clearly attached, both within the language and intent of the statute. It would be very singular if it were not so when the defendant testified that he rented the land, and told the landlord so, mainly for the purpose of mowing the hay on this meadow. It was the "crop" he had in anticipation. That the rent was to be paid in cotton did not release the lien given by the statute (The Code, sec. 1754) "on any and all crops raised on said lands," any more than if the rent had been payable in money. The words "crop raised" mean simply the crop grown or gathered during the year. The word "raised" appears nowhere else in that section, nor in section 1755, nor in succeeding sections, only the word "crop" being used. The Legislature had in mind no distinction between *fructus industriales* and *fructus naturales,* and there was no need of any. the word "crop" covers both, says 8 A. and E. Enc., 302. Webster defines "crop—that which is cropped, cut or gathered (1057) in a single season." In *Goodrich v. Stevens,* 5 Lans. (N. Y.), 231, the Court says: "A crop is primarily some *product of the soil* gathered during a single year." And in *Emerson v. Hedrick,* 42 Ark., 265, it is held that wild prairie grass when cut is a "product" which is subject to the laborer's lien for moving it.

In 8 A. and E. Enc., 302, it is said that crops are divided into two kinds, *fructus industriales* and *fructus naturales,* the material difference being that the latter are the part of the crop which does not go to the outgoing tenant as "emblements," nor to the personal representative as against the heir. This division is one made in favor of the landlord and not against him. Our statute gives the landlord a lien for his rent "on any and all crops," that is, on all that

is "cropped, cut or gathered" in that season from his land, and there can be no rule of construction which would deprive him of a lien on that very part of the crop which by reason of public policy has always been held so closely vested in the landlord that the tenant can neither claim them as emblements nor the personal representative. See Black's Law Dict., "Emblements," and Bouvier, ditto. In *Reiff v. Reiff,* 64 Pa. St., 134, it was held in favor of the landowner that when tenant for life died during the year, the grass uncut, even when cultivated grass and ready for cutting, went to the owner of the reversion, and not as emblements to the lessees of the land, the Court adding: "The learned judge in the court below is a practical farmer, thoroughly acquainted with the established usages of our State, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator (the landlord)." The cases cited by defendant's counsel, *Brittain v. McKay,* 23 N. C., 265, 35 Am. Dec., 738; *Flynt v. Conrad,* 61 N. C., 190; 93 Am. Dec., 588; *Walton v. Jordan,* 65 N. C., at p. 172, and *Bond v. Cooke,* 71 N. C., 100, so far
(1058) as they apply at all, are directly against him, in that they hold that the *fructus naturales* inhere in the owner of the land, the tenant or personal representative having a claim only on the *fructus industriales.* The distinction, however, has no bearing here, as the law says, and plainly intends, that what crop a tenant raises, gathers, or gets in any way out of the land is subject to the lien of the landlord till his rent is paid, and the tenant is forbidden to remove any part thereof without payment of the rent, unless there is notice to the landlord and his consent to the removal.

The landlord's lien attaches to all the crop, and hence applies to hay, whether grown from natural or cultivated grass.

Nothing in this opinion has reference to an ordinary grass or hay patch, the spontaneous growth of the soil, as a volunteer stand of crabgrass, for *that state of facts is not presented.* On the contrary, the evidence of the defendant and of the prosecutor concurred, as above set out, that the land was rented by the defendant chiefly for the purpose of mowing this meadow, and that this was stated when the land was rented.

There was a failure at first to send up the judgment in the transcript, but instead of dismissing the appeal, as might have been done (*Rosenthal v. Roberson,* 114 N. C., 594; *S. v. Hazell,* 95 N. C., 623, and other cases cited in Clark's Code, 3 Ed., p. 734), the Court *ex mero motu* sent down a *certiorari* to obtain it, as was done in *Foster v. Hackett,* 112 N. C., 556, and other cases.

In *S. v. Cameron,* 122 N. C., 1074, by reason of the failure of the clerk to send up, as in this case, an important part of the record, it was ordered that he should be "allowed no costs for the making and sending up the transcript of the record," the Court saying: (1059) "The omission to send up that part of the record is too grave a matter to be passed over by this Court." The same order of disallowance is made in this case. The Constitution, Art. IV, sec. 8, gives this Court general supervision and control of proceedings in the lower courts.

No error.

MONTGOMERY, J., concurring: I cannot concur in that part of the opinion of the Court where it is held that the ordinary grass or hay patch, the natural and spontaneous growth of the soil on the rented premises, is embraced in the word "crops" in section 1754 of The Code, unless it be shown that such was a part of the rental consideration if the rent was to be paid in money, or unless the tenant was by the contract required to cut the grass or hay and deliver a part of the same to the landlord as rent. The criminal law has already been invoked by legislation as a redress for civil injuries growing out of this subject as far as it ought to go, in my opinion, and I, as a judge, am not willing to extend its jurisdiction. Otherwise I concur in the opinion.

DOUGLAS, J., concurring: I concur in the opinion of the Court, understanding that it applies only to *regular* meadows or to crops such as clover or cultivated grasses. In the absence of contract, or of such established usage as would raise an implied contract in law, I cannot suppose that a mere volunteer stand of crab-grass, for instance, that should happen to grow during an unusually wet season, could possibly come within the scope of this opinion.

(1060)

STATE v. BRADLEY.

(Filed 12 May, 1903.)

Intoxicating Liquors—Retailing—Special Verdict—Verdict—The Code, Sec. 1076—Laws 1901, Ch. 9, Secs. 70, 103.

In a prosecution for retailing liquor without a license, a special verdict which fails to find that the defendant did not have a license to sell, is not sufficient to sustain a judgment of guilty.

STATE *v.* BRADLEY.

INDICTMENT against Eli Bradley, Jr., heard by *Jones, J.*, at Spring Term, 1903, of POLK. From a judgment of not guilty on a special verdict, the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
J. E. Shipman for defendant.

CONNOR, J. The defendant was charged in the usual form of indictment with retailing without license "a quantity of spirituous liquor by small measure, to wit, by the measure of a pint." The jury returned for a special verdict "that the defendant sold one quart of whiskey to J. B. Constand, in Polk County, about one year prior to the finding of the bill, for which said Constand in Polk County paid the defendant 30 cents. If upon the above facts the court be of the opinion that the defendant is guilty, the jury so find; otherwise, not guilty."

His Honor held that the defendant was not guilty and so adjudged. The solicitor for the State appealed.

We are of the opinion that his Honor could not have adjudged the defendant guilty upon the special verdict, and that he could not render any judgment thereon. The offense charged is selling liquor without having a license to do so. It is true that it has been the settled law in this State for more than fifty years that "proof of the existence of a license to retail must come from the defendant." *S. v. Emery,*
(1061) 98 N. C., 668; and upon proof of sale, in the absence of such proof, the jury must find the defendant guilty.

If, however, the jury shall, instead of returning a general verdict, find a special verdict, they should find every fact, if it exists, either by proof or presumption, essential to the defendant's guilt; otherwise, the court should set the finding aside and direct a *venire de novo. S. v. Bloodworth,* 94 N. C., 918; *S. v. Bray,* 89 N. C., 480; *S. v. Corporation,* 111 N. C., 661; *S. v. Oakley,* 103 N. C., 408.

The bill of indictment is drawn under the provisions of section 1076 of the Code, which makes it a misdemeanor to sell "spirituous liquor by the small measure in any other manner than is prescribed by law." The charge is that the defendant sold "by the measure of a pint." It may, if the allegations are found to be true, be sustained either under that section or section 103, chapter 9, Laws 1901. Section 70 of this statute, being the revenue law of that year, prescribes: "Every person . . . selling spirituous . . . liquors . . . shall pay a license tax semi-annually on the first days of January and July as follows: First, for selling in quantities of 5 gallons or less, $50 for each six months; second, for selling in quantities of 5 gallons or more,

$100 for each six months," etc. Section 103 makes it a misdemeanor to practice any trade or profession or use any franchise without having paid the tax and obtained a license as required, etc. It would seem that in view of the new classification of dealers in spirituous liquors, a sale of 5 gallons or less would be by small measure. This is the principle of construction adopted in *S. v. Shaw,* 13 N. C., 198. We have said this much because we presume the appeal is taken for the purpose of having our opinion on the question.

For the defect in the special verdict there must be a
Venire de novo.

Cited: *S. v. Holder,* 133 N. C., 713; *S. v. Fisher,* 162 N. C., 565.

(1062)

STATE v. MEHAFFEY.

(Filed 12 May, 1903.)

1. Rape—Instructions—Assault with Intent to Commit Rape—Intent.

In the trial of an indictment for an assault with the intent to commit a rape a requested instruction that rape is a most detestable crime and that the heinousness of the offense may transport the jury and judge with so much indignation that they may be overhastily carried on to a conviction on insufficient evidence, was properly refused.

2. Instructions—Trial Judge—Prayers for Instructions.

The trial judge is not required to give instructions in the very words in which they are requested.

3. Evidence—Sufficiency of Evidence—Rape—Assault with Intent to Commit Rape.

There is sufficient evidence in this case to be submitted to the jury as to whether the accused made the assault with the intent to commit rape.

4. Rape—Assault with Intent to Commit Rape—Intent.

If at any time during an assault by a man on a woman he has an intent to ravish her, he is guilty of an assault with the intent to commit a rape.

5. Continuances—Supreme Court—Appeal.

An appeal in a criminal action will not be continued in the Supreme Court for the reason that a civil action for the same offense is pending in the Superior Court.

DOUGLAS, J., dissenting.

INDICTMENT against J. T. Mehaffey, heard by *Long, J.*, and a jury, at February Term, 1903, of CATAWBA. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and W. C. Feimster for the State.

(1063) *L. L. Witherspoon and W. B. Gaither for defendant.*

CLARK, C. J. Indictment for assault with intent to commit rape. There are five exceptions, three of which are to the refusal to charge as prayed, and the other two are to the charge. The court gave the following instructions at the request of the defendant:

1. That in order to convict for an assault with intent to commit rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part.

2. It is not proof of guilt merely that the facts are consistent with guilt; they must be inconsistent with innocence. It is neither charity, nor common sense, nor law to infer the worst intent which the facts will admit of; the reverse is the rule of justice and law. If the facts will reasonably admit the inference of an attempt, which, though immoral, is not criminal, we are bound to infer that intent.

3. A conviction of an assault with intent to commit rape by force is not warranted by proof that the defendant against the will of the female upon whom the crime is charged to have been committed, indecently fondled her with intent to induce her thereby to submit to his embrace. It must appear that his intent was to accomplish his purpose by force and against her will and at all events, notwithstanding any resistance on her part.

The defendant further requested the following instruction:

4. The crime which is charged in the bill that the defendant intended to commit is a most detestable crime; the heinousness of the offense may transport the jury and even the judge with so much indignation that they may be overhastily carried on to a conviction on insufficient evidence. Blk. Com., 215.

The defendant excepts to the court not using this exact phraseology, but the above was not laid down by Mr. Justice Blackstone as substantive law nor as a consecrated formula for instructions to the

(1064) jury. All that the defendant was entitled to was proper caution, which appears fully throughout the charge, and in the above prayers that were given; and, besides, his Honor in conclusion cautioned the jury: "It is your duty, gentlemen of the jury, to review this evidence without bias or prejudice, calmly and deliberately, and endeavor to ascertain the truth. If there has been anything said by

counsel in the heat of debate and in the ardor of argument calculated to prejudice the cause of the State or the cause of the defendant, it is your duty to dismiss that part of the argument and consider only such argument as assists you to determine what the facts are in this case, and the law as given to you by the court"—and much more to same effect. The judge is not required to give an instruction in the very words asked. *S. v. Hicks,* 130 N. C., 705, and cases there cited.

The fifth prayer for instruction was: "Considering the evidence offered by the State in this case, it is not sufficient to authorize the jury in rendering a verdict of guilty of an assault with intent to commit rape as charged in the bill of indictment." This prayer was properly refused. The intent is necessarily an inference to be drawn from the defendant's acts, and it must be drawn by the jury and not by the judge, when there is any evidence. The prosecutrix, a young girl barely fourteen years of age, was an employee of the defendant, a mature man of fifty-four, who employed attention, gifts of money and association with her, which the evidence tended to show was with a design to have carnal intercourse with her. The evidence also tended to show that failing to seduce her by these means, he sought a retired place and opportunity to gratify his passions at all events, where her outcries were heard only by her younger sister, who had been working with her in the field; that she was a girl of good character and made no assignation with him; that he sent her to the cotton house to empty some baskets; that he went in behind (1065) her, closed the door, and when she started out he jerked her down, put his hand on her private parts, also caught her in his arms and felt her breasts; he then put his hands where his pants unbuttoned, she screaming and crying and trying to get loose. Her little sister, who was the only person near by, testifies that she heard the outcries, the prosecutrix says she was screaming as loud as she could, crying and trying to get away; that the defendant got his finger inserted in her person twice; that finally, for a few minutes, the defendant desisted and she does not know why, unless because she was crying and screaming so loud. Whether he desisted for that reason, or because at his age he could not accomplish his purpose after so vigorous an opposition, or because he was physically unable to overcome her opposition, or because he did not intend to have intercourse with her by force, was a matter for the jury alone, and was properly left to them in connection with all the other evidence in the case. *S. v. Matthews,* 80 N. C., 417; *S. v. Horne,* 92 N. C., 805, 53 Am. Rep., 442; *S. v. Kiger,* 115 N. C., 746; *S. v. Finger,* 131 N. C., 781. It is true, he desisted, that is to say, he did not succeed in having sexual intercourse with the girl. If he had, he would have been on trial for the capital felony and not for the intent. But his

failure is not conclusive of the absence of intent, so that the court should not have charged the jury as prayed, that he did not have such intent. If his purpose was only seduction, why did he persist in using force after her tears and outcries and struggles had showed that she would not consent? If he at any time during the assault (which the defendant admits) had such intent, he was guilty, no matter what caused him to abandon his purpose. There was other evidence, as the attempt of the defendant afterwards to buy the silence of the prosecutrix and his admission of illicit intercourse with another girl. His intent could only be found by a jury, and the three
(1066) instructions above set out, given at the request of the defendant, and the judge's charge also, fully instructed them as to what the nature of the intent must have been.

The offense charged is the attempt to have carnal knowledge of the prosecutrix forcibly and against her will. Shutting the door behind her and jerking her down when she attempetd to go out was evidence of force; putting his hand on her private parts and the other hand where his pants unbuttoned was evidence of an intention to have carnal intercourse, and his persisting in spite of her screams and struggles was evidence to show his intent to succeed against her will. Of the sufficiency of such evidence the jury alone could judge. This evidence can scarcely be said to look like seduction. The failure of defendant to accomplish his purpose is not, as a matter of law, conclusive that he did not intend to succeed. As already said, there were several reasons, either of which may have prevented him from being now on trial for the capital offense.

The defendant also excepted to the charge because the judge instructed the jury: "But if you find there was no assault upon the prosecutrix with intent to ravish, as alleged and above explained, and if you further find that he never committed an assault upon her amounting to a simple assault as above explained, then your verdict should be not guilty." This was substantially the sixth prayer asked by the defendant, and the only real objection is that it was too favorable to the defendant, for his own testimony admitted the assault.

The last exception, that "The court failed to collate the evidence and bring it together in one view on each side, with such remarks and illustrations as would properly direct the attention of the jury to each material matter in issue," is equally without merit. The charge is sent up and is a very full, careful, able, and just presentation
(1067) of the contentions of the parties and of the law applicable to each phase of the facts as the jury might find them to be.

At the opening of the case in this Court, the defendant moved for

a continuance on the ground that a civil action was pending, and it might prejudice the verdict in that case if the verdict and judgment in this should be affirmed. There is no precedent to justify such motion, and we know of no reasoning which would have justified granting it. Should an appeal in a criminal case be held up for such reason, the State might be prevented several years from enforcing justice till the appeal in a civil case should get here. Should an appeal in a civil case also be held up till a criminal action is disposed of? If both cases must be disposed of in this Court at the same term, the same would be true in the court below, with great inconvenience to the administration of justice, and would be impracticable, also, for the further reason that in many counties civil and criminal business is tried at separate terms, and even when tried at the same term one case must be tried before the other. The opinion in this case, so far as it refers to the facts, cannot be evidence in the trial of the civil action, and the fact of the verdict in this case, if the appeal were held up by a continuance, would be, if it gets to the knowledge of the jury, as effective as our affirmation on appeal that the judge committed no error of law in the trial, which is the only matter before us. We notice the matter, as the motion is a novelty in this Court, and is without merit to sustain it.

Affirmed.

MONTGOMERY, J. I am compelled to concur in the opinion of the Court because the trial was regularly conducted, and no fault can be found with any of the rulings of his Honor. But I feel constrained to say that the evidence, in my opinion, did not justify the verdict.

DOUGLAS, J., dissenting: The grossly indecent nature of the assault and my personal feeling towards any one who would betray or abuse a child, make me hesitate to dissent from the (1068) opinion of the Court; and yet, as a naked question of law, I see no evidence that the defendant intended to ravish. Bad as the facts are, they are all consistent with his innocence of the grave crime with which he is charged. From the State's testimony alone, it seems that he had the girl in his power, and that he desisted without any outside interruption and without any actual attempt upon her person. There is no evidence that his clothing was unbuttoned, or that he was prepared to complete the crime. His fondling the girl would itself tend to prove that his purpose was persuasion. I do not mean to say that he was innocent of all crime. He was clearly guilty of an aggravated assault and should be punished accordingly, but he should

not be subjected to the terrible consequences of so heinous a crime as that of which he has been convicted without competent evidence of his guilt. Seven years in the penitentiary to one of his age may be a life sentence, and in any event a conviction of attempt to commit what is generally regarded as the highest crime known to the law, fixes upon him the lifelong brand of infamy. Nor will he be the only sufferer, as even the innocent of kindred blood will share in his shame. In our detestation of the crime we should not lose sight of the fearful injustice that would result from an unjust conviction.

(1069)

STATE v. COLE.

(Filed 19 May, 1903.)

1. Indictment—Sufficiency of Indictment—Homicide—Premeditation and Deliberation—Murder in the First Degree—Murder in the Second Degree—Manslaughter—Laws 1893, Ch. 85—Constitution, Art. 1, Sec. 11.

An indictment for murder need not contain the words "premeditation" and "deliberation."

2. Evidence—Sufficiency of Evidence—Homicide—Murder in First Degree.

The evidence in this case is not sufficient to be submitted to the jury as to the guilt of the accused of murder in the first degree.

CLARK, C. J., dissenting.

INDICTMENT against Joe Cole and others, heard by *Winston, J.*, and a jury, at Fall Term, 1902, of VANCE. From a verdict of guilty of murder in the first degree against Joe Cole, and judgment thereon, he appealed.

The prisoner was indicted for murder, as follows:

The jurors, etc., present that Joe Cole, Joe Cole, Jr., and John Jones, late of the county of Vance, on 29 September, 1902, with force and arms, at and in the county aforesaid, feloniously, wilfully and of their malice aforethought did kill and murder Fred. Stevens, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The jury found Joe Cole guilty of murder in the first degree, and Joe Cole, Jr., and John Jones guilty of murder in the second degree. Sentence of death was pronounced upon Joe Cole, and he appealed.

The evidence was as follows: W. P. Clements testified for the State that he was on the train leaving Manson: "I got on the rear of the

second-class car for white people, and went through and found the darkies singing boisterous songs, and I said: 'Boys, you are in the wrong car; you will have to go to your car.' There were six or seven, including the two Coles and Jones. They paid no atten- (1070) tion. I tapped little Joe on the shoulder and repeated what I had said. He replied: 'By God, we will go when we get ready.' I then went out, opening the door of the white car, and opposite the door of the colored car, telling them to come on. I went to the front end of the colored car and started back, taking up tickets. The car had three compartments—first-class, second-class, and smoker. The last was next to second-class car for whites. When I reached the first-class compartment I met all the crowd coming back, muttering : 'We have first-class tickets and how is it we are driven round this way?' All passed through the second-class car except four, old Joe, little Joe, Jones, and another. I started to pass, when little Joe, Jones and the other, whose name I do not know, caught hold of me and said: 'How is this? We've got first-class tickets and we are driven round this way; how is it?' I explained that it was a State law, and the railroad had nothing to do with it. Old Joe (the appellant) just then entered the first-class compartment from the smoker. He came on, saying something, I don't know what, a sort of roaring. The first I caught was: 'We are all friends, we are all brothers; we'll all fight for one another, and we'll all die for one another.' While he was saying that, Mitchell, my porter, was standing by, patting him on the shoulder, and said, 'Let captain explain.' Old Joe lunged at me to hit me with his fist. The porter then hit him in the chest with his hand and prevented his hitting me. He staggered back against the smoking-room door and drew his pistol. The porter then rushed on him and pushed him back into the front left-hand corner of the smoking-room. At that time, little Joe, Jones, and the other one shoved me in the smoking-room with them. I straightened up and saw old Joe Cole shove the porter off with his left hand and raise his right hand. He did that twice. There was a pistol in his right hand. Then little Joe tackled the porter with a pistol in his hand. The porter turned and (1071) left old Joe free. Then Stevens entered the back door of the car and ran up to old Joe to grab him, his head to one side and his eyes shut. He touched old Joe with his hand, but did not clinch him. Just as he was about to hit old Joe and before he struck him, Cole raised his pistol, put it in Stevens' face and shot him. Young Joe then shot the porter. I think he shot the porter first. He halloed, 'I am shot.' Jones got his pistol out, but did not use it. He helped push me in the smoking car. From the time I left them in the white car until

I met them in the colored car was not less than two nor more than four minutes. This occurred in North Carolina about one and a quarter miles north of Middleburg, in Vance County, on 17 August, 1902, at 2:15 p. m. Stevens was roadmaster and my superior. Jones had a pistol; didn't try to do a thing that I saw or heard. It was on the Raleigh and Gaston Railroad. Stevens was not roadmaster of that part of the road where this occurred, and had no jurisdiction over me there. Stevens was a stout man (as large as Mr. B., one of the counsel); he rushed on Joe with head turned to one side, with his eyes shut. Then this man pushed his pistol in his face and fired. Stevens came from the white car. He had not talked with either of these persons that I know of. The prisoners were from Lynchburg, Va., and got on my train at Norlina. They acted like they had been drinking, and I thought they had. Jim Mitchell is in the Rex Hospital in Raleigh."

Sam Newsome testified for the State: "These men got on at Norlina. At Ridgeway they became offensive in the second-class colored car. Just before we got to Manson they passed through the first-class colored car and went to the white car, singing. After we got to Manson, Captain Clements came through my car, first class colored, taking
(1072) up tickets. Joe Cole met the Captain in the first class car and said: 'You turned my son and the rest out of the car and we've got first-class tickets.' He put his hand behind him, and a colored woman said, 'He is going to shoot.' He drew his fists, then the porter came up and took him by the arm and talked to him, saying, 'Conductor will explain,' and got him back in the smoker. Two others passed behind the conductor and got in the smoker. I went to the smoker door. Young man Cole told the porter to turn his father loose, took out his pistol and shot the porter, who refused to do so. About that time the roadmaster (Stevens) came in from the second-class white car and went to take old man Cole, who shot him with a pistol. Old Joe was standing up when he shot, and nobody had hold of him. Captain Clements was on the right-hand side of the smoker when the porter was shot. I saw nothing done to the prisoners. I would have seen it in that car. Clements and the porter had no pistols. I saw the old man and the young man have pistols. The old man here is the man. I recognize him. Stevens was killed; was dead when he hit the floor, shot in the head. There were other passengers on the train in the second-class car, and some in the car we were in."

Isaac Steinheimer testified for the State: "I was on train in first-class coach for whites; heard of the shooting and went forward. At rear end of the colored coach I found Turner holding the two Coles, who were trying to escape. They were on bottom step of the platform. Gun was called for. I got one and assisted in securing

and tying them. I took pistol from old Cole's pocket. It had been recently fired. No pistol was found on young Cole or Jones. I didn't see the trouble at all and knew nothing of it until it had ended. I got the pistol and cartridges of the old man."

J. B. Brack testified for the State to finding a pistol near a point where he understood the train had stopped after the shooting, between Rowland's and Twisdale's places. It was the day (1073) after the shooting, about 1 o'clock p. m.

Captain Clements recalled: "The train stopped after the shooting between Rowland's and Twisdale's places, about a mile and a half north of Middleburg. From Manson to Middleburg, four or five miles. Schedule time between these stations six minutes. The second-class car for whites was nearly full of passengers. I knew a good many of them and can name several now" (which he did). The prisoner was convicted of murder in the first degree and moved in arrest of judgment. The motion was overruled, and the prisoner appealed from the judgment pronounced.

Robert D. Gilmer, Attorney-General, and J. H. Bridgers for the State.

T. M. Pittman for defendant.

CONNOR, J. The first question raised on the appeal for the consideration of the Court is, whether the bill of indictment is sufficient in substance and form to support the finding by the jury of murder in the first degree.

The indictment is in the form generally used in this State, and did not charge that the killing was done with premeditation and deliberation. The contention of the prisoner's counsel is that section 3, chapter 85, Laws 1893, conflicts with section 11, Article I, of State Constitution, and that therefore the statutory provision must be declared void. It is ordained in that article of the Constitution that "in all criminal prosecutions every man has the right to be informed of the accusation against him." . . . Laws 1893, ch. 85, does not deny to the accused that right. Murder was the charge made against the prisoner. He knew (by fiction of law, at least) that prior to the act of 1893 it was not necessary either to aver or prove deliberation and premeditation as to the killing. It was sufficient if malice was shown. The act of 1893 was to that extent favorable to those (1074) who, after its enactment, might be indicted for murder. But such as might be, after that time, indicted for murder were informed by section 3 of the act (notwithstanding the advantage given to those charged with murder) that the form of the indictment in use

in the State would not be altered, and that the jury upon the evidence should determine in their verdict whether the crime was murder in the first or second degree, premeditation and deliberation being the features which constitute murder in the first degree. The very words of the act give a clear notice of the form of indictment to be used, and what could be shown in evidence by the State, and the duty and power of the jury to inquire into and weigh the evidence and to determine whether the homicide was committed with premeditation and deliberation. Our statute, then, does not change the quality of the crime of murder, as the offense was defined before the enactment of the statute. The division simply notices, concedes, that the atrociousness of the crime may be greater or less according to conditions and surroundings, and the punishment to be inflicted should be greater in some instances than in others. Many of the States of the Union have statutes similar to ours, and a majority of the courts sustain the sufficiency of bills of indictment that do not contain the averment of premeditation and deliberation.

The question has not been directly raised in this Court, but in a number of cases that have been before us, since the act of 1893, our attention has been called to the form of the indictment, and none of the judges, so far as this writer knows, has had doubts about the sufficiency of such indictment. The point was virtually decided in *S. v. Covington,* 117 N. C., 866. We think the ruling of his Honor in refusing to have the judgment arrested for insufficiency of the indictment (1075) was correct. Whatever difference of opinion may have existed in regard to the construction of Laws 1893, ch. 85, before or at the time of the decision of *Fuller's case,* it is now conceded that by the statute the crime of murder in the second degree is as at common law, which is defined to be: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being; and under the King's peace, with malice aforethought, either express or implied." Blk. Com., star p. 195. To constitute murder in the first degree, since the passage of the statute, the same elements are requisite, with the additional and essential one of "premeditation and deliberation." That from the use of a deadly weapon, either proved or admitted, the law implies malice, and the burden is upon the prisoner to show, if he can, matter in excuse, justification, or mitigation. It is the duty and incumbent upon the State, if it will ask for a conviction of murder in the first degree, to prove "premeditation and deliberation." They will not be presumed or implied from the use of a deadly weapon. *S. v. Fuller,* 114 N. C., 885; *S. v. Rhyne,* 124 N. C., 847.

The present Chief Justice, who dissented in *Fuller's case* and *Rhyne's case,* said in his dissenting opinion in the last-named case, in speaking of the construction placed on the act in *Fuller's case*: "Having reiterated it since, we must take it now as settled." These decisions, however, also hold that no particular length of time is necessary to constitute premeditation, 124 N. C., 857. The court will not undertake to prescribe any arbitrary rule defining the time during which it is necessary that the prisoner "premeditate and deliberate." In the several cases which have come before this Court upon appeal, it has adhered to this construction of the statute, the division of opinion among its members being in regard to the question whether there was or was not evidence of "premeditation and deliberation."

We assume that it is also well settled that if one, attempt- (1076) ing to commit a premeditated and deliberate murder, shall, while in the act, and as a result of it, kill another, he will in respect to the person killed be guilty of murder in the first degree; as if one lay poison for A and it is taken by B, from which he dies, it is murder in the first degree; or if one, of malice, either express or implied, but without premeditation, be in the act of killing A, and while in the act and as a result thereof he kill B, it is murder in the second degree. In both these cases, however, there must be a legal connection or relation between the original purpose and act and the unexpected result. In a certain sense, of course, every act is related to every other and preceding act of a human being; but the law, being based upon principles applicable to the practical transactions of human life, avoids impracticable scholastic refinements and adopts such rules as experience has shown to be capable of practical application.

His Honor charged the jury: "If the killing of Stevens was not the result of an effort to kill Clements, but was intentionally done, then the prisoner could not be convicted of murder in the first degree, for such killing, unless the jury find beyond a reasonable doubt that the prisoner, before the shooting, coolly determined to kill Stevens, and had deliberated and premeditated on it, and as a result had formed a fixed purpose to kill; in other words, to convict a prisoner of murder in the first degree, you must be satisfied beyond a reasonable doubt either that the prisoner had with deliberation and premeditation formed a fixed purpose in his mind, before he shot, to shoot and kill Clements, and, in an effort to do so, killed Stevens, or he had with deliberation and premeditation formed a fixed purpose to kill Stevens, and in pursuance of such fixed, determined, premeditated, and deliberate purpose he did kill Stevens; in either of these stitua-

(1077) tions, he would be guilty of murder in the first degree."

We are not inadvertent to the difficulty which is always involved in the question whether testimony is of sufficient probative force to constitute evidence, or whether it is a mere scintilla. The rule is clear that testimony must be sufficient to do more than raise a mere conjecture or suspicion. The difficulty is found in applying it to particular cases as they arise. Certainly, this Court will not interfere with the conclusion of a judge and a jury that there was not only some but sufficient evidence to bring the mind to a conclusion of guilt beyond a reasonable doubt, except in a very clear case of error. In this case, with the full statement of the uncontradicted testimony of an eye-witness, which is consistent and bears the impress of truth, we are forced to the conclusion that there was not sufficient evidence that the prisoner killed the deceased "in an effort to kill Clements, or that he had with deliberation and premeditation formed a fixed purpose to kill Stevens."

We do not pass upon or express an opinion in regard to his purpose to kill Clements, but assuming for the sake of the argument that he had done so, he did not have his pistol pointed towards him, but, as Stevens came in, "he raised his pistol." The position of Clements at the moment that Stevens came in the car rendered it impossible for the prisoner to shoot at him and hit Stevens. Clements says expressly that, as Stevens came in, the prisoner raised his pistol and shot. The coming in of Stevens, who was doubtless attracted by what had occurred and the noise, was a separate and independent incident in the transaction; it bore no legal relation to the then condition of the parties; it was the intervention of a new element or agency, and brought about an unexpected and, in a legal sense, independent result. The shooting of Stevens by the prisoner was without necessity. He was not armed; his evident purpose was to interfere and aid the conductor and porter in compelling the prisoner and those with him to behave themselves; he was free from blame. The prisoner,
(1078) by his prayer for instructions, prepared by faithful, able, and learned counsel, concedes that he is guilty of murder in the second degree, which excludes all idea of excuse.

While we adhere to the decisions of this Court that it is not necessary that any "particular time" shall elapse for the prisoner to meditate and deliberate, yet the very term necessarily involves the idea that there must be some time, however short, between the first conscious conception and the completion of a purpose or determination in his mind. Fitz James Stephens, in his "History of the Criminal Law of England," gives an interesting account of the efforts made

by the sages of the law to work out a satisfactory definition of "malice," "malice aforethought," and "malice prepense." The author suggests that he has solved the difficulty in his "Digest." The conclusion to which we are brought is that it affords another of the many illustrations of the poverty of language in giving expression to mental conceptions. We find that the words "foresight," "forethought," "forecast," and "premeditation" are used as synonyms. "A man shows his want of premeditation who acts or speaks on the impulse of the moment."

It is impossible to conceive of an act committed under the conditions described by Clements, in the killing of the deceased, as being the result of "premeditation and deliberation," or the expression of a "fixed purpose." Of course, it is for the jury by their verdict to fix the degree, but it is not contemplated that they shall do so arbitrarily or in accordance with their opinion as to the kind or quantum of punishment which should be inflicted. Their verdict must be based upon competent evidence under a fixed rule of law. In some States of the Union the question of punishment is left with the jury. Such has never been the purpose or the policy of the Legislature of this State.

We should, in accordance with the example set by those (1079) who have preceded us, have been content to conclude this opinion with the declaration of the law of the case and our reasons therefor, but for the suggestion urged upon us that, in some way, we are giving encouragement to lawlessness and "lynching." The very remarkable suggestion is made and seriously insisted upon, that it is our duty in the decision of this case to consult criminal statistics, newspaper reports of lynchings and threats thereof, that we may be the better enabled to know and declare what the law is by doing so. Just how, or by what mental process, this Court is to be enlightened in this way, we are not very clearly advised. Nor can we conjecture what certain persons or classes of persons may say or do, because we have, in the discharge of our duty, adjudged the prisoner to be entitled to a new trial. "Such an argument should not be addressed to courts, which cannot make, but only construe and administer the law as it is written. If worthy of consideration, it should be directed to the Legislature as a reason for changing the law." This is the language of a great and learned judge, (*Bynum, J.*, in *Bank v. Green*, 78 N. C., 247). To the suggestion that the construction put upon the statute in *Fuller's case*, decided in 1894, is "unfortunate," we note that the personnel of this Court has since that time undergone many changes, and the case has at almost every term been cited with ap-

proval, and conceded to be the controlling authority for this Court. It is also worthy of note that the Legislature has met at five different sessions, and the law in this respect has not been changed. We have no other means of ascertaining what the law is. The conclusion which we have reached is sustained by the uniform current of decisions of this Court, and our best consideration, guided not by criminal statistics, frequently misleading, nor by an attempt to ascertain or direct public sentiment, but by a determination "to administer justice without respect to persons, and to do equal rights to the poor and rich, to the State and to individuals." Whether such suggestions (which do not come from counsel), that the judges, either from incapacity to know the law or mental bias or sentimental weakness, are inefficient or incompetent, are calculated to suppress lawlessness, is well worthy serious consideration. If we are to have "a government of law and not of men," the courts must be content to move in the orbit assigned to them by the Constitution, declaring the law as it is written, "knowing nothing of the parties, everything about the case." When we "go outside of the record" to decide causes we invite counsel to address to us arguments fit for other forums than this, and ourselves embark into unknown and unsafe waters. The law, instead of being a fixed "rule of action" for the guidance of the citizen and protection of his life, liberty, and property, becomes the expression of the opinion of men set in high judicial position, varying according to the drift of public sentiment or temporary conditions. This is not the example or teaching of the elders. We will not do the people of this State the injustice to believe that they desire their judges to construe the law otherwise than it is written by themselves, or to hasten any man, however degraded or humble, to his death in accordance with arguments drawn from other sources than the "law of the land."

(1080)

We think that the prisoner was entitled to have the jury instructed, as prayed by him, that there was no evidence of murder in the first degree, and that, for the refusal to give it, he is entitled to a

New trial.

CLARK, C. J., dissenting: There is no contradiction in the testimony upon which the exceptions made to the charge of his Honor are based. Clements, the conductor in charge of the train, found, upon leaving Manson, several negroes in the rear end of the second-class car for whites, singing boisterous songs. There were six or seven of them, including the prisoner. He said to them that they were in the wrong car—"You will have to go to your car." They paid no attention. He tapped "little Joe" on

(1081)

the shoulder and repeated the language. He said: "By G—d! we will when we get ready." The conductor went out, opening the door of the white car, and opposite the door of the colored car, telling them to come on, and started back, taking up tickets. The car for colored people had three compartments—second-class, first-class, and smoker. The last was next to the second-class for whites. When he reached the first-class compartment he met all the crowd coming back, muttering, "We have first-class tickets, and how is it, we are driven around this way?" All passed through the second-class compartment, except the prisoner, "little Joe Cole," and one other. As the conductor started to pass through, little Joe and one other, whose name he did not know, caught hold of him and said: "How is this? We have got first-class tickets, and are driven about this way? How is it?" The conductor explained that it was a State law, and the railroad had nothing to do with it. The prisoner just then entered the first-class compartment from the smoker, and came on, saying something the conductor did not understand—a sort of roaring. The first thing he caught was: "We are all friends. We are all brothers. We will fight for one another. We will die for one another." While he was saying that, the porter was standing by, patting him on the shoulder, saying, "Let captain explain." The prisoner "lunged" at the conductor, and hit him with his fist. The porter then hit him in the chest with his hand, and prevented him from hitting the conductor. He staggered back against the smoker-car door and drew his pistol. The porter then rushed on the prisoner, and pushed him back into the front left-hand corner of the smoking-room. At this time little Joe and Jones and another shoved the conductor into the smok- (1082) ing-room with them. The conductor straightened up, and saw the prisoner shove the porter off with his left hand and raise his right hand. He did this twice. Pistol in his right hand. Little Joe "tackled" the porter with pistol in his hand. The porter turned and left the prisoner free. The deceased entered the back door of the car, and ran up to the prisoner to grab him, his head to one side and eyes shut. He touched the prisoner with his hands, but did not clinch him. Just as the deceased was about to hit the prisoner, and before he hit him, the prisoner raised the pistol, put it at deceased's face, and shot him. Little Joe shot the porter. The conductor thinks he shot first. From the time the conductor left the negroes in the white car until he met them in the colored car was not less than two nor more than four minutes. It was in this State. The deceased was a stout man. He had not talked with either of the negroes. They acted as if drinking. Witness thought they had been. The

prisoner was, together with little Joe and Jones, indicted for murder. He was convicted of murder in the first degree, and appealed. The other defendants were convicted of murder in the second degree, and did not appeal.

It was in evidence that the negroes had just come from Virginia, and they were incensed at the legal requirement in this State for the separation of the races in the cars. The prisoner was avowing their determination to "fight for one another; that they would die for one another." The prisoner "lunged" at the conductor, and hit him with his fist. The porter shoved him back, whereupon he drew his pistol. At this, three of the prisoner's comrades shoved the conductor into the smoking-room, and one of them shot the porter. The conductor saw the prisoner shove the porter off and twice raise his right hand with his pistol in it. The jury had a right to infer from this action, from his comrade shooting the porter, from the prisoner's (1083) declaration that they would fight and die together, and from his shoving back the porter, and twice raising his hand with his pistol in it, that the prisoner's intention was to get room to level his pistol at the conductor. There were premeditation and forethought in this. He shoved the porter back. Then he raised his hand with the pistol in it, lowered it, and raised it again with the pistol in it. What that purpose was, the jury alone could decide, not the court. If it was to shoot the conductor, there was not only the "instant of premeditation," which is all that is required by our authorities, but there was calculation, method—a determination to get a good aim, and room to level the pistol at his object. Just then the deceased—roadmaster of the railroad company—entered the car and rushed to grab the prisoner. His object evidently was to seize the prisoner and prevent his shooting the conductor, and the prisoner, balked of his intention to shoot the conductor, turned and shot the deceased. This would seem the only reasonable motive, and certainly the motive was to be drawn from the conduct of the prisoner and the surrounding circumstances, and was a matter which the judge properly left to the jury. If the prisoner was, with legal premeditation, however brief, intending to shoot the conductor, and shot the deceased because he was interfering to prevent it, this was murder in the first degree—as much so as if he had killed the conductor. It was no sudden gust of passion, but an execution of his already formed intention to kill, by killing the man who attempted to prevent him. It was premeditated killing, though the time was shorter in the selection of his new object. The facts of this case duplicate those in *S. v. Benton,* 19 N. C., at page 223, where *Judge Gaston* says: "The accused

was engaged in a most wicked act, not unlikely to terminate in murder. It was the duty of every bystander to interpose and stop this career of violence. The deceased at this moment came up toward the parties, when the prisoner instantly turned from the first contemplated victim of his vengeance, advanced, and, without (1084) a word of warning, plunged a knife into him and killed him. We can discover no provocation on the part of the deceased to change the character which the law impresses on the fatal deed—the character of wilful murder." The matter was properly submitted to the jury, and, it seems to me, with instructions too favorable to the prisoner.

His Honor charged the jury: "If the killing of Stevens was not the result of an effort to kill Clements, but was intentionally done, then the prisoner could not be convicted of murder in the first degree for such killing unless the jury find beyond a reasonable doubt that the prisoner, before the shooting, coolly determined to kill Stevens, and had deliberated and premeditated on it, and, as a result, had formed a fixed purpose to kill. In other words, to convict the prisoner of murder in the first degree, you must be satisfied beyond a reasonable doubt, either that the prisoner had, with deliberation and premeditation, formed a fixed purpose in his mind, before he shot, to shoot and kill Clements, and, in an effort to do so, killed Stevens, or he had, with deliberation and premeditation, formed a fixed purpose to kill Stevens, and in pursuance of such fixed, determined, premeditated, and deliberate purpose, he did kill Stevens. In either of these situations, he would be guilty of murder in the first degree." The prisoner excepted to so much of the charge as submitted the question of his guilt of murder in the first degree; but, as I understand the law, this charge was not only not unfair to the prisoner, but was more favorable to him than he was entitled to. The evidence was sufficient to go to the jury, to show that the prisoner had, with deliberation and premeditation, formed the purpose in his mind to do murder; and, with this purpose fixed in his heart, it makes no difference upon whom his vengeance was wreaked, and particularly is this so in this case, where the killing (1085) is a part of a continuous transaction. *S. v. Benton,* 19 N. C., 223; *S. v. Shirley,* 64 N. C., 610; *S. v. Smith,* 2 Strob., 77, 47 Am. Dec., 589; *Holmes v. State,* 88 Ala., 26, 16 Am. St., 17; *People v. Miller,* 121 Cal., 343; *Hopkins v. Com.,* 50 Pa., 9, 88 Am. Dec., 518. I think the judgment should be affirmed. I concur in the opinion of the Court sustaining the sufficiency of the indictment.

Every dissenting opinion is necessarily a declaration that, in the opinion of the dissenting member of the Court, the law has been er-

roneously declared by the majority. It is not every time, however, that a judge who disagrees with the majority is justified in dissenting. The matter should either be of enough importance to justify putting his dissent on record, in the prospect that on some future occasion the Court may change its views, or the matter should be of such a nature that the dissenting judge deems it to the public interest to point out the injurious consequences which in his judgment will result from the principles laid down in the opinion of the Court. Especially should this be the case when, as here, the dissent is against granting a new trial to one convicted of a capital offense.

There is nothing that is more subversive of good government than lynchings, yet more men have been executed in this mode in North Carolina in the last fourteen years than by lawful process, and some years twice as many, as appears by the reports of the Attorney-General. The last message of the Governor of the State reports eight executed by lynch law in the last two years, of whom three only were lynched for rape, and in the same period only five were executed by the sheriff for all offenses. The frequency of lynchings has dulled the popular perception of the dangerous demoralization which will result from such punishments inflicted "outside of the law." Not long since, a
(1086) coroner's jury impaneled to sit upon one executed in this method, in one of the most intelligent counties of the State, passed resolutions eulogizing the lynchers, and the grand jury of an adjoining county officially indorsed their action by a resolution. In the case of this very prisoner (the appellant), and in numerous others known to all men, a military guard had to be ordered out, at much expense, to protect the prisoner till a legal trial could be had, and frequently the accused have had to be brought to Raleigh for safe-keeping. There need not be and should not be such conflicts between the public desire for the repression of crime and the execution of that will through their properly constituted public officials and servants.

In a free country, law is simply the expression of public opinion, formulated through the servants of the people elected for that purpose, for our laws are made by the people through their representatives in the State Legislature and in Congress. The lynchings in this State, as elsewhere, are a declaration that public opinion is not yet in favor of the abolition of capital punishment, and show that there is in many quarters a lack of confidence in the certainty of the execution by the properly constituted authorities of the law which requires the infliction of such punishment for murder and rape. When public confidence is restored, in the certainty of the execution of the law in this particular, lynchings will cease. The evil can only be removed by destroying the cause.

It has not been alleged in any quarter that those selected to execute the laws in any of the three departments—executive, legislative, or judicial—are lacking in integrity, learning, and devotion to their duty; but we know this, that whereas, by the Attorney-General's report in 1890 (when criminal statistics were first reported), there were for the two years, 1889-1890, indictments for murder (of whom two only were hung by process of law), 96; rape, 25; manslaughter, 15. Total all criminal cases, 10,437. There were by the Attorney- (1087) General's report in 1902, for the two years, 1901-1902, indictments as follows: Murder, 191; rape, 37; manslaughter, 60. Total criminal cases, 17,610.

These are the official reports of the Superior Court clerks, compiled by the Attorney-General, an officer of this department, and, being published by authority of law, we take judicial notice thereof.

The great expense of criminal courts is borne by law-abiding citizens, that men and women may be secure in their persons, their lives, and their property, and the great object of punishment is to lessen crime by deterring others from its commission. The above figures show that this object is not being attained, but, on the contrary, the reverse. The figures are official, and have been published by the State under authority of the General Assembly, and for this very purpose of furnishing information, whether the method of executing the law is such as to decrease crime, or needs amendment to that end. The number of murders in London last year, with its 6,000,000 of people, drawn together from all parts of the globe and all classes of men, is shown by the police reports to have been 20. North Carolina has less than one-third of the population, and, with one of the most homogeneous people in the world, makes the above showing in her published official reports. That evil-doers should so multiply among us can be due only to some defect in the execution of the laws, which should, but too evidently does not, repress and diminish crime. The existence of lynchings is but one form of public protest, and is one from which only evil can come.

What are the defects in our administration of justice which should be remedied, it may not be proper, in a judicial opinion, to indicate; but, as a justification of my dissent in this case, it (1088) is enough to say that the ruling here made, by increasing the difficulty of sustaining convictions for murder upon such a state of facts as is here shown, is, in my judgment, detrimental to the public welfare.

Whatever the cause, the number of murders has doubled in twelve

years, while manslaughter has increased fourfold, and other crimes 70 per cent. And it must be remembered that there are a large number of homicides which, because committed in self-defense or for other reasons, have not been indicted, and are not included in the above numbers; and, indeed, the number of homicides in this State last year has been officially reported by the United States Census Bureau as having been 285— how correctly, cannot be ascertained. Thinking, as it is my right of dissent to say, that the judgment of the Court is erroneous as a matter of law, I should not have put myself on record with a dissenting opinion if I did not think that my highest duty to the public welfare required this dissent to a ruling whose harm will go further, in my judgment, than the release of this appellant from just punishment for the capital offense of which a jury have found him guilty. The conviction of the prisoner was a matter for the jury. I have viewed with unfeigned alarm the growing disposition to take cases from the jury, both in civil and criminal matters, upon the ground, unknown to the elders (see opinion of *Bynum, J.*, in *Wittkowsky v. Wasson,* 71 N. C., 458, and *Douglas, J.*, in *Coble v. R. R.*, 122 N. C., 900), that there is not sufficient evidence, although the twelve men who are by the Constitution sole judges of the facts have found the evidence sufficient to compel a unanimous verdict, and the trial judge has refused to set aside their action, as he is vested with the power to do.

In a trial for any capital offense, apart from any other reasons, the mode of trial prescribed by legislation, of itself, renders a conviction for murder in the first degree almost an impossibility in this (1089) State, except in cases of sheer poisoning or lying in wait, if the prisoner is able to retain able and skillful counsel. If the abolition of capital punishment was embodied into law, and was a fair expression of public opinion, this would be proper. But because this practical abolition of capital punishment is not according to the law, which still denounces capital punishment for certain crimes, and is contrary to public opinion, we have lynchings, to threaten public order, and the great increase in homicides, as shown from our official reports. In a trial for a capital offense, formerly the prisoner was neither allowed counsel to speak for him nor compulsory process to summon witnesses in his behalf, nor the right to cross-examine the witnesses for the State. To mitigate this barbarism and injustice of the common law, a great disparity in the number of challenges was given the prisoner. Now, though the above disadvantages to the prisoner have been removed, the prisoner has still twenty-three peremptory challenges, while the State has only four, besides his unlimited number of challenges for cause. It is only necessary for the prisoner to "run" for one

man on the panel who is friendly to him, for, if he can secure that man by the rejection of twenty-three others besides those stood aside for cause, he has defeated the unanimous verdict which is requisite for conviction.

The prisoner has, and should have, the benefit of the presumption of innocence, and that the jury should be convinced of his guilt beyond a reasonable doubt; and he has also the unavoidable advantage that every judge who sits in the trial court and in this Court has, like the writer, more or less often been counsel for those charged with crime, and naturally views every cause, more or less, from that standpoint, and with the natural sympathy any humane man must feel for any one who is on trial for his life. In addition, in our State, the jury must be unanimous, and failure to agree of one juror out of twelve (1090) defeats conviction. This has been changed in some of the States, it having been found necessary, in order to secure the administration of justice, to require only a two-thirds or a three-fourths vote; but the people of this State will be slow, probably, to abolish the requirement of a unanimous verdict. The State, however, is further handicapped in capital cases, and without any reason, by the prisoner being allowed twenty-three peremptory challenges to its four. This has been changed in most of the States, which now allow an equal number of peremptory challenges (usually six or ten) to each side. Then the defendant in all criminal cases has the still further advantage that while the defendant can except, and review on appeal any ruling against him, the State can never except to any ruling, however erroneous, made in favor of the prisoner and against the prosecution. Formerly, in North Carolina, and until changed by statute, the State could appeal from a verdict of not guilty (*S. v. Haddock,* 3 N. C., 162; *S. v. McLelland,* 1 N. C., 632), and should be allowed to do so again, in the interest of public justice. This is allowed in Connecticut and some other States. *S. v. Lee,* 65 Conn., 265, and cases cited under that case in 27 L. R. A., 498, and 48 Am. St., 202. The sympathies of the jury and of the judge are naturally with one charged with a capital offense, lest he shall be convicted unjustly; but this natural tendency should not be added to by the matters above mentioned, and others not mentioned, which make the execution of the law in cases of those charged, however justly, with a capital offense, almost a dead letter, so far as a conviction carrying the death penalty is concerned.

Our statute law says murder shall be punished with death. In practice, in this State, and some others, the punishment is ordinarily a fine paid by the accused to his counsel as a fee, and a far heavier fine paid by the law-abiding people for the costs of the useless trial.

(1091) The exceptions do not count; being, as our Reports show, one, and never over two, in a hundred, executed by law, and double that number by lynchings.

It is useless to pass laws against carrying concealed weapons whenever men shall become convinced that slayers of men, however guilty, can only in rare instances be punished by law, and that real protection is really in their own pockets, and "getting the first shot." It will be equally useless to denounce lynchings, by statute or otherwise, in any locality where men in any considerable number believe that in no other way than by the fear of lynching can grave crimes be prevented, and that the fear of punishment by law is too vague and indefinite to deter men from the commission of capital offenses. The ever-increasing tide of crime should be repressed in an orderly and legal way, by the administration of the law by the courts, and resort to any other mode is evil and evil only. But to do this, the administration of justice, especially in capital cases, should be more efficient. Any amendment which shall render it possible to convict the guilty will not, if properly framed, destroy any safeguard to those who are innocent. It is possible here, as well as elsewhere, to make legal proceedings more efficient without making them work injustice. Whatever our laws are, they should be enforced.

The passage of the bill to divide murder into two degrees was secured with the design of making the execution of the law more efficient, since juries must convict of murder in the second degree in cases in which they might acquit rather than convict of an offense calling for capital punishment. Unfortunately, however, the majority of the Court, in *S. v. Fuller,* 114 N. C., 885, ruled further, though there was no provision in the act on the subject, that the immemorial common-law presumption of guilt of the offense charged in the indictment, raised by proof of killing with a deadly weapon, was transferred, to be a (1092) presumption only of murder in the second degree. Though there was a dissent in that case, this ruling has been so long acquiesced in that it can probably only be changed now by legislative enactment. The result, however, has been the almost practical abolition of convictions for murder in the first degree, which was not contemplated by the Legislature. In consequence of that ruling, the majority of the Court felt unable to approve the verdict of murder in the first degree in *S. v. Gadberry,* 117 N. C., at page 825, in which the prisoner was carrying off a little girl for purposes of lust, and upon her weeping and crying, and calling upon her father and mother and brother to save her, they came without any weapon, whereupon the prisoner pushed the child into the road in front of him, "put the pistol to the

child's back, fired, and ran off into the woods." The verdict of guilty was set aside by this Court. There is not a more horrible case in the books. In *S. v. Bishop,* 131 N. C., 753, in conformity to the same precedent, the majority of the Court felt compelled to set aside a verdict of murder in the first degree where four negro men went in a body to a store, grossly insulted a young white clerk, and, when they got him outdoors, chased him around, firing fifteen or twenty shots at him, seven of which struck him, all in the back, and after he fell they stood by till one of their number fired two more shots into the dying man, when they all jumped into a wagon and rode off. In *S. v. Thomas,* 118 N. C., 1113, a man cruelly beat his wife, was heard to threaten to kill her, then a heavy blow followed, her neck was broken, he threw her body into the water, and denied having touched her. Yet the Court held there was no evidence of murder in the first degree, and set aside the verdict. In *S. v. Rhyne,* 131 N. C., 847, a negro being engaged in a row with another employee, the employer asked him in a gentle way as to the trouble, whereupon, without provocation, he slew the employer and rushed off, boasting of the deed. The majority (1093) of this Court set aside the verdict. At the following term of the court below, when the prisoner submitted to guilty of murder in the second degree, the presence of a company of soldiers was necessary to secure his safe conveyance to the penitentiary. This should not be the case in any country where the people make and execute the laws. There are several other cases in our books almost as bad. Enough has been done for those who murder. It is time the courts were doing something for those who do not wish to be murdered.

"Mercy but murders, pardoning those who kill."—SHAKESPEARE.

The eminent judges who made the precedent in *S. v. Fuller* could not, and did not, foresee how far it would be carried. In the present case, the deceased, unarmed, was simply trying to prevent the murder of the conductor. The prisoner killed him for trying to prevent it. There was no provocation. It seems to me that this is clearly murder in the first degree, and that I should say so.

Regretting to differ from my brethren in any case, and especially in a case of this nature, a high sense of public duty compels me to enter my dissent to a ruling which is according to precedent as they see it, but which, to my view, is not only clearly erroneous in law, but must have a detrimental effect upon the due administration of justice. If what is here said shall in any way bring about increased efficiency in the administration of justice, and moderate or reduce the growing volume of crime, which has increased 70 per cent in twelve years, and doubled the number of true bills for murder and quadrupled the num-

ber of indictments for manslaughter in that short space of time, this dissent will not have been written in vain. The fear of prompt and certain punishment can deter from crime and reduce the frightful and growing number of homicides; else why have a costly administration of justice at all? It is certain that under our present procedure in capital cases, and the construction placed by the Court on the act dividing murder into two degrees, that punishment in such cases is very far from certain. Men do not fear the law enough to refrain from gratifying their evil passions. These things should be plainly said, and, if the only relief is in legislation, law-abiding citizens should know it, that a sound public opinion may apply the remedy.

(1094)

Cited: Mial v. Ellington, 134 N. C., 181; *S. v. Lipscomb, ib.,* 694; *S. v. Cameron,* 166 N. C., 386; *S. v. Dalton,* 178 N. C., 782.

(1095)

STATE v. HALL.

(Filed 2 June, 1903.)

1. Evidence—Homicide—Intent—Manslaughter.

In an indictment for murder, evidence tending to show that the accused had an unlawful purpose in going to the place of the killing is competent, if their guilt is by the charge of the court made to depend in some measure upon their purpose in going.

2. Evidence—Homicide—Intent—Murder.

In an indictment for murder, a conversation between two persons is competent to contradict one of the persons, he having testified to a different state of facts from those used in the conversation.

3. Impeachment of Witnesses—Witnesses—Evidence.

A witness may be asked on cross-examination whether many things relative to the case are not slipping from his memory, for the purpose of showing that his memory is weakening.

4. Argument of Counsel—Nolle Pros.—Discharge of Prisoner.

The discharge of one of three defendants and the entry of a verdict of not guilty as to another are proper subjects of comment by counsel in the trial of the other defendant.

5. Homicide—Manslaughter—Intent.

Where a person is killed by the accidental discharge of a gun, in an attempt by another person to execute an unlawful purpose, the person making the attempt is guilty of manslaughter.

6. Exceptions and Objections—Instructions—Appeal.

A general objection to the entire charge, or any part thereof which contains several distinct propositions, will not be considered on appeal.

STATE *v.* HALL.

INDICTMENT against John Hall, Pink Woods, Ed. Chavis, Pink Chavis, and Peck Locklear, heard by *Cooke, J.*, and a jury, at February Term, 1903, of ROBESON.

The defendants, with Peck Locklear, were indicted in the court below for the murder of Philip Barton. At the trial and after the evidence was concluded, the State consented to a verdict of not guilty as to Peck Locklear, the court having intimated that there was no evidence against him, and the other defendants were convicted of manslaughter.

It appears from the case that on Christmas day, 1902, the defendants John Hall, Pink Woods, and Peck Locklear went to the house of Elizabeth Barton, where Nep Barton, her son, lived. No one was there at the time but Kitty Barton and a small boy named Porter Barton. They left the house after a short stay, and the defendants John Hall and Peck Locklear returned later in the day, John Hall having with him a gun, and found Rual Barton and Nep Barton at the house. They remained at the house a short while and then left, and late in the afternoon of the same day the defendants and Peck Locklear were again at the Barton place. While they were there Philip Barton was killed. There was some discrepancy in the evidence as to whether the defendant Pink Woods was with Hall and Locklear when they went to the house the second time, but in the view we take of the case it is immaterial whether he was with them or not.

The evidence is very conflicting as to the material facts of the case, and the exceptions of the defendants, we think, can be best understood by stating the contentions of the State and defend- (1096) ants, there having been evidence to support each of said contentions.

The State insisted that upon the evidence the defendants, John Hall, Pink Woods, and Peck Locklear, had gone to the Barton house twice before the homicide occurred, and that on the occasion of the second visit John Hall had an altercation with Rual and Nep Barton. That John Hall jumped into the door of the house with a gun in his hands and said to Rual Barton, "I hear you accuse me of selling your dog, and anybody who said so is a liar"; that during this visit Rual Barton snatched the gun from the defendant John Hall, and the said defendants left the premises, threatening at the time to get a crowd and come back and retake the gun by force. Shortly afterwards, but late in the afternoon, the defendants Hall and Woods and Peck Locklear, accompanied by Ned Chavis and Enoch Chavis and one Utley Locklear, returned and made an assault upon Rual Barton, who was trying to

drive the defendants away. In the fight which ensued the defendant Hall snatched the gun from Rual Barton, all of the defendants taking part in the fight, and immediately upon Hall's gaining possession of the gun, he fired the same and shot the deceased, Philip Barton, who was standing about five or six feet behind Nep Barton and Rual Barton, and who had not engaged in the fight.

The defendants contended that on the said day John Hall and Pink Woods and Peck Locklear, being intimate with and on friendly terms with the Barton family, visited the home of the Bartons for the purpose of paying attention to two of the Barton girls, who were granddaughters of Elizabeth Barton, and who at the time made their home with her; that just prior to their first visit the defendants Hall and Woods, and Peck Locklear, met Rhoda Barton near her home, and the defendant Hall made an engagement to meet her later in the day, after which they went on to the home of Elizabeth Barton, and there saw Kitty Barton alone, when the defendant Woods made an
(1097) engagement to meet her later in the day; that having been disappointed in seeing the girls in accordance with their engagements the defendant Hall and Peck Locklear went to the home of Elizabeth Barton, on the occasion of the second visit, expecting to see the girls and find out the cause of the failure to keep the engagements, when they met Rual and Nep Barton, both of whom were drinking and boisterous. Nep Barton cursed the defendant Hall, and Rual Barton took from the defendant Hall his gun, and rather than have any difficulty the defendant Hall, and Peck Locklear, left; all this taking place prior to the visit during which the homicide occurred; that being joined by defendant Woods, who was waiting for them, they all went home; that at the home of their father the defendants Hall and Woods met the two Chavis boys, who were their cousins, and after having eaten dinner were joined by them, and all started to the home of one John Archie Locklear. On the way they were joined by Peck Locklear. In going to John Archie Locklear's they took the nearest road, which leads by the house of Elizabeth Barton, the road and her yard adjoining and there being no fence between them. Just before getting to the Bartons, they were met and joined by Utley Locklear, who went along with them on the way to John Archie Locklear's, and just as they approached the house of Elizabeth Barton, Rual Barton and Nep Barton, Rual armed with a gun and Nep with a knife, rushed out to meet the defendants—Philip Barton, the deceased, following them. Rual Barton, when the defendants were only a step or so from him, raised the gun and began threatening to shoot. Nep rushed at the defendants, and Rual telling him to get out of the way, started to shoot,

when the defendants advanced upon him to prevent his shooting and to protect themselves. Rual Barton tried to strike with the gun, and as he struck the defendant Chavis the gun fired, (1098) killing the deceased, who was at the time about five or six steps behind him. While Rual was scuffling and trying to get the gun in position to shoot, Nep Barton was using his knife, and one of the defendants (Chavis) exhibited at the trial long gashes across his back, which he claimed were made by Nep Barton during the scuffle. Nep, who was a witness for the State, denied having the knife, and all of the Bartons testified that Nep did not cut the defendant. The defendants further contended that they did not succeed in getting the gun away from Rual Barton until after it had been fired and was broken while Rual Barton was striking at the defendants with it. The gun, according to all the testimony, had but one barrel.

The State insisted that the defendants were guilty of murder in the first degree, and the defendants, on the other hand, contended that no one of them discharged the gun, but that it was discharged in the hands of Rual Barton while he was assaulting the defendants; that the Bartons were the aggressors and the defendants acted strictly in self-defense.

At the trial the defendants proposed to ask Peck Locklear, one of the defendants, who was introduced as a witness, what was the purpose of the defendants in going to the Barton house, which was excluded on objection by the State. They also proposed to ask defendants' witness, Oakley McMillan, the following question: "What was said between Kitty and Nep Barton as to why the boys were there?" which was also excluded by the court. The defendants proposed to ask Rual Barton, a witness for the State, the following question: "A good many things are slipping from your memory today in reference to this transaction, are they not?" This was stated, at the time the question was asked, to be for the purpose of testing the witness's recollection and ascertaining whether or not he claimed to recollect all about what took place at the time the homicide occurred and as to what took place at the coroner's inquest. The witness (1099) was the uncle of the deceased, and, according to the contention of the defendants, it was he who had the gun in his possession at the time it was discharged. The defendants further claimed, and several witnesses testified, that the witness was very much intoxicated on the day of the homicide. In addition to this, to a number of questions previously asked him, the witness had replied, "I don't recollect," "Has slipped my recollection," etc. Further, a number of witnesses testified during the trial to contradictory statements made to

them by this witness, to a great many of whom he and Nep Barton had stated that the deceased was killed by Ned Chavis with a pistol, in consequence of which it was shown that Ned Chavis was arrested first by the sheriff. It was further shown by the coroner that this witness had stated to him that the gun was not loaded when the difficulty took place; that he had taken the shell out of the gun (which was breechloading); and it was further shown by the coroner that this witness gave to him some shells, one of which he said he had taken out of the gun just prior to the difficulty, and yet none of the shells would fit the gun.

In addressing the jury, and while discussing the evidence of the Bartons, who had been introduced as witnesses for the State, counsel for defendants used the following language: "If you convict these defendants you must do it on the testimony of the Bartons, and these people, the Bartons, have charged two other men with being guilty, along with these defendants, of the murder of Philip Barton, namely, Utley Locklear and Peck Locklear. Utley Locklear was discharged by the coroner's jury, and the State has, by consenting to a verdict of not guilty, as to Peck Locklear, admitted that the Bartons were wrong as to Peck." These remarks were not objected to by the solicitor, so far as the record shows, but the court of its own motion interrupted counsel and refused to permit him to make this argu-
(1100) ment, and told the jury not to consider it. Defendants excepted.

The State had endeavored to impeach Utley Locklear, who was a witness for the defendants, by asking him if he had not been charged with being a party to the homicide. It was in evidence that Utley Locklear had been charged with the homicide and was discharged after investigation by the coroner's jury, and it was also in evidence that the Bartons had made the charge against him. The Bartons were the only witnesses for the State as to the occurrence at the Barton house, except Bemus Blue, who was a member of the Barton family.

The same counsel in addressing the jury used this language: "The Bartons have charged Peck Locklear with being responsible for this crime. The bill against him was returned by the grand jury, and the Bartons were the people who brought the charge against Peck, as well as being the main witnesses." The court again interrupted counsel and refused to permit him to make this argument and also instructed the jury not to consider it. Defendants excepted.

At the close of the evidence the defendants requested the court to give the following instructions, among others, to the jury: "Even

though the jury shall find that defendants were engaged in an assault or some other unlawful act, if the jury shall find that the gun was discharged by Rual Barton, or that the gun was accidentally discharged while in the hands of Rual Barton, resulting in the death of Philip Barton, still the defendants cannot be held criminally responsible for the homicide, and in this case the defendants cannot be found guilty of either murder in the first degree or murder in the second degree or manslaughter." This instruction was refused, and the defendants excepted.

The only part of the judge's charge which it is necessary to set forth is as follows: "If you shall further find that John Hall went upon the premises of the Bartons, and that Pink Woods (1101) and the other defendants accompanied him, after he and they had been forbidden so to do, with the purpose and intent on Hall's part to kill the Bartons, or to do them or either one of them serious bodily harm, or with the purpose of forcibly taking the gun away from Rual Barton at all hazards, although it might involve the killing of or the doing of great bodily harm to the Bartons, or some one of them, and if the said Pink Woods knew the said purpose of John Hall, and if, with the intent to aid and abet the said John Hall in this purpose, he assaulted Rual Barton and aided John Hall to wrench the gun from Rual Barton's hands, and that John Hall then wilfully and because of such malice and in pursuance of such purpose shot Philip Barton, then Pink Woods would be guilty of murder in the second degree." To this charge the defendants excepted.

The court further instructed the jury as follows: "If you shall find that John Hall had express malice against the Bartons and went there with the purpose of killing the Bartons or either one of them, or doing them or either one of them serious bodily harm, or with the purpose of forcibly taking the gun away from the Bartons at all hazards, although it might involve the killing of them or some one of them, or of doing serious bodily harm to them or some one of them, and that the other defendants, Pink Woods, Ed. Chavis, and Enoch Chavis, knew of this purpose, and accompanied Hall to aid him in such purpose, and if he entered upon the premises after being forbidden so to do, and in furtherance of that purpose assaulted Rual Barton, and threw him to the ground for the purpose of wrenching the gun forcibly from him, and if, in the effort to wrench the gun from Rual Barton's hands, the gun was discharged, killing Philip Barton, then all the defendants, or such of them as you shall find knew of this purpose and in pursuance thereof aided and abetted, as stated

above, would be guilty of manslaughter." Defendants excepted. Verdict for manslaughter as to all the defendants except Lock-
(1102) lear. Defendants appealed from the judgment pronounced.

Robert D. Gilmer, Attorney-General, for the State.
John H. Cook for defendants.

WALKER, J., after stating the case: We do not see why the question proposed to be put to the witness, Peck Locklear, was not competent, especially in view of the particular instruction given to the jury in regard to manslaughter, of which crime the defendants were convicted. The guilt of the defendants was by that charge made to depend, at least in some measure, upon their purpose in going to the house of the Bartons, for the court told the jury that if John Hall had express malice against the Bartons and went to their house for the purpose of killing them or any one of them, or to do them or any one of them serious bodily harm, or with the purpose of forcibly taking the gun from them at all hazards or without regard to consequences, and if the jury also found that the other defendants knew of this purpose, and accompanied John Hall in order to aid and abet him in executing his unlawful design, and if, in furtherance of that design, Rual Barton was assaulted, and in the effort to wrest the gun from him it was discharged and Philip Barton was killed, the defendants, or such of the defendants as knew of this purpose of John Hall and were present aiding and abetting him, would be guilty of manslaughter. It appears most clearly, therefore, that the purpose of the defendants in going to the house of the Bartons was made one of the essential facts of the case to be established by the State, and, evidence having been introduced which tended to prove this fact, the defendants were entitled to be heard in contradiction of it. How could the absence of an unlawful intent or the existence of a lawful one be better shown than by the testimony of one of the parties charged with having entertained that purpose? Whether the
(1103) witness should be believed is a question solely for the consideration of the jury. This Court has often ruled that when a person is charged with a fraudulent intent it is competent for him to show by his own testimony that, at the time of the transaction, he had no such intent, and so may any person charged with an unlawful intent in a criminal case be heard by his own testimony in order to disprove or rebut the charge made against him, at least when the intent becomes essential in determining his guilt. We are not informed upon what ground or for what reason the question was objected

to by the State. There may have been some good reason for the objection and the ruling, but it does not appear in the record, by which, of course, we are bound. There is nothing, therefore, to take the ruling out of the general, if not universal, principle that both parties must always be heard, provided they offer competent and relevant testimony.

It was suggested by the Attorney-General that the guilt of the defendants depended not so much upon their purpose in going to the Barton house as upon their acts and conduct after they entered upon the premises, as they were convicted of manslaughter and not of a higher felony. If the only evidence in the case had been that of the State, there might be some force in this suggestion; but it was not by any means all the evidence, as the defendants introduced testimony tending to show that they were walking in the public road, which passed the house of the Bartons, in a peaceful manner and for a lawful purpose, they being at that time on their way to John Archie Locklear's, and as they were passing the Barton house they were violently set upon by the Bartons, one of whom at least was armed; that the Bartons were the aggressors and the defendants acted strictly in self-defense. But even if the consideration of this part of the case should, as a matter of law, have been confined to what occurred at the house, it does not follow that the excluded question was incompetent, because (1104) the court did not in fact so confine and limit the inquiry, but, on the contrary, made the guilt of the defendants, as we have said, turn in part upon the intent with which they accompanied John Hall to the Barton house. But there is another reason why the evidence should have been admitted. The theory of the State was that the defendants went to the house of the Bartons to attack them, and the defendants contended that they had no such purpose, but were on their way to John Archie Locklear's when they were violently assaulted by the Bartons, and that all they did at the house was strictly in self-defense; and, as we have said, whether the contention of the State or that of the defendants was the right one was a matter solely for the jury to find. The defendants were certainly entitled to show, as one of the facts tending to sustain their contention, that they went to the house for a lawful purpose, for if they went there for an unlawful purpose, as the State insisted they did, it would tend in some degree at least to weaken, if it would not destroy, their plea of self-defense. It was competent also to prove the fact, as some evidence tending to show how the fight started, whether the Bartons or the defendants were the aggressors, or whether or not the defendants entered into the fight willingly. If defendants were on their way to Lock-

lear's, and, when they reached the house of the Bartons, they were attacked without having done anything to bring on the fight, and they afterwards acted strictly in self-defense, they were entitled to an acquittal. Would not the jury be more apt to conclude that a man with hostile purpose was the aggressor in a fight than that one with a peaceful purpose was? The particular error in the ruling was that the court deprived the defendants of an opportunity to show that their purpose was a lawful one, and in charging the jury that, in passing upon the guilt of the defendants, they should consider and find what that purpose was, as if it bore directly upon the issue (1105) joined between the State and the defendants. The impression made on the jury by the ruling of the court upon the evidence, when considered in connection with the charge, cannot well be determined, and the prisoner may have been seriously prejudiced thereby.

The error of the court in excluding this question is sufficient to entitle the defendants to a new trial, but we deem it best, under the facts and circumstances of this case, to make some comment upon the other exceptions, as the same questions thereby presented, or at least some of them, may be raised at the next trial.

The exception to the ruling of the court in excluding the question put to the witness Owen McMillan is not very clearly stated in the record. It appears only that the defendants were not permitted to prove what was said between Kitty and Nep Barton "as to why the boys were there," that is, at the house. It is not shown what the witness would have said in answer to the question, but we take it that he would have testified that Kitty and Nep Barton said in that conversation that they were there for some lawful purpose. It is best always and in order to a perfect understanding of an exception based upon the rejection of evidence, that the particular nature of the evidence to be elicited should clearly appear. If we are correct in our inference as to what the witness would have said, it seems that the question was competent for the purpose of contradicting the witness Nep Barton. It could not have been competent as substantive testimony.

We can see no valid objection to the question proposed to be asked the witness Rual Barton, who testified in behalf of the State. It did not tend, perhaps, to prove very much in the case, one way or the other, but from the manner in which the exception is stated in the record, we have been able to discover no sufficient reason for excluding the question, as it was some evidence, though very slight, tend- (1106) ing to impair the witness's credibility. It is competent to prove

that a witness's memory has been weakened, and it can make no difference whether the impairment of memory is proved by the witness himself or by some one else, or how slight the evidence may be. It would be competent to ask a witness if he recollected all of the facts and circumstances connected with a particular transaction, or whether he had forgotten some of them, and we can perceive no substantial difference between that kind of evidence and that which was proposed to be elicited in this case.

Passing to the next exception, we have said at this term that it is the duty of the court to stop counsel when they discuss matters of which there is no evidence, or which are not proper subjects of comment; but, within the proper limits of debate, counsel should be permitted to discuss any fact of which there is evidence, and which is relevant to the issue. We are of the opinion, therefore, that the discharge of Utley Locklear or the failure of the State to prosecute him, when he had been charged by the Bartons as being one of the guilty parties, and the other fact that the State after a full investigation at the trial of this case had consented to a verdict of not guilty as to Peck Locklear, though he had been similarly accused by the Bartons, were not improper subjects of comment.

The court was clearly right in refusing the defendants' prayer for instruction. It did not state a correct principle of law, and especially is it erroneous when considered with reference to the facts of the case. If the defendants went to the house of the Bartons for the purpose of recovering the gun "at all hazards," and to kill if necessary to accomplish their purpose, they were guilty at least of manslaughter. This is the way in which the able and learned judge who presided at the trial submitted the case to the jury in his charge, and the instruction we think was clearly right. A case directly in point is *Reg. v. Skeed,* 4 F. and F., 931. In *Reg. v. Archer,* 1 F. (1107) and F., 351, it appeared that the defendant pursued the deceased for the purpose of regaining possession of a loaded gun which the deceased had theretofore taken from the defendant's house and carried away with him, and during the struggle for the gun between the defendant and deceased, it was discharged and the deceased was killed; the Court held that the defendant was guilty of manslaughter. 1 McLain Cr. Law, sec. 347. The same doctrine is laid down in *S. v. Vines,* 93 N. C., 493. It is the unlawful purpose, in the prosecution of which the homicide is committed, that makes the killing manslaughter.

The defendants' exception to the charge of the court cannot be sustained. We have examined the charge very carefully and can find

no error in it, but if there had been error it should have been specifically pointed out, and the defendants will not be allowed to take advantage of it by a general objection to the entire charge, or to any part of the charge, which contains several distinct propositions, some of which are correct, or at least correct as to one or more of the defendants, although one or more of the principles laid down may be erroneous.

There must be a new trial because of the errors committed by the court in the respects pointed out.

New trial.

Cited: S. v. White, 138 N. C., 715; *S. v. Durham,* 141 N. C., 746; *Rich v. Electric Co.,* 152 N. C., 696; *S. v. Bowman, ib.,* 820; *S. v. Price,* 158 N. C., 648; *S. v. Hand,* 170 N. C., 706; *Hauser v. Furniture Co.,* 174 N. C., 468.

STATE v. BOONE.

(Filed 6 June, 1903.)

Carrying Concealed Weapons—Mail Carrier—The Code, Sec. 1005—The Constitution, Art. I, Sec. 24—Constitutional Law—Civil Officers.

A mail carrier is indictable for carrying a concealed weapon.

INDICTMENT against Riddick Boone, heard by *Justice, J.,* and a jury at April Term, 1903, of GATES. From a judgment of not (1108) guilty on a special verdict, the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendant.

CLARK, C. J. The special verdict finds: "That within two years before finding the bill of indictment the defendant was U. S. mail carrier, bonded and sworn, from Adair to Topsy, in this State, and that on the day in question, while carrying the mail between said points, the defendant had a pistol, a deadly weapon, concealed on his person, and after delivering the mail at Topsy he carried the pistol concealed from Topsy to his home, one-half mile."

The Constitution, Art. I, sec. 24, guarantees to the defendant, as to all citizens, the right to bear arms. The Legislature, however,

has the undoubted right to require that such arms shall be carried openly, and to make the carrying concealed weapons by persons when off their own premises an indictable offense. This it has done by section 1005 of The Code, which contains certain exceptions. The only exception which it is contended embraces the defendant is "civil officers of the United States while in the discharge of their official duties." The defendant does not come within the exception, for two reasons:

1. "A mail carrier is not a public officer, but is a private agent of the contractor for carrying the mail" (and in some cases the contractor himself). Mechem Pub. Off., sec. 41; *Sawyer v. Corse,* 58 Va., 230, 99 Am. Dec., 445; Throop Pub. Off., sec. 12; *S. v. Barnett,* 34 W. Va., 74; *Hathcote v. State,* 55 Ark., 181. In this last case it is said: "Engagement in the service of the Federal Government implies no license to violate State laws; and a crime against the State is not excused by the fact that the criminal was, at the time, though not in the act of its commission, engaged in such service. No such doctrine is found in *Neagle's case* (*In re Neagle,* 135 U. S., 1), (1109) for it only holds that what the Federal Government enjoins as a duty, the State cannot punish as a crime. It by no means follows that if a Federal officer while engaged in his employment, does some independent act in violation of State laws, he may not be held to answer for it. The defendant shows no authority from the Federal Government empowering him as a mail carrier to carry weapons; and we think the fact that he was a mail carrier affords no justification for the act in the absence of such authority. *S. v. Barrett,* 34 W. Va., 74."

If the mail carrier thought that carrying a weapon was necessary for the protection of the mails, or of himself, or for any other reason, or chose to carry it for no reason at all, he had a right to do so; but he must carry it openly, as the law requires of all other citizens when off their own premises, except those whom the statute authorizes to carry concealed weapons. If his object was to keep off highwaymen, this could be better done by letting it be seen that he was armed than by carrying a concealed weapon.

2. Even if the defendant had been a civil officer of the United States (and not a mere contractor or agent of a contractor), the pistol was not carried "while in the discharge of his official duties," for it was no part of his official duties to execute the laws or do anything which might require the use of weapons; still less was he on duty when carrying the pistol concealed from Topsy to his house, half a mile away. In *S. v. Hayne,* 88 N. C., 625, this Court held that "the exemption from the provision of the statute is only given to such

officers while in the actual discharge of their official duties"—*Judge Ashe* saying: "The law gives no protection to a man under such circumstances (*i. e.,* when off duty), although clothed with the authority of a deputy marshal of the United States, and having at the time warrants and process in his possession."

In *Love v. State,* 32 Tex. Cr. App., 85, it is held that "A dep-
(1110) uty postmaster whose duties are confined to the post-office building violates the law when on his private business or pleasure he is found carrying a pistol on the public streets."

The statute, The Code, sec. 1005, forbidding carrying concealed weapons, is a general one, and the exceptions are "officers and soldiers of the United States Army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State Guard when called into active service, officers of the State, or of any county, city or town, charged with execution of the laws of the State, when acting in the discharge of their official duties." These exceptions are not intended to create a privileged caste of office-holders and military exempted from the prohibition, resting upon all other citizens, not to carry concealed weapons. But the exceptions in the statute simply authorize the classes named to carry concealed weapons when on duty, not as a privilege to them as a class, at all times, but for the public benefit, when in the discharge of duty. The defendant neither belonged to the exempted class nor was he on duty, when going from Topsy to his home.

There is no question here of concealment or of intent, which are matters of defense, but that subject has been recently and fully considered, with a review of the authorities, in *S. v. Dixon,* 114 N. C., 850; *S. v. Lilly,* 116 N. C., 1049; *S. v. Pigford,* 117 N. C., 748; *S. v. Reams,* 121 N. C., 556; *S. v. Brown,* 125 N. C., 704.

Upon the facts stated in the special verdict, the defendant should have been adjudged guilty. The judgment is reversed, and the case remanded, that the sentence of the law may be imposed.

Reversed.

DOUGLAS, J., dissents.

Cited: S. v. Simmons, 143 N. C., 615; *S. v. R. R.,* 145 N. C., 544; *Groves v. Barden,* 169 N. C., 12; S. v. Kerner, 181 N. C., 576.

(1111)

STATE v. YODER.

(Filed 10 June, 1903.)

1. Indictment—Warrant—Complaint—Quashal of Warrant.

A complaint describing a road, naming the county wherein it lies, alleging the person to have been the overseer of that particular road; that the defendant was a citizen of the county liable to work on said road and duly assigned thereto, and that he had been duly summoned, giving time and place; that he wilfully and unlawfully failed to work, and also negatived the payment of $1, is sufficient to support a warrant for failure to work a public road.

2. Highways—Failure to Work—Summons—Notice—The Code, Sec. 2019.

That a person was summoned to work a public road three consecutive days, the law providing that hands shall not be required to work continuously for longer than two days at any one time, is no defense for failing to work the first two days.

3. Highways — Failure to Work—Evidence — Judgment—County Commissioners—Collateral Attack.

In an indictment against a person for failure to work a public road, the order of the county commissioners laying out said road is competent evidence to show the establishment of such road; and such judgment cannot be collaterally attacked.

4. Highways—Assignment to Work.

That the person had been assigned to work a public road is no defense to an indictment for failing to work another road to which he had been subsequently assigned.

DOUGLAS, J., and CONNOR, J., dissenting.

INDICTMENT against Charles Yoder, heard by *Long, J.*, and a jury, at February Term, 1903, of CATAWBA.

The defendant was warranted before a justice of the peace on the following complaint: "B. B. McLurd being duly sworn, complains and says that he was duly appointed overseer by the Board of Commissioners of Catawba County, State of North Carolina, to open (1112) a public road in said county, Jacobs Fork Township, leading from Plateau over the lands of Charles Bronce and others to a point on the Kings Mountain road near the Lincoln County line; that Charles Yoder has been duly assigned, is and was liable to work on said road, he being a citizen of the said county of Catawba; that affiant at and in the said county of Catawba, State aforesaid, on 13 December, 1902, as overseer, duly summoned said Yoder to appear on the 18, 19 and 20 December, 1902, at a time and place named in said summons, to work on said road, and that the defendant wilfully and unlawfully failed to appear, and refused to work in accordance with said sum-

mons, and failed and refused to furnish an able-bodied hand as a substitute, with the implement directed, and failed and refused to pay the one dollar as prescribed by the statute, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The justice issued his warrant against the defendant "to answer the above complaint." He was found guilty and fined two dollars and costs, from which he appealed to the Superior Court. In that court he was found guilty by the jury, fined two dollars and costs, and appealed.

Robert D. Gilmer, Attorney-General, and L. L. Witherspoon for the State.

S. J. Ervin, Self & Whitener, and E. B. Cline for defendant.

CLARK, C. J. The motion to quash was properly denied. The affidavit contains every allegation necessary in a proceeding to enforce a penalty for failure to work the roads. It describes the road, names the county wherein it lies, alleges that the person summoning the defendant was overseer of that particular road, that the defendant was a citizen of that county, liable to work on said road and duly assigned thereto, and that he had been duly summoned, giving time and (1113) place; that he wilfully and unlawfully failed to appear and refused to work, and also negatives the payment of $1. Technical and critical fullness are not expected in proceedings of this nature, but this affidavit contains all that could be desired to give the defendant the fullest information of the charge against him, which is the only object of the complaint. Its terms were adopted by the warrant issued thereon, and come up fully to all the requirements as set out in the following cases: *S. v. Smith,* 98 N. C., 747; *S. v. Pool,* 106 N. C., 698; *S. v. Neal,* 109 N. C., 859; *S. v. Covington,* 125 N. C., 641. "The affidavit and warrant, in contemplation of law, are one, if one is referred to by the other" (as was here the case). *S. v. Davis,* 111 N. C., 729; *S. v. Sykes,* 104 N. C., 694; *S. v. Sharpe,* 125 N. C., at p. 635.

The defendant places much stress upon the fact that he was summoned to work three days consecutively, whereas The Code, sec. 2019, provides that the "hands shall not be required to work continuously for a longer time, at any one time, than two days." This would be a good defense if the alleged default was for failure to work the third day, but the notice was good for two consecutive days, and the defendant admittedly paid no attention to it and did not do any work at all, leaving the

other citizens assigned to that road to do his part. They had a right to see that under the notice he worked two days or paid his $1 per day. The overseer was simply their representative in enforcing his *pro rata* part of the work. It appears from the evidence that the road was worked only two days by any one at that time, that the defendant made no objection that the notice specified three days, or it might have been then amended. He did not go to the road at all. He was fined $2 for failure to work two days only, and has in no respect been prejudiced by the notice being for three days. As a law-abiding citizen, he should have attended and worked two days, as his neighbors did, and failing to do so, he has no good ground to object to paying $2 (1114) to make his share of this public duty equal to theirs.

The second objection was to the introduction of the judgment of the county commissioners which ordered this road laid out, appointed an overseer and assigned hands, etc., and is without merit. This objection is stated in the brief to be on the ground that chapter 336, Laws 1889, required the assignment of hands "from the body of the county." That means simply that they shall be from the road hands of the county, and the order assigning for the construction of the new road "all the hands liable to road duty and residing in two and a half miles of the nearest portion of said road" is in accordance with what has always been the uniform understanding of the duty of county commissioners in this regard. It has never been understood that all the hands in the county were to be ordered out. There is no provision for drawing out a part of them, like a special *venire.* The mode of assigning hands is left to the county commissioners, and in selecting these hands near the road, and men who would be most likely to be benefited by an use of the road, there was no oppression. Besides, it has been expressly held that the judgment of the county commissioners ordering the laying out of the road is final unless reversed on appeal, and any person affected could appeal. The order cannot be collaterally impeached. *S. v. Witherspoon,* 75 N. C., 222; *S. v. Smith,* 100 N. C., 550; *S. v. Joyce,* 121 N. C., 610. In this last case, at page 611, the Court says: "When the board of commissioners ordered the road to be laid out and constructed as a public county road, appointed an overseer and assigned hands to him to construct the road, and ordered him to have the work done, in the eye of the law it became at once a public road, and the hands so assigned were as much bound to attend and work as any other road hands in the county, and they could not question the regu- (1115) larity of the proceedings of the board in the matter, and if they refused to work they are liable under the general law to indictment."

The other exceptions are for refusal of special instructions. The

first prayer was a general demurrer to the evidence. There being evidence tending to prove the charge, its sufficiency was for the jury. Clark's Code (3 Ed.), pp. 525, 526; Walser's Digest, 373.

The second prayer was in effect that if the defendant had been previously assigned as a road hand to another road he could not be assigned to this. Every man liable to road duty in the county had been already assigned to some road, and if the defendant's assignment to the new road was illegal, it would be impossible to execute the law—a most necessary one, authorizing the county commissioners to lay out new roads and assign hands to construct and work them. The assignment to the new road canceled the assignment to the former road. Whether the number of days work already done on the first road must be deducted from the total number of days (eight) which a hand may be required to work in a year, thus restricting the number of days the defendant can be required to work on the new road to the difference, is a matter not before us, though it seems a reasonable construction. The defendant could not be required to work on two roads at the same time (*S. v. Hinton,* 131 N. C., 770); but he is not indicted for failure to work on the first road after being assigned to the new road. The assignment to the latter canceled the first assignment, as a matter of course.

The only remaining exception is to the refusal of the prayer to instruct the jury that as the order of the county commissioners laying out the new road did not "provide for the assessment of damages, the same was irregular and erroneous and void and of no effect." The
(1116) order was irregular and erroneous as to the landowners, if thus defective; but it was not "void and of no effect" so as to authorize the defendant to impeach it collaterally. He could not be judge and jury in his own favor, and decide that the order to work the road thus laid out was a nullity, and disobey the order. *S. v. Joyce,* 121 N. C., 610. If aggrieved by the order laying out the road and assigning him as one of the hands, he should have tested the validity of such order by appealing. Not having done so, he should have obeyed it.

No error.

DOUGLAS, J., dissenting: This was a criminal action tried on appeal by the defendant from the judgment of a justice of the peace. The following is the "complaint" on which the warrant was issued:

B. B. McLurd, being duly sworn, complains and says that he has been duly appointed overseer by the Board of Commissioners of Catawba County to open out a public road in said county, Jacob's Fork Township, leading from Plateau over the lands of Charles Bronce and

others to a point on the Kings Mountain road near the Lincoln County line; that Charles Yoder has been duly assigned, is and was liable to work on said road, he being a citizen of the said county of Catawba; that affiant at and in the said county of Catawba on 13 December, 1902, as overseer duly summoned said Charles Yoder to appear on 18, 19, and 20 December, 1902, at a time and place named in said summons, to work on said road, and that the defendant wilfully and unlawfully failed to appear and refused to work in accordance with said summons, and failed and refused to furnish an able-bodied man as a substitute, with the implement directed, and failed and refused to pay the $1 as prescribed by the statute, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

B. B. MCLURD.

The defendant was found guilty both before the justice of the (1117) peace and on appeal in the Superior Court.

The defendant moved to quash the warrant and in arrest of judgment. Both motions were refused by the court below and are now before us on exceptions.

I think the motion in arrest of judgment should have been granted, as the so-called complaint does not charge any criminal offense. The warrant simply directs the arrest of the defendant "to answer the above complaint."

Section 2017 of The Code provides that "all able-bodied male persons between the ages of 18 and 45 years shall be required under the provisions of this chapter to work on the public roads." . . . The warrant, including the complaint as a part thereof, does not allege a single one of the requisites specified in The Code. It states merely the legal conclusion that he was "duly assigned" and was "liable to work on said roads, he being a citizen of the said county of Catawba." The word "citizen" might be construed as meaning inferentially that he was a male person, but that is only one of its legal meanings, and it never can be construed to include the idea of being able-bodied and between the ages of 18 and 45. No motion was made to amend the warrant, although full notice was given by the motion to quash. It will be seen that the statute designates the class to which it shall apply, in express terms, which are words of limitation and not of exception. Now, if the statute provided that *all persons* should be required to work the roads, with certain exceptions, the case would be different, as the existence of the facts creating the exception would generally be matter of defense. It is well settled that if the words are essentially those of qualification and not of exception, even if stated under the form of an exception or proviso, they must be alleged by the State.

In *S. v. Norman,* 13 N. C., 222, the distinction is thus clearly drawn:

"We find in the acts of our Legislature two kinds of provisos—
(1118) the one in the nature of an exception, which withdraws the case provided for from the operation of the act; the other, adding a qualification whereby a case is brought within that operation. Where a proviso is of the first kind, it is not necessary in an indictment, or other charge founded upon the act, to negative the proviso; but if the case is within the proviso, it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso; for in reality that which is provided for in what is called a proviso to the act is part of the enactment itself." This case has been repeatedly cited with approval and seems never to have been questioned. *S. v. Tomlinson,* 77 N. C., 528; *S. v. Narrows Island Club,* 100 N. C., 477, 6 Am. St., 618; *S. v. Pool,* 106 N. C., at p. 700; *S. v. Davis,* 109 N. C., at p. 784; *S. v. Downs,* 116 N. C., 1064.

It is true, the penalty is prescribed in section 2020 of The Code, but that section does not describe the offense, nor specify the class to which the penalty shall apply except by reference to other sections, including, of course, section 2017. The expression, "liable to work on the road," is merely a legal conclusion from facts elsewhere stated.

While I can find no case exactly like that before us, there are many involving the same principle, inasmuch as they hold the warrant or indictment invalid where it did not fully describe the offense. In *S. v. Smith,* 98 N. C., 747, it was held (quoting the syllabus) that "A warrant against a person for failing to work the roads, which fails to allege that the defendant has been duly assigned and was liable to work on that particular road, and that he had been properly summoned, is fatally defective." In *S. v. Baker,* 106 N. C., 758, it was held (quoting the syllabus) that "A warrant charging simply that the defend-
(1119) ant 'did refuse to work the public road after being legally warned by P., supervisor, against the peace and dignity of the State,' is insufficient." In *S. v. Pool,* 106 N. C., 698, in which the warrant was held to be fatally defective, various defects are pointed out, among others, the failure to negative the payment of $1 in lieu of personal service. In *S. v. Neal,* 109 N. C., 859, it was directly held that a warrant against one for refusing to work on the public road was fatally defective if it failed to negative the payment of $1 by the defendant in discharge of his liability. Laws 1887, ch. 73, and 1889, ch. 338, do not affect the case at bar.

The principle above stated would be sufficient to determine this appeal. But there is one other question clearly presented in the record,

as well as in the briefs of counsel, that I think it better also to discuss. The defendant requested the court substantially to charge that he could not be required to do double road duty by being assigned to two different roads at the same time. This point has been directly decided in *S. v. Hinton,* 131 N. C., 770, where the Court says: "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." The State contends that this exemption from double duty applies only to roads already laid out, and that "the law imposes this obligation upon him (working on a *new* road) in common with other residents of the county, in addition to his liability to render service in keeping in repair roads already established." We do not see the distinction. Compulsory working on the roads is in the nature of taxation, and should be uniform as far as local conditions will permit. I think that the defendant should have been permitted to show where and when he had worked on the public roads during the current year, in order to get full credit for the time already given to public duty.

CONNOR, J., concurs in the dissenting opinion.

Cited: S. v. Yellowday, 152 N. C., 796; *S. v. Thomas,* 168 N. C., 149; *S. v. Poythress,* 174 N. C., 811.

(1120)

STATE v. WILCOX.

(Filed 10 June, 1903.)

1. Experts—Findings of Court—Appeal.

The finding of a trial judge that a witness is an expert is final if there is any evidence to sustain the finding.

2. Expert Evidence—Opinion Evidence—Physicians and Surgeons—Witnesses—Wounds.

A physician may testify as an expert as to the kind of weapon that would produce a wound examined by him.

3. Expert Evidence—Opinion Evidence—Physicians and Surgeons—Wounds.

A physician may testify as an expert whether the absence of water from the stomach or lungs of a person, taken from water, indicated that such person was killed otherwise than by drowning.

4. Evidence—Drawings—Maps.

A person may use a map or drawing to demonstrate the relative positions of places involved in the evidence given by him.

5. Evidence—Flight.

Evidence that the prisoner did not escape jail, he having opportunity to do so, is not competent.

6. Instructions—Circumstantial Evidence—Reasonable Doubt—The Code, Sec. 413.

The trial court is not required to give instructions in the language of the prayers—here relative to circumstantial evidence and reasonable doubt—provided the instructions given are correct and cover the various phases of the testimony.

7. Evidence—Sufficiency of Evidence—Questions for Jury—Homicide.

There is sufficient evidence in this case to go to the jury connecting the defendant with the death of the deceased.

INDICTMENT against James Wilcox, heard by *Councill, J.*, and a jury, at March Term, 1903, of PERQUIMANS. From a verdict of guilty of murder in the second degree and judgment thereon, the defendant appealed.

(1121) *Robert D. Gilmer, Attorney-General, for the State.*
E. F. Aydlett and W. M. Bond for defendant.

CONNOR, J. This was an indictment against the defendant for the murder of Nellie Cropsey. The State introduced testimony tending to show that W. H. Cropsey, the father of the deceased, had been living in Elizabeth City since April, 1898; that at the time of the disappearance of deceased and for two years prior thereto his residence was within a short distance of the Pasquotank River. That deceased was at the time of her death 19 years old; that the defendant met her in June, 1898, and began paying her attentions, he being a young unmarried man; that his attentions were marked by frequent visits, as often as three times a week; that he gave her a number of presents, carried her to ride and sailing and to places of amusement. "He gave her a silver dish at one Christmas, a pin at the next, and on her birthday in July a diamond ring. He also gave her small pictures of himself and a parasol." In September, 1901, defendant and deceased had a "kind of falling out." She was heard to say to him about the middle of September: "If you are going to act like this the rest of the season, you can stay at home." About 1 October, 1901, Miss Carrie Cropsey, a cousin of deceased, came from Brooklyn to make a visit to the family. About this time there was a series of religious meetings in Elizabeth City. Defendant frequently went with deceased and at other times went for and took her home. She joined the church 13 October. At

the time of the Fair, 22 October, defendant and deceased were friendly. He gave her tickets for herself, sister, and cousin. They remained friendly until 7 November; prior to that day he visited her every night, sometimes in the afternoon. On the night of 7 November he was at the home of the deceased. Her sister and cousin were in the parlor with them. When he left, she said "Pull," which meant hurry.
She went to the door with him and came back immediately. (1122)
He did not take her remark in fun. He visited the house after
that. Deceased never spoke to him after that night, nor did he speak to her. She never went to the door with him after that night. She was seen walking with her cousin and defendant once, her cousin being between them. Deceased was to make a visit to New York, intending to leave on Saturday, 23 November. This was known to the defendant. On Tuesday afternoon before her disappearance her cousin came home and said she was going to the skating rink with the defendant that night. When he came and rang the bell, deceased declined to let him in. The cousin, Carrie, let him in. When the defendant came in and took a seat, he said to deceased: "I guess your corn is getting better." She turned to her sister, Miss Ollie Cropsey, laughed and said: "A little," in a very low voice. Deceased and her sister were dancing just before defendant came in. Defendant turned to Miss Carrie and said: "I expect it is time you were getting your hat." She went upstairs, leaving Ollie and deceased in the parlor. No words were passed between defendant and deceased. Ollie talked with him. When the defendant and Carrie returned from the rink deceased was writing a letter. They brought some fruit with them, which they put in another room. Defendant did not speak to deceased. After sitting some time deceased said: "I certainly would enjoy a good apple tonight." Carrie turned to defendant and said: "How about the fruit?" He said: "It is yours." Carrie handed the fruit. Deceased said: "No, thanks." She wouldn't have any apple. Defendant stayed a little while, took his hat and left. When he was gone, deceased said: "This is a good joke on Jim." She took an apple and commenced eating it. Defendant left about half-past 10 or 11 o'clock. On Wednesday afternoon, 20 November, 1901, Carrie and one of the sisters of the deceased went to town and came back accompanied by defendant about half-past
5. Defendant indulged in some pleasantry with Ollie. He left in (1123)
about half an hour. No words passed between him and deceased.
He returned about 8 or half-past. Carrie let him in. Roy Crawford was at the Cropsey house visiting Ollie. He was not on good terms with the defendant. Deceased was sitting at table, sewing. She continued sewing

until 9:30 o'clock, when she put her sewing up and got some musical instruments. They had some music. Defendant did not speak to her; "just sat there gazing at nothing"; had hardly spoken to any one. He finally said Miss Burnett was going to be married. The members of the family began to leave the parlor to retire, until deceased, defendant, Ollie, and Crawford were the only ones left. Defendant asked if there was any water in the pump. Ollie got up to get a glass. He said: "I don't want your glass; I might poison it." He took his watch out six or seven times. At 11 o'clock he looked at it and said: "Your clock is just like my watch." They all stood up. Roy stood by deceased and took hold of her chin, saying: "You are looking mighty sweet to-night." Ollie said: "As if she don't always look so!" Defendant rolled up a cigarette and took his hat, saying: "Mamma said I must be in at 11 o'clock to-night." Ollie said: "Jim, you are getting good." He made some slight remark, took his hat from the rocking chair and started out. When he got in the hall, the door was partly open. He walked out and said: "Nell, can I see you out here a minute?" She looked at her sister, said nothing, and went into the hall with the defendant. She was never seen alive again by her family. This was the first time she had gone to the door with the defendant since 7 November. He had been there every other night. He had taken Carrie and a sister of deceased sailing. Deceased left the door open. Ollie closed it. Roy Crawford remained in the parlor with Ollie some time and then went out. Ollie went in the front hall with
(1124) him and found the two doors open and the screen door flapping in the wind. She said to Roy: "This is funny; Nell gone upstairs, leaving me to shut up alone." She went upstairs and retired. She felt in the bed for Nell, but she was not there. In a short time Mr. Cropsey, the father, came downstairs. Some time after Ollie notified her father of Nell's absence. Family got up and began to search for her. It was a very cold, clear, moonlight night. Father, mother, and sisters looked over premises for deceased and called for her. Could not find her. Before defendant left on the night of 20 November, "the subject of drowning was brought up either by Carrie or defendant." He said: "That is one thing I would like to do. It is such a pleasant sensation. I would not mind it." Deceased said: "That is one thing I would never want to do. I would not want my hair coming out straight." Her hair was in curl papers. She said: "If I die, I would want to freeze to death." The Cropsey residence fronts up the Pasquotank River, Riverside Avenue running between the front fence and the river. It is 66 feet from the bottom step to the front gate. The street is 33 feet wide. From the edge of the street to the

river shore is 112 feet, making the entire distance from the steps to the river 211 feet. A little to the left of a line from the house to the street is a summer-house, about 150 feet from the gate, and about 40 or 50 feet to the bank of the river. A little to the left of the summer-house is a fish-house, 350 feet, and near by are some cypress trees in the water. Up the street 850 feet is the pier of the Hayman Ship Yards, to the end of the pier is about 500 feet, making 1,350 feet from gate to end of the pier. The water at the end of the pier is 10 or 12 feet deep. The Tolley house is 2,500 feet from the Cropsey gate. Witness walked it in ten minutes. Defendant (1125) lives up that street 4,300 feet from the Cropsey house, 1,800 feet from the Ives place. Several measurements of the water near the Cropsey house were taken, showing depth at 10 feet from shore, 2½ feet; 35 feet from shore, 3 feet deep; running out to 75 feet, 4 feet deep.

C. T. Parker testified that on the night of 20 November he was at Fletcher's store at about 10 o'clock, and remained there about ten minutes. That he was driving a horse to a top buggy, traveling about five or six miles an hour, and passed the Cropsey house. That he met a man and woman near the gate of the Cropsey house, somewhere near there; might have been about the gate, did not know exactly. They were medium-size people. Their faces were turned toward each other. The man was taller than the woman. Witness was right close to them. Was in street and they were on the sidewalk. They were walking. Does not know the parties. Knows Wilcox; has known him a long time. It was a bright moonlight night. He took no notice of them. Witness met a man about 50 steps after meeting the man and woman. This man could see the two persons walking the road. There was no crook in the road. Man and woman were talking to each other, he thinks.

Leonard Owens testified that he has known defendant five years. He was on the street the night of 20 November; was within 15 feet of Ives' house, between Ives' and Tolley's house, about 11:30 o'clock; met defendant, who said: "Hello, old boy." Witness said: "Hello, Jim." He said: "Where have you been keeping yourself?" Witness said: "I have been coming and going," etc. Asked him to take a cigarette. Said he was making one. After talking a little they parted and witness went home. Witness went up Hunter Street about 200 yards, crossed and went over to Morgan Street, where he lives. He called his wife and went upstairs. As he was undressing the (1126) town clock struck 12. About 400 or 500 yards from where he met defendant to where he lives. Nothing unusual in defendant's

appearance or conversation. He talked friendly. Witness passed Cropsey house. Did not know what time.

Captain Baily testified that Owens left the boat at 11:30 o'clock. He got witness a pint of whiskey and sent it by a negro, Sherman, who witness sent with him. Sherman was back in about ten minutes. Witness's watch was two minutes faster than the town clock.

W. H. Cropsey testified: Deceased was a good swimmer; had seen her plunge into the water. He retired on night of 20 November at 8.25 o'clock; got up at 11:45; blew his lamp out at 12 o'clock; went downstairs at 12:45, and heard dogs barking. Was notified by his daughter of absence of deceased. Searched for her. Went to Dawson, chief of police, and told him about missing deceased. That was about 1:15 o'clock. Dawson came to house with defendant at 4 a. m. Witness's wife was crying. Defendant looked cold and indifferent. His wife asked defendant something. He began to tremble and witness walked out of room. Daughter was well educated and a lively girl.

Dawson testified: Was called up by Mr. Cropsey between 2 and 3 o'clock in the morning. Went to home of father of defendant. Went upstairs with defendant's father. Defendant was lying in bed on left side. Mr. Meade was in same bed. Defendant was asleep. Witness called him, saying: "I want you to go over to Mr. Cropsey's with me." Defendant said: "All right, I will go." He got up and dressed and went downstairs. When they got in street witness said: "Jim, what do you think about this case?" Defendant said: "I don't know what to think." Witness said: "When was the last time you saw Miss Cropsey, and where was she?" He said: "I left her
(1127) standing on the front porch." Witness said: "Did she seem to be in any trouble?" He said: "Well, yes. I left her crying." Witness said: "What was she crying about?" He said: "I gave her back her picture, and she said, 'I know what that means,' and began to cry, and I turned off and left her." Defendant said he came home. Witness said: "Now, have you had any quarrels—had any lovers' quarrels, or anything like that?" He said: "Well, no. Nothing more than she laughed in my face and I told her the laugh would be on the other side." Defendant said that on the night before that, that is, Tuesday night, he went in the room and asked her how her corn was, and he said that was when she laughed in his face. He also said that some one brought up the subject of suicide that night. That deceased said that she would rather commit suicide by freezing than any other way. That about a year ago in a summer-house she said in a crowd that if she was going to commit suicide she would drown herself and tie a stone around her neck. When they got near the Ives house defendant said:

"Right here last night I met Leonard Owens about half-past 11." When they reached the Cropsey house, the family was in the dining-room. Defendant passed through sitting-room. Curtain hanging in the door. He took hold of it. Mrs. Cropsey came up and put her arm on his shoulder and said: "Jim, tell me where Nell is, for your sake, for my sake, and for your mother's sake. Please tell us where Nell is." He said: "Mrs. Cropsey, I don't know. I can swear that I don't know." He said nothing else. Defendant was put under arrest, and was released about 12 o'clock on that day. He was arrested a second time and carried before Mr. Wilson and four other justices, and released on his own recognizance. He was, at his own request, sworn, and said: That he went to call on deceased, and left about ten minutes after 11 o'clock. That he rolled up a (1128) cigarette and asked Miss Nell to let him see her in the hall, and she went in the hall with him. That he left her on the porch crying, and that he had not seen her since. He did not go back after leaving the yard. The mayor required defendant to appear before him every day at 12 o'clock until further notice, which he did.

Charles Reid, deputy sheriff, testified: That the Sunday after deceased disappeared, at request of defendant's father and mother, he went with defendant to Mr. Cropsey's. On the way witness said: "Jim, it looks to me like you ought to explain this, as it is getting you into trouble—not for your sake, but for your mother's." After walking about twenty steps he said: "I have told all I can tell." Witness took defendant to Mr. Cropsey's at railroad. They had some conversation. They went to the house. Mrs. Cropsey put her arm over his neck and asked him if he knew where Nell was, and if so, to tell her. He said: "I don't know where she is." She then said: "You say you left her crying?" He said: "Yes." Mrs. Cropsey said: "Had you ever seen her crying before?" He said: "I don't know what she was crying about, unless I told her I was going to quit her." Mrs. Cropsey was crying. Defendant's manner was very indifferent. Defendant showed witness the position in which he left deceased. He walked to the right side of the porch and put his arm up on the porch and leaned his head against his arm. The left temple was exposed. He said that he was standing on the second or third step. He first said he was standing there five minutes, then said it might have been fifteen minutes. The people were engaged in searching for deceased, dragging the river, etc., thirty-seven days. Defendant took no part in the search. One day Mr. Cropsey said to defendant, standing on the street: "Jim, ain't you ever going to say anything or do anything towards finding Nell?" Defendant said: "I have said all I am going

to say and done all I am going to do," or words to that effect. On the day the body was found defendant was arrested. Deputy sheriff said to him: "You are a pretty looking chap for a young lady (1129) to go off and drown herself about." He threw himself back in the buggy and laughed and said: "Ain't I, though?" Witness asked him if he couldn't have seen her from the hill to the house, and he said: "Yes, I could have seen her, and if I had known all this trouble was coming I would have called her sister out before I left." His general appearance and manner is that of indifference.

P. B. Hayman testified: That defendant worked with him from September until the preliminary trial in this case. Once during the time witness said: "I wish we could find her or hear something from her." Defendant said, "I wish to the Lord we could"; that he would go look for her, but if he found her, they would say right off that he had killed her. This was about the time they were dragging for her.

C. A. Long testified: That he was in boat with Mr. Stilman on the river, on 27 December. Went out in small boat from the shore near front of the Cropsey residence. Fifty yards from shore saw body of deceased; top of her head was out of the water, floating. Mr. Cropsey went out and identified the body. There were no weights on it; dress was muddy. Body was nearly in front of residence, between bath-house and summer-house, looking from the shore. Some bricks near where body was found, some stubble, stumps, etc.

Dr. Fearing, coroner, thirty-three years old, graduate of College of Physicians and Surgeons, general practitioner, took charge of the body on 27 December, about 50 yards in river. Body was staked and tied, floating face down. Had body covered with quilts and carried to outhouse. Impaneled jury, and sent for Drs. Wood and McMullen. Found no disarrangement of clothing. Took off clothing. Found no evidence of violence at that time. Top skin slipped off when (1130) touched; hair slipped off. Made incision in body. Deceased was chaste. She was a virgin. Cut open stomach. Found one or two tablespoonfuls of fluid—undigested food. Heart in perfect state of preservation, empty, normal in appearance. Lungs likewise. Cut through large section right lower lobe; found it contained no water. Upon pressure, it emitted a dark, mucous fluid, about half tablespoonful. Do not think there was any froth in it. Pleural cavity empty. Did not examine head at that time. Two of jurors thought it looked a little thicker, or enlarged on left side. Jury left and went to town. Went back after dinner. Made an incision all round head above left ear. Began on right side and went to left. No blood in

right temple. As we cut through left temple discovered a contusion; a fluid, about a tablespoonful dark fluid blood, ran out. It was very blue down to the membrane of the bone. It indicated a wound or contusion. There was no fracture of bone. No evidence of violence to membrane of the brain. Brain was very soft; offensive odor. Of the organs the brain is the seventh in order to decompose. Witness gives opinion that wound on left temple was given with some round instrument, padded. Examination was made about an hour after body was taken out of the water. The condition of the stomach, heart, pleural cavity, and lungs indicate that the deceased came to her death by means other than drowning; that she received a blow which stunned her and rendered her unconscious. Body was not swollen. Body of person drowned usually swollen when taken out of the water. Wound had the appearance of having been stricken before death. Dr. Wood assisted in making the autopsy. He testified that he was fifty-eight years old, and had been practicing medicine since 1869.

There was some conflicting evidence in regard to the clothes which the defendant had on the night of 20 November. Mr. Meade testified that he slept in the same bed with the defendant. Did not hear him when he came home. Saw defendant's clothes the next (1131) morning when he got up that he had worn that night. They were hanging up behind the door. Thinks they were the same he had on at the time of the trial.

The defendant objected to the testimony of Dr. Wood and Dr. Fearing as experts. Dr. Wood stated that from his experience as a practitioner and learning as a physician he considered himself competent to give an opinion satisfactory to himself on medical matters, also as to the death of a person, whether it was caused by drowning or otherwise. That he had no experience before this in examining the body of a person alleged to have been drowned. This was the first autopsy he had made in such a case. That he derived his information from the authorities Reese and Taylor; that from an examination of these authors he was prepared to express an opinion. That they devoted from 8 to 14 pages to the subject of drowning. They are considered standard authorities. Dr. Fearing testified to substantially the same. The court found as a fact that the witnesses were experts. Defendant excepted to the finding of the court and objected to the witnesses testifying as experts in this case. Objection overruled; defendant excepted.

If there is any evidence to sustain his Honor's conclusion it is final, and not subject to review. *Smith, C. J.*, in *Flynt v. Bodenhamer*, 80 N. C., 205, thus declares the law: "The court must decide whether

the witness has had the necessary experience to enable him to testify as an expert. But the value of his opinion when admissible must be determined by a jury alone and depends upon the opportunities he has had for acquiring skill and knowledge and the use he has made of these opportunities. If a regular, continuous practice of his profession for thirty years does not entitle the witness to be regarded as an expert or experienced physician, it is difficult to conceive what would do so." The finding of the judge is conclusive. *S. v. Cole,* 94 N. C., 964, and cases cited. It is not necessary that a physician, learned and
(1132) experienced in his science and profession, should have actually seen or made an autopsy in a case like the one on trial. In *S. v. Clark,* 34 N. C., 152 (155), *Ruffin, C. J.,* says: "That circumstance does not touch the question of competency, though it may lessen the credit given to the testimony. . . . It is the point for the man of science to consider whether in a particular state of facts he can or cannot form a sound opinion which would satisfy his own judgment as to the matter of fact. In the next place, if it were the office of the court to determine whether the circumstances were or were not sufficient to enable the witness to form such an opinion, it could not be held they were insufficient here merely because exactly such a case as this had not before fallen under the observation of the witness or under his notice in the course of his reading. For the man of science is distinguished from an empiric in nothing more than in not relying on specific and also in not waiting for exact similitudes in things material and immaterial before forming a judgment, whether two patients are laboring under diseases of the same character and requiring the like treatment. It is the province of science to discover general principles from long and accurate observation and sound reasoning." We are of the opinion that his Honor's finding that Drs. Wood and Fearing were experts is sustained by ample testimony. The exception thereto cannot be sustained.

The doctors were asked the following questions: "Q. From the appearance of that bruise and dark blood and the contusion—was there any contusion?" "A. Yes, sir." "Q. "What, in your judgment, produced it?" Defendant objected to the witness testifying as to what caused the bruise or contusion on the left temple of the corpse of Nellie Cropsey. Objection overruled, and defendant excepted. "A. I think
(1133) a direct blow produced it." "Q. What shaped instrument would probably have produced that bruise?" Defendant objected. "Q. Upon your examination of that wound are you in a position to give an opinion as to what produced it?" "A. No, sir. I

could not give a positive opinion." "Q. Upon your examination of the wound, what kind of an instrument or weapon, if any, produced it?" "A. I think some covered instrument would have produced it—a blunt covered instrument." "Q. From the examination of the wound are you prepared to give an opinion satisfactory to yourself as to the character of the weapon or instrument used, if any?" "A. Positively, no; I am not." "Q. From your examination of the wound on the head are you prepared to give an opinion of what caused the bruise?" "A. I think I am, sir." "Q. Please give that opinion." "A. I think she was struck by some blunt instrument—something that would not break the skin—a direct blow on the left temple." "Q. From your examination and knowledge of the wound are you prepared to give an opinion as to whether this blow was produced before or after death?" "A. Yes, sir." "Q. Please give that opinion." "A. If the wound was inflicted just before death, or just after death, it is hard to tell which, because of the blood being diffused in the muscles of that wound. The blood was circulating from the blow given." To all of the foregoing questions and answers the defendant objected, and upon objection being overruled, excepted.

We think the questions and answers competent to be considered by the jury. "In reference to questions involved in controversies like the present, namely, as to the nature and effect of a wound described to a witness, it certainly is to a considerable extent a matter of science. Whether a wound was made by a shot or a sword or other sharp instrument can, beyond all doubt, be better judged of by one who has habitually examined and treated wounds of such kinds." *S. v. Clark,* 34 N. C., 154; Lawson on Expert and Opinion Ev., (1134) 125. "The opinions of medical men are constantly admitted as to the cause of disease or death or the consequences of wounds. . . . and as to other subjects of professional skill." 1 Greenleaf on Ev., sec. 440.

In *Gardiner v. People,* 5 Parker Crim., 202, it is held that "Medical witnesses are competent to testify as to the kind of an instrument or weapon that would produce a wound or fracture and whether a particular wound or fracture may have been made with an instrument mentioned to the witness." *Williams v. State,* 64 Md., 384; Kerr on Homicide, sec. 479; *S. v. Harris,* 63 N. C., 1. *Taft, Circuit Judge,* in *Accident Co. v. Dargan,* 58 Fed., 945, 22 L. R. A., 620, says: "The witness was an expert, and it is proper to ask his judgment of the conditions which he found in the body of the deceased and what they indicated as to the cause of his death. Several questions were submitted to the expert physicians based upon the assumption that the jury find

certain conditions incorporated in the questions in respect to which there had been testimony before them, and the opinions of the physicians asked as to the probable cause of death based upon such finding of fact by the jury."

The physicians were asked the following questions: "Upon a post-mortem examination of a person taken from the water, what does the absence of water in the stomach indicate?" A similar question was asked in respect to the absence of water in the lungs. To each of these questions witnesses answered that they "indicate that the deceased came to her death otherwise than by drowning." To all of these questions the defendant excepted. The questions were formulated in accordance with the rules prescribed by this Court in *S. v. Bowman,* 78 N. C., 509. In *People v. Barker,* 60 Mich., 277, 1 Am. St., 501, the question is asked the witness: "Doctor, from the nature of the examina-
(1135) tion that you made of the heart, lungs, eyes, mouth, neck, and general appearance, together with the mutilation you have testified to, do you come to any conclusion as to whether the death occurred by drowning or by other means?" To which he answered: "Yes; my opinion was that the man didn't come to his death by drowning—that he was dead before he was put into the water." The ruling of the Court is directly in point and sustained by numerous other authorities which sustain his Honor's ruling upon the several questions, in regard to the opinion evidence of the experts as to the manner in which the deceased came to her death as indicated by the physical condition found upon the autopsy. Maxwell Criminal Procedure (2 Ed.), 204. The weight to be attached to these opinions is peculiarly the province of the jury.

The defendant objected to the diagram made by the witness H. T. Greenleaf by which the witness proposed to demonstrate to the jury the location of the Cropsey residence and other points immediately around there. The objection was overruled, and defendant excepted. The defendant also objected to any examination of the witness with reference to the map. The exception cannot be sustained. The map was not admitted in evidence, but it was competent "for the purpose of enabling the witness to explain his testimony and enabling the jury to understand it." Diagrams, plats, and the like are of frequent use for this purpose in the trial of causes, and for such purpose the use of the map was admissible. *Dobson v. Whisenhant,* 101 N. C., 645; *Riddle v. Germanton,* 117 N. C., 387.

The defendant offered to prove by Mr. Reid, the deputy sheriff, that since his incarceration, and since the first trial also, he has had opportunities to escape from the jail where he was so incarcerated,

and that he declined to avail himself of them. The testimony was, upon objection, excluded, and the defendant excepted. The exact question has been decided by this Court in *S. v. Taylor,* 61 (1136) N. C., 508, *Battle, J.,* saying: "The argument in favor of the exception is that as the flight of an alleged criminal is admissible as evidence against him, his refusal to flee in the first instance and his declining to escape after having been admitted to jail ought to be admitted as evidence in his favor. The argument is plausible, but it would be permitting prisoners to make evidence for themselves by their subsequent acts." The writer of this opinion, speaking for himself, has been impressed with the argument, and, subject to well-defined limitations, as, for instance, that the defendant was without any agency on his part given an opportunity to escape and refused to accept, is inclined to the opinion that his conduct is competent to go to the jury to be given such weight as under the circumstances of the case it is entitled to. There is nothing, however, in this case to take the question out of the well-settled rule, and the exception cannot be sustained.

We have disposed of the exceptions made by the defendant to the admission and rejection of testimony, and find no error in the rulings of the court. The defendant made a number of requests for instruction directed to the question of murder in the first degree, which by the verdict of the jury became immaterial and unnecessary to be considered.

The defendant requested his Honor to charge the jury that the prisoner is not called upon to introduce any testimony until the State has made out its case with evidence sufficient to satisfy their minds beyond a reasonable doubt. This instruction was given. The court was also requested to instruct the jury: "This is a case in which the State relies upon circumstantial evidence for the conviction of the prisoner. Before the State can ask you to convict upon this kind of evidence it must prove each material circumstance relied upon, beyond a reasonable doubt, and if it fails to prove any material circumstance relied upon it will be your duty to return a verdict of not guilty." Several other instructions were asked in which the same prin- (1137) ciple is expressed in different forms. It is well settled that the court is not required to give instructions in the language of the defendant's prayers, provided that the instructions are correct and cover the various phases of the testimony as prescribed by the act. The Code, sec. 413. His Honor charged the jury as follows: "What is meant by the term 'reasonable doubt' is, fully satisfied, or satisfied to a moral certainty. The words 'reasonable doubt' in themselves are about as near self-explanatory as any explanation that can be made of them." This language has the approval of this Court. *Dick, J.,* in *S. v. Mat-*

thews, 66 N. C., 106 (114), says: "The rule requiring proof beyond a reasonable doubt does not require the State, even in a case of circumstantial testimony, to prove such a coincidence of circumstances as precludes other hypotheses except the guilt of the prisoner. The rule is that the circumstances and evidence must be such as to produce a moral certainty of guilt and to exclude any other *reasonable hypothesis.* Where any reasonable hypothesis of innocence exists in the minds of the jury there must necessarily be a reasonable doubt as to the guilt of the accused, and he is always entitled to the benefit of that doubt." We think his Honor's charge is in accordance with this principle.

His Honor further charged the jury: "In the trial of this case the State relies upon what is known as circumstantial evidence for conviction; hence it becomes the duty of the court to instruct you upon the rules of law applicable to this class of evidence and how it should be considered by juries. Circumstantial evidence is a recognized instrumentality of the law in the ascertainment of truth, and, when properly understood and applied, highly satisfactory in matters of gravest moment. Where such evidence is relied upon to convict it should be clear, convincing, and conclusive in its connections and combinations, excluding all rational doubt as to the prisoner's guilt. . . . (1138) When such evidence is relied on for conviction, every material and necessary circumstance must be established beyond a reasonable doubt, and the entire circumstances so established must be so strong as to exclude every reasonable supposition but that of guilt." This language is fully sustained by numerous decisions of this Court. His Honor adopted the language used by *Merrimon, C. J.,* speaking for the Court, in *S. v. Brackville,* 106 N. C., 701 (710), and sustained by the authorities cited. His Honor said to the jury: "Reference has been made during the argument of the case as to the sufficiency or insufficiency of the evidence to be submitted to you for your consideration. The court has submitted the evidence to you and you will consider it under the rules I have laid down for your government and render your verdict based upon it." The defendant excepted to this language and contended that it violates the statute prohibiting the judge from expressing an opinion as to the weight of the evidence. We are unable to see how such construction could be placed upon the language of the court. His Honor simply stated to the jury, in view of the argument made by the counsel for State and defendant, that as a matter of law there was evidence to be submitted to them, the weight and credibility of which and conclusions to be drawn therefrom were for their consideration under the rules laid down in his charge. We see no force in the objection. We have examined the several prayers

for instruction and the exceptions of the defendant to the charges given. We find no error in his Honor's ruling in respect to them. The charge was clear and presented to the jury the testimony and the law bearing thereupon fairly to the State and the defendant.

The defendant requested the court to charge the jury that, upon the whole of the evidence, they should find a verdict of not guilty. It is upon the exception to the refusal to do so that the defendant's counsel strongly and earnestly urged upon us to grant a new trial. We have considered the case with that anxious care and solicitude (1139) to arrive at a correct conclusion which its importance to the State and the defendant demands. Either the deceased came to her untimely death by self-destruction, being driven thereto by what strongly impresses us in any aspect of the testimony as a trifling with her affections, or she was the victim of a cruel murder. If the first be true, the defendant is entitled to a new trial and to have the jury instructed that they should render a verdict of not guilty upon the testimony, leaving him to that remorse which would come to him for his treatment of her as detailed by himself. If the last theory be true, nothing but the natural hesitation of a jury to find a verdict for the highest grade of crime upon circumstantial evidence has saved the defendant from the extreme penalty of the law. It is difficult to read the testimony in this case without emotion. It is pathetic and painful. We have, however, considered it in the "dry light" of judicial investigation.

"If the evidence taken as a whole will not warrant a verdict of guilty, there is no evidence sufficient to be left to the jury, and the court should so declare." *S. v. Powell,* 94 N. C., 965. Again, it is said: "The facts, their relation, connection and combination, should be natural, reasonable, clear, and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in its connection and combination, excluding a rational doubt as to the prisoner's guilt, and it is not sufficient to be left to the jury unless in some aspect of it they might reasonably render a verdict of guilty." *S. v. Brackville,* 106 N. C., 710. Such is the standard laid down by this Court by which the testimony is to be measured by us in passing upon this exception to his Honor's ruling. By this we are to understand that it is in the province of the jury to pass upon the credibility of the witnesses and ascertain the truth of the testi- (1140) mony. The exception is based upon the assumption that it is all true; that the witnesses have testified truthfully. The defendant's contention is that in this view of the case the State has not presented

such evidence as should have been submitted to the consideration of the jury.

The defendant earnestly insists that the evidence points to the fact that the deceased came to her death by suicide. It is argued that she had opportunity, motive, and time to drown herself. Adopting the well-considered language of the brief of defendant's counsel, they contend she had the motive—the defendant had for three years been her lover, the only one she ever had; he had been loyal to her and regular in his attentions. Her cousin's visit to the Cropsey home had attracted the attention of the defendant, his attentions were divided. She began to be jealous and treated him coolly; his continued visits to the cousin made the deceased independent and appear indifferent. She continued to love him, kept his presents, and remained in the room when he was there. She was lively and tried to throw off this feeling; he returned her pictures and parasol. On the evening of her disappearance just before she was to leave for New York she was overcome by the turn in her affairs, and feeling that it was an easy way to end her troubled life, she rushed without stopping to think to the river, and threw herself in. This line of thought has been strongly pressed upon us by the defendant's able and zealous counsel.

To the adoption of this view there are several serious difficulties. There can be no doubt that the deceased was deeply grieved and distressed by the conduct of the defendant, that her affections were trifled with. Her conduct showed her to be a young woman of deep and strong feeling. The last scene which we have from an eye-witness strongly impresses this fact upon us: "As he was leaving the room he said: 'Nell, can I see you out here a minute?' Nell looked
(1141) at me, never answered, and went into the hall with him. This was the last time she was seen alive by any of her family."

So far as it appears that she ever thought or spoke of suicide, she had expressed an abhorrence of being drowned. We attach, however, but little importance to the testimony in this respect. Assuming that she ever contemplated suicide by drowning, it is far from clear that she had the time or opportunity for doing so on the night of 20 November. She went on the porch with the defendant at about 11 o'clock. Defendant says that he left her on the porch at about 11:05 or 11:10. Roy Crawford left the house in a short time. Parker passed there evidently a short time after 11 o'clock. The testimony shows the condition of the river at and near to the front of the Cropsey residence, with its receding shores, is such as to make it necessary for her, if drowned there, to go out 75 feet from the shore before reaching water 4 feet deep. At points along the shore where the bank was steep

there were bushes and briars. The testimony in respect to the river and shore all conflict with the theory that she could have thrown herself into the water. That which is most conclusive against the theory of suicide is what may be termed the natural evidence. If she walked out into the river upon the receding shore until she reached deep water, it is impossible to understand how she could have received the blow upon her left temple. That the wound upon the left temple was as described by the experts and three of the coroner's jury is established beyond controversy. It is impossible to account for it upon any other theory than that she was stricken with some instrument or that she threw herself into the river at deep water and came in contact with some hard substance. In *Cluverius v. Commonwealth,* 81 Va., 825, we find the Court discussing the theory of suicide of Lillian Madison. *Lewis, J.,* says: "The mark of a straight blow over and back of her right eye which did not abrade the skin could not have been made by her throwing herself or falling face fore- (1142) most or headlong and striking upon the brick of the incline to the water in the reservoir, because it is not probable, if indeed it is possible, that such an impingement would not have either staved in her skull or glazed and lacerated her skin." If this unfortunate girl had plunged into the water and struck, with sufficient violence to have made the contusion found upon the left temple, any hard substance, it would surely have glanced and lacerated her skin. The stumps, bricks, and roots spoken of by the witnesses were on the edge of the shore. If she had fallen and struck her head upon them before going into the water and became insensible she could not have gone further. The suggestion that she did so is improbable. The opinion of the physicians that she received the blow from some blunt instrument is fully sustained by the appearance of the wound. The condition of the lungs and stomach of the deceased in the opinion of the physicians is inconsistent with the theory of suicide by drowning. The appearance of the wound, the blood still under the skin, the color, all indicate that the blow was struck during her life. The absence of water from the stomach or lungs indicates either death or insensibility at the time of or prior to being placed in the water. The physicians testify with caution in regard to the conclusions to be drawn from the conditions found upon the body. An examination of Wharton and Stillé, Medical Jurisprudence, confirms their testimony and their opinion. The concurrent opinion of two physicians who made the autopsy, that the deceased did not come to her death by drowning, together with the other testimony, is certainly sufficient to be submitted to the jury, and, if believed by them, to sustain their conclusion

that the deceased did not commit suicide. If the deceased received the wound upon her head before being thrown into the water, this would contradict the theory of suicide, and, as we have seen, it (1143) is, to say the least, exceedingly improbable that she received the wound otherwise than in accordance with the opinions of the physicians. The work which we have examined upon medical jurisprudence states that the body of a person will remain in the water before rising or floating for a much longer period in cold weather than in warm. The testimony shows that the weather continued cold during the entire thirty-seven days. The body was in a perfect state of preservation.

Having reached the conclusion that the theory of suicide cannot be sustained, we proceed to inquire whether there is sufficient evidence to go to the jury connecting the defendant with the death of the deceased. It is urged that he had the motive, the opportunity, the time. In a criminal case where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent. Some motive, temptation, or evil impulse, we may assume, is the source of every crime. Not always can we discover what it is, so that the proof of a motive is indispensable to a conviction. 1 Bishop New Criminal Procedure (4 Ed.), sec. 1077. "We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. . . . If we should hold that no crime is to be punished except such as is rational, there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime; never accurately proportioned to it." 1 Wharton on Criminal Law (9 Ed.), sec. 121. It is, of course, difficult to the sane mind to understand how, from the conditions by which this defendant was surrounded and the relation which he bore to the deceased, it is possible for him to have taken her life. Yet it (1144) must be conceded that the relations between them were such as to arouse his evil impulse. What passed between them after she left her sister in the parlor will never be known.

"The various springs by which human motives are supplied are frequently difficult to trace, but perhaps none are more difficult than those having their fountain-head in envies and jealousies which agitate the human heart. . . . In the administration of the criminal law any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the at-

testation of innocence or points to the perpetrator of the crime." *Hunter v. State,* 43 Ga., 483 (523). A man's motive may be gathered from his acts, and so his conduct may be gathered from the motive by which he was known to be influenced. Proof that the party accused was influenced by a strong motive of interest to commit the offense proved to have been committed, although weak and inconclusive in itself, yet it is a circumstance to be used in conjunction with others which tend to implicate the accused. The defendant had the opportunity and was the last person seen with the deceased. The time which elapsed between the moment that he went out of the door, she following him, and the time he was seen by Owens was sufficient for him to have taken her life. The blow on the head was but the matter of a moment. The defendant left the room in the Cropsey house five minutes after 11 o'clock and deceased immediately joined him in the hall, or, as he says, on the porch. He is next seen by Owens at the Ives house about 2,500 feet from the Cropsey house at about 11:30, probably, in view of the testimony, ten minutes later. It is in evidence and experience tells us that this distance can be walked by a young man in full health on a cold moonlight night in ten minutes. Defendant says that he was with the deceased on the porch five minutes, and afterwards said ten or fifteen minutes, and left her there crying. Ollie Cropsey says that Crawford left the house twenty (1145) or twenty-five minutes after defendant. She went upstairs and went to bed. In a short time she heard her father get up. He testifies that this was about 11:45. All of which tends to show that defendant had left the house a short time after 11 o'clock. Where was he and where was the deceased between this time and his meeting Owens? He says that he left her crying on the porch. Parker says that he passed the Cropsey house at about 11 o'clock and saw near the gate a man and woman walking on the sidewalk. It is not an unreasonable conclusion to draw that the man and woman seen by Parker were the defendant and the deceased. There is no suggestion to the contrary. If so, defendant is contradicted in saying that he left her on the porch. If they were on the street walking, where were they going, what became of her? No one saw her after she left her sister to go into the hall with defendant, unless Parker did, until, thirty-seven days thereafter, her lifeless body is found 50 yards in the river in front of her father's house with a contused wound upon her left temple. Who the man was seen by Parker, walking 50 steps away from the man and woman, is left to conjecture. It would have thrown much light upon this mysterious case if this man had been called as a witness. Parker says he could have seen the man and woman. The deceased met her

fate within this half hour. The defendant is, of all persons in the world, most deeply interested in accounting for his every movement from the moment that he asked deceased to go with him into the hall and the moment he met Owens near the Ives place. There is not the slightest suggestion that any one, save the defendant, had either the opportunity or any motive to take her life or do her harm. There is not a suggestion that she had offended another human being. He says that he told her that he was going to quit her; that he gave her back her picture, that she said she knew what that meant; that he
(1146) walked off and left her crying and did not look back. While the conduct of a man under the circumstances surrounding the defendant from the time that he was awakened by Dawson and told that Nellie Cropsey was missing and the time that her body was found, should not be viewed with an eye to detect guilt in every movement, words spoken and expression used, yet such conduct is competent to be considered by the jury to aid them in ascertaining the truth. The defendant's conduct is difficult to understand and interpret, viewed from any standpoint. His indifference to the fate of the woman towards whom he had occupied the relation of an accepted suitor for nearly two years and with whom he had been trifling for one month, finally giving to her affections and pride a deadly thrust, by telling her that he was going to quit her, is difficult to understand. His total indifference to the grief of her mother as she appealed to him by the most tender and sacred ties for the sake of his own and the mother of the missing girl, to tell her something to throw light upon the terrible mystery surrounding the fate of her daughter, when, as we may readily understand, her memory is surrounded by suggestions darker and more terrible than death itself, is incomprehensible. Not one word of sympathy or comfort or offer of assistance came from him. When the father makes the final appeal to him, with cold indifference he says: "I have said all that I am going to say and done all that I am going to do." And when he learned that her body had been found, and the suggestion is made to him that she had drowned herself because of him, he laughs and indulges in levity. But it is said that he did not flee; that although given every opportunity to do so, he remained at home; that he denied knowing her whereabouts, that he said he last saw her on the steps crying. These facts were submitted to the jury and given their proper weight. "It cannot be said that the verdict of the jury in this case, although founded on circumstantial evi-
dence alone, was without evidence or plainly against the evi-
(1147) dence. The circumstances proved pointed with fatal precision to the plaintiff in error, and there is not a circumstance which

points to any other person or agent. The theory of suicide finds no substantial support from the proved facts. All the surroundings of the deceased on that dreary and dismal night, remote from human habitation, in that gloomy locality, led away from suicide, without the proved facts indicating violence to her person and plainly destroying the idea of suicide. The jury were the triers of the fact, and they have rendered their verdict of guilty, and the court below did not err in refusing to set it aside and grant a new trial." This language used by the Court in *Cluverius v. Commonwealth,* 81 Va., 825, in so far as it applies to the facts in this case, appropriately expresses the conclusion at which we have arrived. We think that, measured by the standard prescribed by law, the evidence was properly submitted to the jury, and we cannot say they have not reached a correct conclusion. Human tribunals can only deal with such cases in the light of such testimony as it is possible to obtain. No man can say with absolute certainty what the very truth of the matter is, but calling to our aid the experience and wisdom of the sages of the law and examining the testimony as it is certified to us, we are of the opinion that it is sufficient to bring the minds of an intelligent and fair-minded jury, under the instruction of a learned, just, and impartial judge, to the conclusion to a moral certainty that the defendant is guilty. That is the extent of our duty. In the discharge of it we must declare that we find in the record

No error.

DOUGLAS, J., concurring only in result: I cannot concur in the opinion of the Court as to the weight of the evidence. All that I can say, in justice either to the prisoner or myself, is that an impartial jury has found him guilty upon evidence *tending* to prove his guilt. Further, I cannot go.

Cited: *Summerlin v. R. R.,* 133 N. C., 554; *Abernethy v. Yount,* 138 N. C., 345; *S. v. Adams,* 138 N. C., 697; *S. v. Turner,* 143 N. C., 642; *Allen v. Traction Co.,* 144 N. C., 289; *Horne v. Power Co., ib.,* 377; *S. v. Harrison,* 145 N. C., 411, 416; *S. v. McDowell, ib.,* 566; *Martin v. Knight,* 147 N. C., 578; *Britt v. R. R.,* 148 N. C., 39; *S. v. West,* 152 N. C., 833; *Pigford v. R. R.,* 160 N. C., 103; *Mule Co. v. R. R., ib.,* 255; *S. v. Matthews,* 162 N. C., 550; *Rangeley v. Harris,* 165 N. C., 362; *S. v. Rogers,* 168 N. C., 114; *S. v. Johnson,* 169 N. C., 311; *S. v. Bridges,* 172 N. C., 823; *S. v. Bynum,* 175 N. C., 781; *S. v. Spencer,* 176 N. C., 712; *Brewer v. Ring,* 177 N. C., 485, 486; *S. v. Wiseman,* 178 N. C., 791; *S. v. Gray,* 180 N. C., 702.

(1148)

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

S. *v.* JAMES MONDS, from CHOWAN. *Attorney-General* for State; *W. J. Leary, Sr.,* for defendant. *Per Curiam.* Affirmed.

J. W. HERRING *v.* E. D. LEWIS, from BEAUFORT. *Grimes & Grimes* for plaintiff; *Rodman & Rodman* for defendant. *Per Curiam.* Affirmed.

B. F. WILLEY *v.* A. C. L. RAILROAD, from GATES. *W. M. Bond* for plaintiff; *L. L. Smith* for defendant. Motion to reinstate defendant's appeal denied. *Per Curiam.*

E. V. ROWE *v.* S. C. AM. LEGION OF HONOR, from BEAUFORT. *C. F. Warren* for plaintiff; *Hinsdale & Lawrence* for defendant. *Per Curiam.* Affirmed.

C. W. VINCENT *v.* GARYSBURG MFG. CO., from NORTHAMPTON. *T. W. Mason* and *W. E. Daniel* for plaintiff; *Day & Bell, Calvert* and *S. F. Mordecai* for defendant. *Per Curiam.* Affirmed.

D. C. JERNIGAN *v.* BRANNING MFG. CO., from BERTIE. *Smith & Lassiter* for plaintiff; *Pruden, Shepherd* and *F. D. Winston* for defendant. *Per Curiam.* Affirmed.

G. D. GARDNER *v.* C. WHITE ET AL., from CRAVEN. *H. E. Shaw* for plaintiff; *W. W. Clark* for defendant. *Per Curiam.* Affirmed.

A. T. DUVAL *v.* A. C. L. RAILROAD, from CRAVEN. *L. J. Moore* and *Stevenson* for plaintiff; *Simmons & Ward* for defendant. *Per Curiam.* Affirmed.

R. L. HANFF *v.* A. C. L. RAILROAD, from CRAVEN. *D. L. Ward* and *L. J. Moore* for plaintiff; *Simmons & Ward* for defendant. *Per Curiam.* Affirmed.

L. A. WHITE *v.* LOCKEY & CANNON, from CRAVEN. *W. D. McIver* for plaintiff; *W. W. Clark* for defendant. *Per Curiam.* Affirmed.

(1149) R. R. FOY *v.* A. AND N. C. RAILROAD, from CRAVEN. *W. D. McIver* and *L. J. Moore* for plaintiff; *Simmons & Ward* and *W. C. Monroe* for defendant. *Per Curiam.* Affirmed.

S. *v.* R. AND S. BURKE, from LENOIR. *Attorney-General* for State; *T. C. Wooten* for defendant. *Per Curiam.* Affirmed.

JOSEPH DUNN *v.* W. AND W. RAILROAD CO., from DUPLIN. *A. D. Ward* for plaintiff; *Junius Davis* and *H. L. Stevens* for defendant. Petition to rehear dismissed.

B. C. BECKWITH, administrator, *v.* R. AND G. RAILROAD, from WAKE. *Peele & Maynard* for plaintiff; *Day* and *T. B. Womack* for defendant. *Per Curiam.* Affirmed.

A. J. MCKINNON *v.* TRANSPORTATION CO., from ROBESON. *Patterson*

& McCormick and *McLean & McLean* for plaintiff; *R. E. Lee* for defendant. *Per Curiam.* Affirmed.

MURTEE HUGGINS *v.* W. AND W. RAILROAD CO., from ROBESON. *J. D. Shaw, Jr.,* and *A. W. McLean* for plaintiff; *G. M. Rose* for defendant. *Per Curiam.* Affirmed.

RODMAN-HEATH COTTON MILLS *v.* TOWN OF WAXHAW, from UNION. *Adams & Jerome* for plaintiff; *Redwine & Stack* for defendant. Petition of plaintiff to rehear dismissed.

A. E. HENDLY *v.* J. P. MCINTYRE, from ANSON. *J. A. Lockhart* for plaintiff; *Bennett & Bennett* for defendant. *Per Curiam.* Affirmed.

W. H. OSBORN *v.* M. T. LEACH, from GUILFORD. *Cited: S. c.,* 133 N. C., 428; *S. c.,* 135 N. C., 629. *T. M. Argo, J. T. Morehead* and *King & Kimball* for plaintiff; *Armistead Jones, J. A. Barringer* and *F. H. Busbee* for defendant. *Per Curiam.* Affirmed.

C. T. JOHNSON *v.* G. S. BRADSHAW ET AL., from RANDOLPH. *J. T. Morehead* and *W. J. Gregson* for plaintiff; *J. T. Brittain* for defendant. *Per Curiam.* Affirmed.

J. M. SHARPE *v.* SOUTHERN RAILWAY CO., from IREDELL. *George B. Nicholson* for plaintiff; *L. C. Caldwell* for defen- (1150) dant. *Per Curiam.* Affirmed.

L. D. LOWE *v.* JAMES HARRIS ET AL., from WILKES. *Finley & Greene* for plaintiff; *R. N. Hackett* and *W. W. Barber* for defendant. *Per Curiam.* Affirmed.

W. R. SPRINKLE *v.* J. M. WELLBORN, from WILKES. *T. B. Finley, Shepherd* and *Womack* for plaintiff; *Glenn, Manly & Hendren* and *W. W. Barber* for defendant. *Per Curiam.* New trial.

M. A. JOHNSON ET AL. *v.* P. E. SLATE, from STOKES. *W. W. King* for plaintiff; *Watson, Buxton & Watson* for defendant. *Per Curiam.* Affirmed.

J. W. VICKERS *v.* MARTHA E. VICKERS, from WILKES. *T. B. Finley* for plaintiff; *W. W. Barber* for defendant. *Per Curiam.* Affirmed.

D. G. HELTON *v.* A. AND C. A. L. RAILWAY CO., from MECKLENBURG. *Maxwell & Keerans* for plaintiff; *George F. Bason* for defendant. *Per Curiam.* Affirmed.

A. H. FRAZIER *v.* J. R. WILKES, from MECKLENBURG. *Maxwell & Keerans* for plaintiff; *Burwell & Cansler* and *Jones & Tillett* for defendant. *Per Curiam.* Affirmed.

I. A. ALEXANDER *v.* CANNON MFG. CO., from CABARRUS. *M. H. Caldwell* and *L. T. Hartsell* for plaintiff; *Jones & Tillett* for defendant. *Per Curiam.* Affirmed.

M. E. CHURCH *v.* DAN YATES, from WATAUGA. *R. Z. Linney* for

plaintiff; *L. D. Lowe* and *W. C. Newland* for defendant. *Per Curiam.* Affirmed.

WESLEY WATTS *v.* CAROLINA AND NORTHWESTERN RY. CO., from CALDWELL. *Edmund Jones* for plaintiff; *J. H. Marion* and *W. C. Newland* for defendant. *Per Curiam.* Affirmed.

S. *v.* THOMAS BIRD, from HENDERSON. *Attorney-General* for (1151) State; *Toms & Rector* for defendant. *Per Curiam.* Affirmed.

S. *v.* SOUTHERN EXPRESS CO., from BURKE. *Attorney-General* for State; *J. C. Martin* for defendant. *Per Curiam.* Affirmed.

S. *v.* JOHN BRUCE ET AL., from POLK. *Attorney-General* for State; no counsel for defendant. *Per Curiam.* Affirmed.

T. G. BARKER *v.* SOUTHERN RAILWAY CO., from HENDERSON (two appeals). *Smith & Valentine* for plaintiff; *G. F. Bason* and *F. H. Busbee* for defendant. *Per Curiam.* Affirmed.

CHARLES SUNOFSKI *v.* RHETT, from HENDERSON. *H. G. Ewart* for plaintiff; *Smith & Valentine* for defendant. *Per Curiam.* Affirmed.

G. R. WESTFELDT *v.* W. S. ADAMS, from SWAIN. *F. A. Sondley* and *J. C. Martin* for plaintiff; *Merrimon & Merrimon, Shepherd* and *J. J. Hooker* for defendant. *Per Curiam.* Petition of plaintiff to rehear dismissed.

M. L. WILLIS *v.* CORUNDUM MINING CO., from MACON. *S. L. Kelly* and *J. F. Ray* for plaintiff; *Elias, J. W. Ferguson* and *Shepherd* for defendant. *Per Curiam.* Affirmed.

D. W. BELDING *v.* R. N. ARCHER, from CLAY. *Merrimon & Merrimon* and *Shepherd* for plaintiff; *Davidson, Thomas A. Jones, C. B. Matthews* and *Busbee & Busbee* for defendant. *Per Curiam.* Plaintiff's petition to rehear dismissed.

HARRIS V. QUARRY CO., from HENDERSON. Motion by *A. S. Barnard,* for defendant, to correct judgment of this Court denied, on authority of *Barnhardt v. Brown,* 118 N. C., 710.

(1152)

Report of the committee appointed to prepare resolutions in relation to the death of the late Joseph Branch Batchelor, LL.D., submitted by Richard H. Battle, Esq., to the Supreme Court.

IN THE SUPREME COURT,
TUESDAY, 10 March, 1903.

JOSEPH BRANCH BATCHELOR, LL.D., the son of James W. Batchelor, of Halifax County, N. C., was born in that county 5 October, 1825, and died in Raleigh, 11 January, 1903, in the seventy-eighth year of his age.

Educated in the schools of his native county until his matriculation at our State University in the summer of 1841, he graduated from that institution in 1845 with its highest honors, his friend, the late George V. Strong, sharing those honors with him. Some two score years thereafter his *alma mater* conferred upon him the honorary degree of LL.D.

Choosing the law as his profession, he studied it diligently, under the direction of his neighbor, Joseph J. Daniel, then a distinguished member of our Supreme Court bench, and was admitted to the bar soon after he attained his majority. Thence on, to within a month of his death, he recognized the law as a jealous mistress, and nothing ever diverted him from her service, unless service for a single term, that of 1860 and 1861, in our State Legislature was a brief diversion. He began the practice in his native county, but having married, in 1850, Miss Mary C. Plummer, daughter of William Plummer, Esq., of Warrenton, he removed to that town, which was his home until 1866, when he removed to Raleigh. He was early elected county solicitor of Warren and prosecuted its criminal docket. Such was his recognized ability and learning as a young lawyer, that in 1855 he was appointed by Governor Thomas Bragg Attorney-General of the State, as successor of Matt. W. Ransom, resigned, the duties of the office then requiring the incumbent to serve as solicitor of the Raleigh circuit. During his term of service the Supreme Court requested his (1153) opinion on the liability of its members to pay taxes on their salaries, and that opinion, published at the end of 48 N. C., both for its style and logical ability, was commended by the bar of the State.

Mr. Batchelor became the partner of the late Sion H. Rogers, on his removal to Raleigh, and after Colonel Rogers' death practiced as

a partner of L. C. Edwards and John Devereux, Jr., successively. After Mr. Devereux's removal from the State a few years ago, he practiced alone until his last illness. Whether alone or as a partner of those eminent lawyers, his ability and faithfulness to his clients and their business were ever recognized, and he was frequently mentioned as one fitted for high judicial office. For many years he was a director and attorney of the Raleigh and Gaston Railroad Company, and he continued until the last to be one of its trusted counsel.

In 1870 he was appointed, with William M. Shipp and James G. Martin, as a member of the Fraud Commission to investigate and report upon alleged frauds in the use of appropriations for railroads by the Convention of 1868 and the Legislature of 1868-'69, and he performed his duty as a member of that commission ably and fearlessly. Courage, moral and physical, and sincerity, candor, and honesty were ever his characteristics.

In early manhood he became a communicant of the Episcopal Church, and for half a century he was nearly always a member of its annual conventions in this diocese. As a Christian, the virtues of purity, charity, and brotherly kindness were exemplified in him. In private life he was a most affectionate husband and father. The devotion between him and his gifted wife, whom he survived but two years, attracted the admiration of their intimate friends. He had a full share of private afflictions, for only three of thirteen children survive him. He was perhaps a little reserved with strangers,
(1154) but to the many acquaintances and friends of his long life he was ever affable and agreeable, and to all he was eminently a courteous "gentleman of the old school."

While Mr. Batchelor never filled political office, he was public spirited and patriotic, dividing his allegiance between Jefferson and Marshall as leaders in the framing of our Government. As a believer in States' rights, he revered the political wisdom of the former, while as a lawyer he could not withhold his admiration of, if not his full assent to, the luminous arguments of the latter as to the powers of the General Government.

In all the relations of life our friend was true; and he died as he had lived, in the reasonable hope of a blessed immortality: Therefore,

Resolved, That in the death of Joseph Branch Batchelor, LL.D., the community has lost an excellent citizen, the Church of God a devout and consistent member, the bar an able and honorable lawyer, and we who are left, a beloved elder brother.

Resolved, That a copy of this report be presented to the Court with the request that it be entered upon its minutes.

Resolved, That a copy be sent by the secretary to the family of our deceased brother.

JAMES E. SHEPHERD *(Chairman),*
BART. M. GATLING *(Secretary),*
R. H. BATTLE,
T. B. WOMACK,
F. H. BUSBEE,
J. H. POU,
ARMISTEAD JONES,
Committee.

Chief Justice CLARK, for the Court, after appropriate remarks, directed the proceedings to be spread upon the minutes and published in the ensuing volume of the Supreme Court Reports.

INDEX

INDEX