NORTH CAROLINA REPORTS

Vol. 136

Cases Argued and Determined

IN

THE SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1904

BY

ZEB. V. WALSER

STATE REPORTER

(VOL. X.)

ANNOTATED BY

WALTER CLARK

REPRINTED BY THE STATE
EDWARDS & BROUGHTON PRINTING COMPANY
STATE PRINTERS AND BINDERS
RALEIGH, N. C.
1910

CITATION OF REPORTS.

Rule 62 of Supreme Court is as follows:

Inasmuch as all the 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 volumes prior to 63 N. C. as follows:

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1904

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

WALTER A. MONTGOMERY, PLATT D. WALKER,
ROBERT M. DOUGLAS, HENRY G. CONNOR.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

ZEB V. WALSER.

CLERK OF THE SUPREME COURT:

THOS. S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

JUDGES

OF THE

Superior Courts of North Carolina

Name.	*District.*	*County.*
GEORGE W. WARD	First	Pasquotank.
ROBERT B. PEEBLES	Second	Northampton.
HENRY R. BRYAN	Third	Craven.
CHARLES M. COOKE	Fourth	Franklin.
OLIVER H. ALLEN	Fifth	Lenoir.
WILLIAM 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.
JAMES L. WEBB	Twelfth	Lincoln.
W. B. COUNCILL	Thirteenth	Watauga.
M. H. JUSTICE	Fourteenth	Rutherford.
FREDERICK MOORE	Fifteenth	Buncombe.
GARLAND S. FERGUSON	Sixteenth	Haywood.

SOLICITORS

Name.	*District.*	*County.*
HALLETT S. WARD	First	Washington.
WALTER E. DANIEL	Second	Halifax.
L. I. MOORE	Third	Pitt.
CHARLES C. DANIELS	Fourth	Wilson.
RODOLPH DUFFY	Fifth	New Hanover.
ARMISTEAD JONES	Sixth	Wake.
C. C. LYON	Seventh	Bladen.
L. D. ROBINSON	Eighth	Anson.
AUBREY L. BROOKS	Ninth	Guilford.
WILLIAM C. HAMMER	Tenth	Randolph.
S. P GRAVES	Eleventh	Surry.
HERIOT CLARKSON	Twelfth	Mecklenburg
MOSES N. HARSHAW	Thirteenth	Caldwell.
J. F. SPAINHOUR	Fourteenth	Burke.
MARK W. BROWN	Fifteenth	Buncombe.
THADDEUS D. BRYSON	Sixteenth	Swain.

LICENSED ATTORNEYS

FALL TERM, 1904

ANDERSON, JOHN B.	Madison County.
BARBOUR, JAMES R.	Johnston County.
BARBOUR, OFFIE A.	Johnston County
BLACK, FREDERICK L.	Mecklenburg County.
BOGGAN, HENRY S.	Anson County.
BRITT, EVANDER M.	Robeson County.
BROWN, SYDNEY G.	Guilford County.
BRYAN, ROBERT K.	Pender County.
CRITCHER, BURROUS A.	Martin County.
CUMMINGS, PRESTON, JR.	New Hanover County.
DANIEL, ERASMUS A.	Halifax County.
DORTCH, JAMES T.	Wayne County.
DUNN, WILLIAM, JR.	Craven County.
EVERETT, SIMON I.	Martin County.
FIELD, WILLIAM A.	Halifax County.
FORTUNE, RALPH B.	Union County.
GULLEDGE, JOHN W.	Anson County.
GIBBS, JOHN C.	Caswell County.
GOLD, THOMAS J.	Cleveland County.
HOLTON, CHARLES L.	Yadkin County.
HONEYCUTT, ANDREW C.	Stanly County.
JACKSON, WINSTON M.	Surry County.
JOHNSON, HUGH	Halifax County
JOHNSTON, ANDREW H.	Buncombe County.
LAMBERT, MAURICE A.	Wake County.
MALLONEE, JAMES D.	Macon County.
MATTHEWS, JOHN H.	Bertie County.
MCBRAYER, FRED W.	Rutherford County.
MEARES, THOMAS D., JR.	New Hanover County.
MEDLIN, LORENZO	Union County.
MORGAN, JOSEPH R.	Haywood County.
OLIVE, PERCY J.	Wake County.
PHILLIPS, WADE H.	Davidson County.
RICH, CHAMP F.	Durham County.
ROBERTS, EDWARD G	Buncombe County.
ROLLINS, EUGENE M.	Wake County.
ROWE, CLAUDE W.	Union County.
SIGMON, ROMULUS L.	Caldwell County.
SINCLAIR, LOGAN C.	McDowell County.
SKINNER, HARRY, JR.	Pitt County.
STEARN, DAVID P.	Halifax County.
TAYLOR, CHARLES E.	Brunswick County.
UMSTEAD, JOSEPH M.	Durham County.
WILLIAMS, ROBERT R.	Catawba County
WILLIAMS, SAMUEL C.	Montgomery County.
WILSON, HEMBREY W.	Pitt County.

CASES REPORTED IN THIS VOLUME

CASES CITED

C

M

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1904

MEEKINS v. RAILROAD CO.

(Filed 13 September, 1904.)

HEARSAY EVIDENCE—*Declarations—Witnesses—Exceptions and Objections.*

Where incompetent evidence is admitted without objection, at a subsequent trial, the witness being dead, it is not competent to prove what witness testified at former trial if objected to.

ACTION by J. C. Meekins against the Norfolk and Southern Railroad Company, heard by Judge *W. A. Hoke* and a jury, at Spring Term, 1904, of TYRRELL. From a judgment for the plaintiff the defendant appealed.

E. F. Aydlett, for the plaintiff.

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

(2)

CLARK, C. J. A witness on a former trial testified, among other matters, to hearsay—the unsworn declarations of the intestate as to the circumstances attending the injury—which, though incompetent, had been admitted on such trial because not objected to. On this trial below, the witness having died, the plaintiff offered to prove such witness' testimony on the former trial. The defendant objected to the admission of proof of that part of the testimony which was incompetent. The Judge admitted the testimony and the defendant excepted.

If the witness were living the defendant would not have been estopped to object to the incompetent part of his testimony, because it had not been objected to on the first trial. The same reason applies to proof of his testimony at the first trial, when, by reason of the witness' death, it is competent to put it in evi-

dence. *Garrett v. Weinburg,* 54 S. C., 127; 1 Rice Ev., 399. In *Chemical Co. v. Kirven,* 130 N. C., 161, there was no objection on the ground of incompetency to any part of the evidence at the former trial. The declarations of the intestate in this case should have been preserved by a deposition *de bene esse.*

For the error in admitting, over the defendant's objection, the incompetent part of the testimony given in at the former trial there must be a

New trial.

(3)

GRAVES v. RAILROAD CO.

(Filed 13 September, 1904.)

1. CONTRIBUTORY NEGLIGENCE—*Proximate Cause—Carriers.*

   Where, in an action for injuries, the evidence was conflicting, and the jury might have found that plaintiff was not guilty of contributory negligence, or that such negligence was not the proximate cause of his injury, the court should not, on the facts shown, direct an affirmative verdict as to contributory negligence.

2. CONTRIBUTORY NEGLIGENCE—*Negligence—Instructions.*

   In an action for personal injuries, the trial court should not instruct relative to contributory negligence, so as to exclude the idea of the negligence of the defendant.

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

   Where the defendant did not except to the charge, or request the court to set out the same or any part thereof in the case, it would be conclusively presumed on appeal that the charge was free from error.

ACTION by J. W. Graves against the Norfolk and Southern Railroad Company, heard by Judge *W. A. Hoke* and a jury, at January (Special) Term, 1904, of PASQUOTANK. From a judgment for the plaintiff the defendant appealed.

E. F. Aydlett, for the plaintiff.

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

WALKER, J. The plaintiff was a railway postal clerk on one of the trains of the defendant, and in his complaint he alleges that while engaged in his work in the railway car assigned to him for his use the train was stopped at a water tank

and then started very suddenly and with an unusual (4) jerk, so that he was thrown violently to the floor of the car and severely hurt. The defendant denied these allegations, and alleged that if the train was suddenly started with a jerk the plaintiff's fall was not caused thereby, and if it was so caused the plaintiff negligently contributed to his own injury, in that, being lame from the effects of paralysis, he undertook to walk from one end of the car to the other with a heavy mail sack upon his shoulder, and being thus handicapped he tripped and fell over a mail sack which he had himself carelessly left lying on the floor of the car. The jury found by their verdict, in response to the first issue, that the defendant had negligently started the train at the water tank, and there is no exception to any ruling of the Court upon this issue, which is now relied on by the defendant. Besides, we think the charge of the Court as to this issue was correct in all respects. *Nance v. R. R.*, 94 N. C., 619; *Wallace v. R. R.*, 98 N. C., 494; 2 Am. St., 346; *S. c.*, 101 N. C., 454; *Tillett v. R. R.*, 118 N. C., 1031; *Weeks v. R. R.*, 119 N. C., 740; *Whitley v. R. R.*, 122 N. C., 987; *Davis v. R. R.*, 132 N. C., 291. The Court also gave the plaintiff's requests for instructions so far as they related to the first issue. The exception to the charge, so far as it affected this issue, was therefore properly abandoned.

The real and, it seems to us, the only contention is as to the second issue, which refers to the plaintiff's contributory negligence. The jury also found this issue against the defendant, who had requested the Court to charge the jury that if the plaintiff walked across the car and stumbled over the mail sacks, which caused him to fall, and he was thereby injured, or if he carried upon his shoulders a heavy sack of mail and while thus walking across the car the train started suddenly and he fell and was injured, the jury, in either case, should find that he was guilty of continuing negligence, which contributed to his injury, and they should answer the second issue (5) "Yes." The defendant then substantially combined the said requests in a third prayer, by which the Court was asked to charge the jury that if the plaintiff, in his feeble condition, walked across the car with the heavy mail sack upon his shoulder and fell over the sack which he had left on the floor, and was hurt, he was guilty of continuing negligence which caused or contributed to his injury, and they should answer the second issue "Yes." It is stated in the case that the Court, in its charge to the jury, "reviewed the evidence, stated the contentions of the respective parties and the general law relating to negligence and contributory negligence," and that "on the

second issue the Court stated the law in regard to contributory negligence, the contentions of the parties on this issue, and then further instructed the jury on the second issue as follows: 'That where facts are admitted or established and the negligent breach of duty is clear, the Court declares whether there has or has not been contributory negligence; but where two men of fair minds could come to differing conclusions on the question, then the law directs that the jury shall find the facts and determine on the entire facts and circumstances of the case whether or not there has been contributory negligence on the part of the plaintiff; and in the case at bar the question is left to the jury to determine from the entire facts and circumstances of the case whether or not there has been contributory negligence on the part of the plaintiff.'" The defendant excepted to this charge and now complains that the Court erred in not giving its request for instructions and in giving the charge upon the second issue, which we have just quoted.

Viewing the record as we do, no error can be seen in either respect. The prayers for instructions were properly refused, because if they had been given, the jury would have been directed to find as matter of law that the plaintiff's own
(6) conduct was the proximate cause of the injury to him, whereas this was a fact to be found by the jury under instructions from the Court as to the law. Even though the plaintiff was negligent, the issue as to his contributory negligence could not have been answered against him unless the jury had found that his negligence was the proximate cause of the injury. The authorities which establish this proposition are too numerous and the principle is now too well settled to require any extended argument or reasoning to support it. *Edwards v. R. R.*, 129 N. C., 78; *Lindsay v. R. R.*, 132 N. C., 59. Before the Court can be required to give an instruction, it must be so framed as to be complete in itself, and it must not only be justified by the evidence, but it must not exclude from the consideration of the jury any testimony which is proper to be taken into account and weighed by them in arriving at a conclusion upon the issues involved, and, above all things, it must not require the jury to treat as a conclusion of law, even under the instruction of the Court, that which is in its very nature a mixed question of law and fact. If the rule is not carefully observed, the Court will often invade the province of the jury. When the facts are admitted or established by proof, and the negligent breach of duty by the defendant, or the plaintiff, as the case may be, is clear, or, in other words, when the facts found constitute the same thing as, or are precisely equivalent

in contemplation of law or in legal effect to, a breach of duty which proximately caused the injury, or when they conclusively present a case of negligence or contributory negligence which proximately caused the injury, the Court in the cases stated will and should declare whether there has been negligence or contributory negligence; but when the facts are controverted or the negligence is not so clearly shown that the Court can pronounce upon it as matter of law, the case should go to the jury with proper instruction, so that the jury may apply the law to any given state of facts as found by them. (7)

In our case it appears that the plaintiff had the full benefit of this rule in the charge of the Court. What we have said is applicable as well to the instruction to which exception was taken as to the prayers of the defendant. The Court, in its charge, left it to the jury to say, upon the facts as they might find them to be, whether the plaintiff had by his own negligence contributed to his injury. We do not understand the charge of the Court as do the learned counsel of the defendant. The second issue was not submitted to the jury upon the evidence without any instruction of the Court to guide them as to the law applicable to the facts. It is expressly said in the case that the Court stated to the jury the law as to contributory negligence, and the contention of the parties, and also the general law as to negligence, and then reviewed the evidence. As the charge is not set out and no exception was taken to it, we must assume that the Court so reviewed the evidence as to present to the jury the different phases of the case in which the plaintiff would be chargeable with contributory negligence, and explained fully to them the law of negligence and contributory negligence, so as to enable them intelligently to pass upon the issues. An elementary principle in the law of appellate proceedings is that no error of the trial court will be presumed in a court of review. If there was error it must be affirmatively shown by the appellant in the record, or it will be taken in this Court that the case proceeded regularly in the Court below and was in all respects correctly tried. If the defendant discovered any error in the charge, he should have excepted to it and requested the Court to set out in the case, as he had the right to do, so much of the charge as was considered erroneous or as was necessary to present the point, and having failed to do so, we must conclusively presume that the charge was free from error.

That part of the charge on the second issue, which is set out in the case, must be taken in connection with the (8) prior instructions of the Court as to the law and cannot be detached from them and considered as thus isolated and as an independent proposition.

Again, why should the Court have told the jury what would be contributory negligence, or stated the law in regard to it, if it was not intended that the jury should apply this law to the facts? It cannot be said that the matter was left at large and that the jury were constituted the sole judges of the facts and the law, in view of the statement in the record that the law was fully explained to them. If the charge had been fully set out we might be able to understand better the contention of the defendant, but in the present state of the record we are unable to discover any error in the instruction to which exception was taken. If it had stood by itself without proper explanation from the Court as to the law which should be their guide in passing upon the evidence, it would clearly have been error, but such is not the case.

It was contended in the able argument of the defendant's counsel that the trial Judge should not have left the question of contributory negligence to the jury as one solely for their decision, but should have collated the facts which the evidence tended to prove and told the jury whether, if they found those facts, there was or was not contributory negligence. The evidence was not all one way, but was conflicting. The plaintiff testified that his injury was caused solely by the sudden jerk of the train, while some of the defendant's witnesses testified that he had stated to them it was caused solely by his stumbling over the mail sacks on the floor, and that the defendant was not at fault. The response of the jury to the first issue, when read in connection with the finding of the Court upon that issue, shows that they found as a fact that the injury resulted from the jerk of the train. With this reference to the state
(9) of the evidence and to the finding of the jury, we come now to the consideration of the defendant's contention.

One fault we find in the defendant's prayers upon the second issue is that they all exclude the idea that the defendant was negligent at all, and we know that there can be no contributory negligence unless there has been preceding negligence on the part of the defendant. *Curtis v. R. R.*, 130 N. C., 437; *Gordon v. R. R.*, 132 N. C., 565; *Morrow v. R. R.*, 134 N. C., 92. They are all founded upon the assumption that the injury was caused solely by the plaintiff's own negligence, although it is described as continuing and contributory, and one sufficient answer to the defendant's contention as based upon the Judge's charge is that it appears by the clearest implication the Court had fully informed the jury, in that part of the charge which was not set out, as to what would constitute contributory negligence upon the facts as found by them. In this case the Court could not

have charged as the defendant contends it should have done and which it is admitted would have been quite proper in some cases, because even if the jury should have found that the plaintiff fell over the mail sacks, or was the more easily thrown by the sudden movement of the train because he had the mail sack on his shoulder, they may yet have concluded from all the facts and circumstances of the case that this was not the proximate cause of the injury, but that the jerk of the train was of sufficient force or violence by itself to produce the unfortunate result, and that it was not only the last in the sequence of events, but was the efficient and responsible cause. It is manifest from the evidence, the charge of the Court and the verdict, when considered together, that the jury rejected the defendant's contention that the plaintiff was injured by falling over the mail sacks, but even if they had found that he did so fall, it may nevertheless be that the jury, under instructions of the Court, further found that, in view of the (10) plaintiff's situation and surroundings and under all the facts and circumstances of the case, it was not negligence to leave the sacks on the floor, or that a prudent man, in the exercise of ordinary care, would not have anticipated such a conjunction of circumstances as made it dangerous to leave them there.

There are many considerations which might have led the jury to the conclusion, upon the facts as they found them, that the plaintiff was not guilty of contributory negligence. This is not a case, therefore, in which it was required that the Court should direct an affirmative response as to contributory negligence upon a given state of facts if found by the jury, although there may have been evidence of those facts, as proximate cause, which is an essential element of an affirmative finding upon the second issue, could not be thus passed upon by the Judge in a case like this. Concurring negligence of a plaintiff may undoubtedly bar his recovery, as contended by the defendant's counsel (*Lea v. R. R.*, 129 N. C., 459), but we do not think that such a case is now presented as permits the application of that rule of law. If the facts, when admitted, or established by proof and found by the jury, lead to but one legal conclusion as to the negligence of the defendant, or as to the negligence of the plaintiff, whether the latter's negligence be concurring or otherwise contributory, it is proper for the Court to instruct the jury how to answer the issue, but not otherwise. *House v. R. R.*, 131 N. C., 103; *Haltom v. R. R.*, 127 N. C., 257.

We do not think the Court, in its charge, violated any principle laid down in *Hinshaw v. R. R.*, 118 N. C., 1054; *Eller-*

bee v. R. R., 118 N. C., 1027; *Russell v. R. R.*, 118 N. C., 1112; or *McCracken v. Smathers*, 119 N. C., 617, which were cited by the defendant's counsel in argument and urged upon
(11) our attention, but on the contrary it is sustained by those cases and by *Styles v. R. R.*, 118 N. C., 1091, and *Coley v. R. R.*, 129 N. C., 411, 57 L. R. A., 817.

In the trial below the defendant had the full benefit of every principle of law applicable to the case and to which it was justly entitled.

No error.

Cited: Brewster v. Elizabeth City, 137 N. C., 395; *Ramsbottom v. R. R.*, 138 N. C., 41; *Miller v. R. R.*, 144 N. C., 554; *S. v. Lance*, 149 N. C., 554.

COPLAND v. WIRELESS TELEGRAPH CO.

(Filed 13 September, 1904.)

1. AGENCY—*Process—Corporations—The Code, Sec. 217.*

   The authority to receive money is not the exclusive test of a local agent upon whom service of process may be made.

2. ACCOUNTS—*Jurisdiction—Justices of the Peace.*

   Where the items of an account are incurred under different contracts, an action may be brought on each item before a justice of the peace, the separate items being less than $200.

3. ACCOUNTS—*Actions—Jurisdiction.*

   The rendering of a statement of an account for the entire amount due under different contracts does not prevent an action on each item if the account as rendered is objected to.

4. DOCUMENTARY EVIDENCE—*Agency—Account.*

   The letter of a corporation objecting to an account rendered is competent to show such objection by the corporation.

ACTION by J. P. Copland against the American De Forest Wireless Telegraph Company, heard by Judge *George H. Brown* and a jury, at May Term, 1904, of DARE. From a judgment for the plaintiff the defendant appealed.

(12) *D. M. Stringfield* and *B. G. Crisp*, for the plaintiff.
Ward & Thompson, for the defendant.

CLARK, C. J. This action against a "wireless telegraph company," which now makes its first appearance in this Court,

proves the oft-repeated observation that every phase of life, the customs, pursuits and progress of a people, soon or late, are photographed in the records of its Courts, as flies are preserved in amber and as the rays of the sun are imprisoned in the diamond.

The summons was served upon the local operator who the Court found as a fact was in sole charge of the defendant's property at that point and in control of its business, and has received messages from ships at sea for pay, though the office was not yet open for general business. This made him "its local agent" under The Code, sec. 217. The words in the proviso, "any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any other State or government shall be deemed a local agent for the purposes of this section," are not intended to limit service to such class of agents, but to extend the meaning of the word "agent" to embrace them. The authority to receive money, of itself, constitutes the one so authorized a local agent, but this is not the exclusive test of agency.

The items of the plaintiff's claim having been incurred under different contracts and at different times, the plaintiff could maintain a separate action for the amount due under each contract, and if under two hundred dollars, before a justice of the peace, though the aggregate be in excess of that sum. It is optional with the creditor in such cases to join the amounts and bring an action therefor, or upon each item separately. *Fort v. Penny,* 122 N. C., 230; *Magruder v. Randolph,* 77 N. C., 79; *Boyle v. Robbins,* 71 N. C., 130; *Caldwell v. Beatty,* 69 N. C., 365. The defendant contends that the plaintiff, having rendered a statement for the entire amount due, is bound (13) by such statement and cannot afterwards elect to sue upon the items separately. This is true when the account rendered is accepted or there is no dissent within a reasonable time, for this amounts to a new contract to pay the amount or balance therein stated to be due. *Hawkins v. Long,* 74 N. C., 781. But here the defendant "objected to such statement" (*Marks v. Ballance,* 113 N. C., 29), and the only contract between the parties is upon the original transactions, and the plaintiff could sue upon each separately.

The letter from the company objecting to the correctness of the account rendered was competent. It was not the admission of an agent as to a past transaction.

No error.

Cited: Kelly v. Lefaiver, 144 N. C., 6.

IN RE PETERSON.

(Filed 20 September, 1904.)

1. ARGUMENT OF COUNSEL—*Opening and Conclusion—Superior Courts, Rules 3, 6.*

The opening and conclusion of an argument in the Superior Court is discretionary with the trial court, except in the cases mentioned in Rule 3, Superior Court Rules.

2. WITNESSES—*Evidence—The Code, Sec. 590—Wills.*

On an issue of *devisavit vel non*, it is not competent to show by the caveators a conversation had with the testator, though it was in the presence of a person interested in the action at the time of the trial, but not at the time of the conversation.

3. EVIDENCE—*Wills.*

On an issue of *devisavit vel non*, it is competent to show what was said by the devisee or legatee when notified of the execution of the will.

4. EXPERTS—*Evidence—Physicians and Surgeons—Wills.*

On an issue of *devisavit vel non*, it is competent to ask a medical expert whether upon a given state of facts the testator was competent to make the will.

5. WITNESSES—*Experts—Physicians and Surgeons—Wills.*

On an issue of *devisavit vel non*, the principle of law which attaches peculiar importance to the opinion of medical men upon questions of mental capacity does not apply to the opinion of expert physicians expressed upon hypothetical questions.

6. WILLS—*Undue Influence.*

The fact that a man wills his estate to his wife, excluding his children, his father and other relatives, does not tend to show mental incapacity or undue influence.

(14) THIS was an issue of *devisavit vel non*, heard by Judge *W. A. Hoke* and a jury, at April Term, 1904, of BEAUFORT.

The will of E. R. Peterson was executed on 25 August, 1898, in which he devised and bequeathed to his wife, Hattie A. Peterson, his entire real and personal estate, appointing her executrix thereto. He died on 6 September of the same year, and the will was admitted to probate in the Superior Court on 10 September. The testator left no children. On 2 January, 1899, the said Hattie A. Peterson executed her last will and testament, in which she devised and bequeathed unto Mary E. Raynor, now Mrs. Ira M. Hardy, her entire real and personal estate, appointing the said Mary E. her executrix, and the will was duly admitted to probate on 6 May, 1901.

On 17 July, 1901, B. F. Peterson and Mrs. Lucy A. Kern

filed a *caveat* to the will of E. R. Peterson, alleging that the said "paper writing" was not the last will and testament of E. R. Peterson, for that "at the time he signed the same he did not have sufficient mental power and capacity to make and execute a valid will," and that the execution thereof was procured by the "importunity, coercion and undue influence of (15) the said Hattie A. Peterson and others." An issue was thereupon made up and transferred to the Superior Court for trial. The jury having responded to the issue in the negative, judgment was rendered accordingly, and the propounder, having noted exceptions to the rulings and charge of the Court below, appealed.

Rodman & Rodman, Bragaw & Ward and *G. W. Ward,* for the propounder.

Small & McLean, for the caveator.

CONNOR, J. The propounder noted an exception to the ruling of his Honor in regard to the opening and conclusion of the argument. This being a matter resting in the sound discretion of the Court except in the cases mentioned in rule 3, the exception cannot be sustained. Rule 6, Clark's Code, 953. In the view which we take of the case, it is not necessary to pass upon all of the exceptions, as many of them may not arise upon another trial. Exceptions numbered 8 to 15 relate to his Honor's ruling in regard to the competency of Mrs. Kern and B. F. Peterson to testify to alleged conversations with the testator, E. R. Peterson, and his wife, Hattie A. Peterson, which were objected to under section 590 of The Code. It is alleged that these conversations were had in the presence of Mrs. Hardy who was then a young girl of fourteen to sixteen years of age, and is now the executrix of Mrs. Peterson. Mrs. Kern testified that she came to Washington, the home of her brother, E. R. Peterson, in May, 1898, to see her brother, because she heard he was ill; that Miss Baynor, now Mrs. Hardy, was a very distant relative of her brother, and first cousin to Mrs. Peterson; that she did not stop at her brother's house on her visit to him during his last illness; that she had always stopped there before. (16)

To the following testimony the propounder objected, the objection was overruled and exception noted: "Mrs. Peterson told me in the presence and hearing of Miss Baynor that she did not want me at the house, and gave as her excuse that it put too much on her servant." She also testified, under objection, to other conversations with Mrs. Peterson in the pres-

ence of Mrs. Hardy and Mrs. Waters, to all of which the propounder excepted.

This testimony comes within the principle decided in *Pepper v. Broughton,* 80 N. C., 251, and is inadmissible, unless, as contended by the caveators, it is made competent by the decisions in *Peacock v. Stott,* 90 N. C., 518, and *Johnson v. Townsend,* 117 N. C., 338. *Pepper v. Broughton* was an issue of *devisavit vel non,* involving the validity of the will of one Lougee. The caveators showed by one Harris a declaration of the testator regarding the treatment of himself by the husband of the propounder. For the purpose of repelling this testimony she offered to prove by her husband that he "never refused to speak to Lougee," being the treatment complained of. This Court held that the witness was incompetent. DILLARD, J., says: "In this case Broughton is received to deny that he refused to speak to Lougee, and this was on his oath, and to this oath the other party to the action, Pepper, could oppose nothing except the statement in conversation with the supposed testator. It matters not whether the object of the testimony was to prove a speaking affirmatively or negatively; it was to prove something material between the witness and the deceased, about which the deceased could have testified if alive, and it was unjust to allow Broughton, by his evidence as to this point, to have any influence to establish one of the wills rather than the other, when Lougee could not be heard in reply." Here the allegation of the caveators is that the execution of the will of E. R.
(17) Peterson was the result of "importunity, coercion and undue influence" of Hattie A. Peterson and others. B. F. Peterson and Mrs. Kern, the caveators, proposed to testify to alleged declarations of the testator, E. R. Peterson, and Mrs. Hattie A. Peterson, the devisee and legatee in the will, tending to establish their contentions. Mrs. Peterson is dead, and is represented by Mrs. Hardy, her executrix and the beneficiary under her will. The caveators contend that the proposed testimony is competent under the exception made to the general rule in *Peacock v. Stott, supra.* We assume that his Honor concurred in that view. The witnesses testified that Mrs. Hardy was present at some of the alleged conversations, and Mrs. Waters at others; that Mrs. Hardy was at that time between fourteen and sixteen years of age. It is not alleged that she was a party to, or took any part in, or was in any way interested in the conversations or the subject matter of them. In *Peacock v. Stott* a contract was alleged to have been made between one Alvin Peacock, Wyatt Earp, Redding Richardson and A. J. Taylor. The plaintiffs offered to prove the terms of

the contract by Peacock, Richardson being dead, the other parties living. In response to an objection to the competency of the witness under section 590. SMITH, C. J., says: "The conversation sought to be elicited by the first interrogatory was with three persons, and to show their contract with the witness, so that these two living witnesses to the fact to which the testimony is directed could give their version of it, and the evidence of the witness would not be beyond the reach of correction or contradiction, and the reason for the exclusion would not exist. As, then, the testimony is not within the words of the excluding proviso, nor the reason of the rule that it prescribes, we are of opinion that it ought to have been admitted." In *Johnson v. Townsend, supra.* MONTGOMERY, J., says: "We think the conversation—transaction—which the witness offered to prove by his own testimony was not strictly a conversation with the intestate, but was one held with him and two others, his sisters the plaintiffs in this action who were associated with him in the transaction." CLARK, J., in *Baker v. Blake,* 120 N. C., 177, points out clearly the principle upon which these cases are based: "In those cases the personal transaction was had with two or more persons associated in interest, and it was held that the death of one of them does not prevent such transactions being given in evidence when the associates of the decedent are living and parties to the action." This case is directly in point. It cannot be that because at the time of the alleged declarations of Mrs. Peterson, a young girl of sixteen years of age, having no interest in the making of Mr. Peterson's will or the disposition of his property, was present, the door is opened, after Mrs. Peterson's death, for the admission of the testimony of persons as to alleged conversations with Mr. and Mrs. Peterson, who are so deeply interested in invalidating the will. At the time of the alleged conversations Mrs. Hardy had no interest in the disposition of Mr. Peterson's property. We think that the testimony objected to was incompetent, and the exceptions relating thereto should be sustained. Of course any declarations of Mrs. Peterson relevant to the issue are competent to be proved by witnesses who do not come within the prohibition of section 590. Dr. J. C. Rodman, the physician of Mr. Peterson prior to and at the time of his death, and who was also a witness to the will, testified as follows: "I told him that you have told me that you have made a will, but I think you had perhaps better have it drown up by a lawyer. I told Mrs. Peterson her husband had made a will in her favor, but advised her to have a lawyer draw it up for her protection." The propounder proposed to show by this witness that

(18)

at the time he spoke to Mrs. Peterson about her husband's will she said that she would not speak to him herself and
(19) would not let the doctor do so; that she would rather let the whole of his property go than annoy him about it. To this the caveators objected. The objection was sustained and constitutes the basis of exception No. 20. It was charged and testimony introduced for the purpose of showing that she, by importunity and undue influence, procured the execution of the will. We think that in rebuttal of such testimony it was competent to show her acts and declarations when advised to have another will written. At that time there was no suggestion of any controversy in regard to her husband's will. He had, it seems, made a will in her favor. Dr. Rodman, thinking it safe to prevent trouble in regard to the form of the will—the description of the property—made a suggestion that it would be well to have it drawn by a lawyer. Her conduct and declaration, showing the state of her mind and feeling upon the subject, were certainly relevant, and we can see no objection to the mode of proof. Dr. Rodman was one of the witnesses to the will, but had no interest in the disposition of the property. The objection should be sustained.

E. R. Peterson, the alleged testator, was sick for several months prior to the execution of the will and his death. Dr. Rodman testified that he, as his physician, took him to Baltimore in April, 1898, for the purpose of an operation, and told him that there was an element of danger in such operations, and asked him if his business affairs were arranged. He told the witness that he had written his will and left everything to his wife. The operation was performed. He returned home. The witness usually saw him from one to three times a day. Some days he did not see him at all. He gave him morphine occasionally. He was always rational until the night before he died. In the latter part of August the witness told him that he was a sick man, and could not say that he would get well. He told him that he (Peterson) had told the witness that he had a will, but he thought perhaps that he had bet-
(20) ter have it drawn up by a lawyer. Peterson said that he would think about it next day. He asked the witness if William B. Rodman (a lawyer) was in town, and the witness told him no. At the witness' suggestion he sent for Mr. Bragaw (a lawyer), and Mr. Randolph came with him. Mrs. Peterson went out of the room. Bragaw asked him how he wanted his property left, and he said he wished it left to his wife. Bragaw then drew the will and Peterson signed it, and the witness, together with Randolph, witnessed it in presence of Peterson

and of each other. Both saw him sign it. Bragaw told him that he had better specify some of his property and put the remainder in the residuary clause, which was done. After it was drawn and read, he asked if everything was left to his wife, and Mr. Bragaw said yes, and he signed the will. His mind was all right and he knew what he was doing. Dr. Rodman testified on cross-examination that he "was consulted by Peterson in December, 1897, or January, 1898. As early as March or April, 1898, he became satisfied that it was cancer and that it was incurable. He took him to Baltimore, where an operation was performed, and it disclosed cancer. It had no beneficial effect except to diagnose his disease. The malignant disease first started in the gall bladder, then extended to the liver, which also became the seat of the disease. The tumors or nodules on the gall bladder presented the appearance of a bunch of grapes. The bile duct was also examined during the operation and was involved in the malignant disease. After his return from Baltimore he continued to grow worse, and his extreme jaundice continued and deepened in color. His falling off and emaciation also continued, so that at the time of his death he was a mere skeleton, weighing probably eighty pounds. This was his condition for some weeks prior to his death. The function of the liver is to secrete bile. The gall bladder acts as a reservoir to hold the bile after its secretion by the liver, and the bile duct conveys the bile from the gall bladder into the in- (21) testines. Bile is necessary to the assimilation and digestion of food, and without that death ultimately ensues. The result of the diseased condition of these organs was to obstruct the passage of bile into the intestines, and it produced jaundice, intestinal indigestion, and helped to starve him, but the malignancy of the disease had more to do with his emaciation than the jaundice. The blood became clogged with impurities and contained bile. Its presence in the blood produced jaundice. It is called bile poison. It impoverishes the blood. One result of bile poison of the blood is to produce in some cases languor, drowsiness, unconsciousness, coma, and even death. The brain is nourished and fed by the blood, and if the blood is poisoned and impoverished it is bound to have some effect on the brain, in my opinion, although Mr. Peterson's brain was not impaired."

It was admitted that Dr. Rodman was an expert physician.

Dr. P. A. Nicholson was introduced by the propounder and testified that he was a practicing physician; knew Mr. Peterson and saw him during his last sickness; that the last visit he made him was in the third week in August, when he saw him

about half an hour. He talked sensibly and reasonably; never saw him any other way; he knew Peterson had mind enough to make disposition of the property. On cross-examination he said the mind of Peterson was not impaired to any degree that he could discover. He was a very isck man, and the witness knew that he would never get up again, but it was not preposterous for him to hope to get well; he had cancer of the gall duct, and that class of patients are always very sanguine.

The caveators introduced Dr. John G. Blount, who was admitted to be an expert physician. He testified in regard to the function of the liver, etc., to which there was no objection. He was asked the following question: "If the jury should
(22) find from the evidence that Peterson was in the physical condition testified to by Dr. Rodman, and should further find from the evidence that it was accompanied by flightiness of the mind, incoherency of speech, impairment of memory and a lack of continuous power of thought, together with a weakened and emaciated condition of his body, would he, in your opinion as a physician, during the last two or three weeks of his life, have sufficient mental capacity to know what property he had, to whom he was giving it, and how he was giving it, in case he undertook to make a disposition of it, assuming that the jury should find the facts stated in this question to be established by the evidence?" To this question the propounder objected; the objection was overruled and the propounder excepted. He answered that in his judgmnt he would not.

The caveators introduced Dr. S. T. Nicholson, whose testimony was substantially like that of Dr. Blount. The exception to the testimony cannot be sustained. These witnesses were examined as experts; they did not see the alleged testator, and their opinions were expressed upon hypothetical questions, the form of which has been approved by this Court. A large number of witnesses were examined by the propounder and caveators in regard to the mental condition of the alleged testator, in which there was a wide difference of opinion expressed. Mr. Bragaw and Mr. Randolph corroborated the testimony of Dr. Rodman.

A large number of special instructions were presented to the Court by the propounder and the caveators, some of which were given, several were modified and a number refused, to which exceptions were noted. We think it necessary to notice only two of the exceptions to the charge.

(23) At the request of the caveators, the Court instructed the jury as follows: "That the caveators, the brother and sister of E. R. Peterson, have offered witnesses, Dr. J. G.

Blount and Dr. S. T. Nicholson, who are termed medical experts; that these witnesses have testified that in the latter stages of the disease, from which Peterson was suffering and died, they would expect to find certain symptoms and conditions, among them the loss of memory, impairment of mind, inability to fix the attention, want of coherency, drowsiness and stupor, lack of will power and resistance; and these medical experts further testified that if these conditions and symptoms did exist, then, in their opinion, the said Peterson did not have the capacity to make a will. Now the Court instructs you that the law attaches peculiar importance to the opinion of medical men upon the question of mental capacity when they testify to mental capacity on matters within the domain of their professional experience and training, as by study and experience in the practice of their profession they become experts in the matter of bodily and mental ailments." The propounder excepted to this instruction, for that it selects two of the physicians who were examined as experts who never saw the alleged testator while he was sick, and who testify only upon the hypothesis that certain physical conditions accompanied by certain mental conditions, are found by the jury to exist, and ignores the testimony of two other physicians who express opinions based upon actual personal knowledge of the condition of Peterson at and near the time of making the will. While it may be that upon a critical view of the language of his Honor it is capable of this construction, it will be observed that his Honor adopted the language of the prayer of the caveators, which was evidently drawn with a view of presenting to the jury the principle announced as to the weight to be given to the opinions of medical men in regard to mental condition. Dr. Rodman and Dr. T. A. Nicholson testified as to the actual conditions, giving their opinions deduced therefrom, while Dr. Blount and Dr. S. T. Nicholson testified as experts only. We are quite sure (24) that his Honor did not intend the jury to understand that the law attached more importance to the opinion of the medical witnesses who had never seen the alleged testator than it did to the opinion of those who had seen, and one of them attended him in his last illness. His evident purpose was to announce a general principle which would apply to all of the medical witnesses. However this may be, the propounder presents by the exception a more serious question: Is the principle, as applied by his Honor to the testimony of Dr. Blount and Dr. P. A. Nicholson, correct? Does it apply to the testimony of witnesses who have no personal knowledge or observation upon which their opinions are based? In *Flynt v. Boden-*

hamer, 80 N. C., 205, a careful examination of the facts shows that the matter in issue was the mental condition of one Speace, who had executed the note sued upon. Dr. Jones testified that he had been a practicing physician for thirty years and "attended the deceased in his last illness." He explained the nature of his disease and its effect upon the mental faculties, expressing the opinion that he was incapacitated from executing the note. The Court said to the jury: "The law likewise attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity." * * * SMITH, C. J., discussing an exception to this instruction, said: "But the opinion of a well-instructed and experienced medical man upon a matter within the scope of his profession and based on personal observation and knowledge, is and ought to be carefully considered and weighed by the jury in rendering their verdict." In conclusion, the learned Chief Justice says that "It cannot admit of question that the opinion of the medical expert who attended the deceased during his last fatal illness and must have become familiar with his disease and its effects upon both body and mind, should have greater weight and possess a higher value in determin-
(25) ing his mental as well as physical condition than the opinion of an unprofessional man." While the distinction sought to be established by the propounder is not clearly pointed out, the language of the Court is confined to cases where the witness had personal knowledge and observation, and is fully sustained by the text-books. In discussing this question the author of Rogers Expert Testimony, p. 476, sec. 204, says: "We have seen in the preceding section that courts have asserted that the opinions of physicians on questions of mental capacity are entitled to greater weight than those of ordinary witnesses. An examination of those cases, however, shows that the opinions of medical men are considered entitled to greater weight than the opinions of nonprofessional persons, provided the physicians have had personal observation and knowledge of the person whose capacity is the matter in issue. The cases which follow show that if the medical men have not had such personal observation and knowledge of the individual, their testimony has not been considered as entitled to greater weight than is the testimony of ordinary witnesses who have personally observed and known the individual in question.

In *Goodwin v. State,* 96 Ind., 550, *Elliott,* J., says: "It would have been error for the Court to tell the jury that the expert witnesses, speaking merely as to matters of opinion and basing their opinions on hypothetical questions, were entitled

to more credit than witnesses who had knowledge of facts gathered from personal observation and who based their opinions on actual facts and not supposed cases. As both kinds of evidence are competent, the jury are charged with the weight and effect of the evidence in each particular case, and the Court has no right to charge them to give preference to one class or the other." Where the expert states precise facts in science as ascertained or settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the (26) probable inference from the facts stated, his opinion is of less importance because it states only the probability. Rogers, *supra,* p. 484; *S. v. McCullock* (Iowa), 55 L. R. A., 378, 89 Am. St., 382. Several eminent judges and authors express the opinion that the rule, even as limited, is not sound and should be rejected. Certainly, in view of the wide divergence and often irreconcilable opinions expressed by medical experts in respect to mental capacity upon personal knowledge of conditions and hypothetical questions, the principle should not be extended beyond the limits herein prescribed. We have a striking illustration in this case of the danger of undertaking to prescribe any rule for weighing the testimony otherwise than by the opportunities for knowing the facts upon which their opinions are based. Of the four intelligent physicians examined, two express positive opinions that the testator had sufficient mental capacity to make the will, and two with equal confidence express opinions exactly to the contrary. It would seem that the safer rule would be to permit the entire evidence to go to the jury to be weighed and considered by them in the light of all the other evidence upon the question. The exception of the propounder to his Honor's instruction must be sustained. Wharton Evidence (2 Ed.), sec. 454; Taylor Evidence, sec. 58; *Kempsey v. McGinnis,* 21 Mich., 123.

His Honor, in response to the prayer of the caveators, instructed the jury that "if E. R. Peterson had died intestate, and having died without children, his widow would have been entitled to one-half of the personal estate and to dower in his real estate, and his brother and sister would have been entitled to the other one-half of his personal estate, and also to his real estate subject to the widow's right of dower. The caveators insist that the fact that E. R. Peterson, by the said paper-writing, entirely excluded his blood from any share in his estate and gave the whole thereof to his widow, is a (27) circumstance, to be considered, tending to show lack of mental capacity to make a will, and the Court so charges you."

His Honor repeated this language, concluding: "Is a circumstance to be considered on the question of undue influence exerted upon him to make the alleged will?" To both these instructions the propounder excepted. Mr. Underhill, in his excellent work on wills, says: "The fact that a man bequeaths his estate to his wife, excluding his children, his father and other relatives, is absolutely immaterial upon the question of undue influence. The silent influence of affection and respect augmented by the tender and kindly attention of a faithful wife cannot be regarded as in any sense undue influence." Underhill Wills, 212. An examination of the cases cited by the author sustains the language quoted. In the light of the experience and observation of men of the best judgment and soundest minds, we can see nothing in the fact that this man gave his estate, the produce of their joint industry and economy, to his wife, tending to show mental incapacity or undue influence. We do not think it tended to show either undue influence or mental incapacity. It seems in the light of the testimony the most natural and fitting expression of affection and solicitude of the testator. His acts and declarations and his letters written to her are all consistent with the disposition which he made of his estate. The exception should be sustained.

While we do not deem it necessary to pass upon the exception to the refusal of the Judge to dismiss the proceeding for that there was no evidence of undue influence, we think it proper to say that when the caveators rested their case there was, in our opinion, no such evidence. The propounder, however, waived this exception by introducing evidence. For the reasons pointed out, there must be a

New trial.

(28) WALKER, J., concurring in the result. I concur fully in the decision of the Court in this case that there should be a new trial, and for the reasons so clearly and conclusively stated by Justice CONNOR; but, as I do not think it is necessary to pass upon the competency of the question which the caveator's counsel asked the witness, Dr. John G. Blount, as to the mental capacity of the testator, the appeal having been disposed of by other rulings, I am unwilling to commit myself to the correctness of the decision upon the question so put to the medical experts. I prefer to consider and decide that matter when it is necessary to do so, and after a careful study and examination of it in the light of the precedents. As at present advised, I am strongly inclined to the opinion that the question was incompetent, as the witness was called upon to give an answer

which, if it was acted upon by the jury, would have decided the issue for them instead of leaving the ultimate fact of mental capacity, which was the very substance of the issue, to be found by the jury upon a review of the evidence, and so that the conclusion when reached would have been that of the jury and not the mere adoption of the opinion of the witness. A witness may testify to the mental condition and the mental and physical characteristics of the person whose mental capacity is in question, but it seems to me that he should not be permitted to give an opinion as to whether he has or has not sufficient mental capacity to execute a will or a deed, for this is a mixed question of law and fact, and, besides, the question in its scope is as broad as the issue itself.

As I understand the law in regard to expert and opinion evidence, such a question is forbidden because the witness must pronounce upon the law, and, besides, in answering the question he would be exercising a function which, under our system of jurisprudence, belongs exclusively to the jury. He passes beyond the limit prescribed for such evidence and enters the domain of fact and law instead of opinion merely. (29) While I have had little time to investigate the subject, it seems to me that the views which I have expressed are fully sustained by the cases of *Smith v. Smith,* 117 N. C., 326, and *Clary v. Clary,* 24 N. C., 78. In the first of those cases the witness testified that "no power on earth could influence the vendor," whose deed was alleged to have been procured by undue influence. The Court held this to be incompetent as the equivalent of an opinion upon the very fact in issue, and as comprehensive as the issue itself, citing *Clary v. Clary, supra.* The cases of *Smith v. Smith* and *Clary v. Clary,* and also *McDougald v. McLean,* 60 N. C., 120, are in perfect harmony, when they are considered with reference to the special facts of each of them, and they do not, in my opinion, sustain the decision of the Court upon a question similar to the one we are now discussing, in *Whitaker v. Hamilton,* 126 N. C., 465. In *Clary v. Clary* the witness was not required to express his opinion as to whether the vendor had sufficient mental capacity to execute the bill of sale, but his testimony related solely to her general mental condition, and his answer did not by any means necessarily imply that she did not have mental capacity sufficient for that purpose. Weakness of mind merely is not the same as mental incapacity to execute an instrument. It may be some evidence to show the existence of the latter, but does not exclude the idea of its nonexistence. What was said by Judge GASTON in *Clary v. Clary* must be considered in relation to the

particular question asked the witness in that case, and had reference to mental condition or soundness and not to mental capacity, which is quite a different thing, as shown in Rogers Expert Testimony (2 Ed.), p. 164, sec. 69, where it is said that the "weight of authority is opposed to allowing the witness to express an opinion as to whether an individual had the mental capacity to dispose of his property by will or deed."

(30) In Lawson Expert and Opinion Evidence (2 Ed.), p. 155, the rule is thus stated: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a will. Under our system that question was addressed to the jury. All evidence which tended to shed light on his mental status, the clearness and soundness of his intellectual powers, should have gone before them. This being done, however, the witness should not have been made to invade the province of the jury." See, also, *Walker v. Walker,* 34 Ala., 470; *In re Arnold,* 14 Hun., 525; *Reg. v. Richards,* Fos. & Fin., 87, and *Fairchild v. Bascom,* 35 Vt., 416, citing *Crowell v. Kirk,* 14 N. C., 356, in which Judge RUFFIN says: "As far as we perceive the meaning (of the question) we suppose the attempt was to get the opinion of the witness, whether the supposed testator had capacity *to make a will.* * * * If this was the purpose of the inquiry it was properly refused, for the witness is not to decide what constitutes mental capacity or a disposing mind and memory, that being a matter of legal definition. He might state the degree of intelligence or imbecility in the best way he could, so as to impart to the Court and jury the knowledge of his meaning, that they might ascertain what was the state of the testator's mind and memory; but whether that was adequate to the disposition of his property by will did not rest in the opinion of the witness." Judge DANIEL, who wrote the opinion of the Court in *Crowell v. Kirk,* says, at page 357: "The defendant's counsel asked his own witness, Harris, if in his opinion the testator was capable of making a will; an objection being made, the witness was not permitted to answer the question. I do not think that the Judge erred in this. The opinions of witnesses in England are confined to persons of science, art or skill in some par-

(31) ticular branch of business, and they have to give the reasons upon which their opinions are founded. All other witnesses are to state the facts, and the jury make up their opinions on the facts thus deposed to. In this country the courts have said that the law placed the subscribing witness

about the testator to ascertain and judge of his capacity. But no case has gone the length of permitting the evidence of opinion offered in this case to go to the jury." The case last cited, it seems, is directly in point and explains what is said in *Clary v. Clary,* so as to reconcile that case with the authorities.

But the evidence of the witness in this case is more objectionable than would be that of an expert who had personal knowledge of the facts upon which he bases his opinion, and the latter is, as we have seen, incompetent to give such testimony. The witnesses, Dr. Blount and Dr. S. T. Nicholson, whose evidence was substantially the same, were permitted to testify that if the jury found the testator manifested certain symptoms and conditions stated in the hypothetical question, he did not have mental capacity sufficient to make a will. Medical experts, who have never seen the testator or observed his symptoms or general mental and physical condition and characteristics, testify not as to the effect which the disease of which these symptoms are indicative was likely to have upon the testator's mind or memory or upon his general mental or physical condition, which are strictly matters of opinion and proper subjects of expert testimony, but they depose to a fact, upon evidence at second hand, and superadd their opinion upon the law applicable to those facts. This, it seems to me, is a clear violation of the rule relating to such testimony.

Cited: Smith v. Moore, 142 N. C., 285; *Taylor v. Security Co.,* 145 N. C., 395.

---

(32)

BROWN v. COGDELL.

(Filed 20 September, 1904.)

1. APPEAL—*Removal of Causes—Personal Property.*

   An appeal may be taken from the refusal of a motion to remove an action for the recovery of personal property, and such removal is a matter of right.

2. VENUE—*Claim and Delivery—Personal Property—The Code, Sec. 190, Subsec. 4—Laws 1889, Ch. 219.*

   The venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to.

ACTION by James Brown against Samuel Cogdell, heard by Judge *T. A. McNeill* at April Term, 1904, of PITT. From a judgment for the plaintiff the defendant appealed.

Jarvis & Blow for the plaintiff.
Grimes & Grimes for the defendant.

CLARK, C. J. This is an action for the recovery of personal property. The plaintiff is a resident of Pitt County and both of the defendants reside in Beaufort County, where, also, the property seized and the subject of the action was situated.

The appeal from the refusal of the defendant's motion to remove the cause to Beaufort County was not premature. *Connor v. Dillard,* 129 N. C., 50; *Roberts v. Connor,* 125 N. C., 45; *Alliance v. Murrill,* 119 N. C., 124. Actions for the recovery of personal property are properly triable in the county in which such property is situated. The Code, sec. 190 (4), as amended by Laws 1889, ch. 219. This is true, whether
(33) the ancillary remedy of claim and delivery is resorted to or not, since the latter is simply to obtain possession of the property before judgment or security for its being forthcoming if the plaintiff obtains judgment.

In *Smithdeal v. Wilkinson,* 100 N. C., 52, it was held that the requirement, The Code, sec. 190 (4), that an action for "the recovery of personal property" should be tried in the county where the property is situated, was restricted to personal property, "distrained for any cause." Thereupon the act of 1889, chapter 219, struck out the restriction and made the venue for the "recovery of personal property" in all cases the county where the property is situated.

The recovery of personal property being the chief object of this action, and not merely an incidental matter (*Woodard v. Sauls,* 134 N. C., 274), and the motion to remove having been made "in writing" and in apt time, *i. e.,* "before the time of answering" expired, the removal was a matter of right, not of discretion. *Mfg. Co. v. Brower,* 105 N. C., 440; *Jones v. Statesville,* 97 N. C., 86. In refusing the motion to remove there was

Error.

(34)

HALL v. HOLLOMAN.

(Filed 20 September, 1904.)

WITNESSES—*Evidence—Husband and Wife—The Code, Sec. 590.*

Where the husband of an administratrix, not being a party to the action and having no interest in the event thereof, testified, it did not render admissible testimony of the defendant as to transactions between the deceased and the defendant.

ACTION by Susette Hall against Robert Holloman, heard by Judge *W. B. Councill* and a jury, at February Term, 1904, of HERTFORD. From a judgment for the defendant the plaintiff appealed.

Winborne & Lawrence and *F. D. Winston* for the plaintiff.
George Cowper, D. C. Barnes and *L. L. Smith* for the defendant.

CLARK, C. J. It is alleged in the complaint, and not denied in the answer, that Emma Butler, the plaintiff's intestate, an ignorant colored woman, held two notes executed by the defendant—one for $1,000 and the other for $700. The plaintiff alleges that the said Emma carried the notes to the defendant to calculate the amount due on the same and for payment; that the defendant, claiming to be busy, told her he would make the calculation and come down and pay her, retaining the notes, but that he has never done so. The defendant denies this, and contends that he paid off the notes in full, and, having thus obtained possession of the notes, he has since destroyed them.

Two witnesses—Keen and Hall, the latter the husband of the plaintiff administratrix and not a party to the action—testified to the conversation between the deceased and the defendant at the time the notes were left with the defendant. (35) Thereupon, the court permitted the defendant himself to testify as to the conversation between himself and the deceased, over the plaintiff's exception. In this there was error. The Code removes generally from witnesses the common law disability by reason of interest, but excepts (section 590) "parties * * * testifying in their own behalf concerning a personal transaction * * * between the witness and the deceased." * * * See *Bunn v. Todd,* 107 N. C., 266, where section 590 is analyzed.

There is this exception to the disqualification still retained by section 590 in the above cases: "Except where the executor,

administrator, etc., is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." Death having closed the mouth of the deceased, the law (as heretofore) closes the mouth of the other, except only where the personal representative of the deceased opens the matter by testifying himself or putting in the testimony of the deceased. This means the testimony of the *deceased* as his deposition *de bene esse,* or evidence of his testimony at a former trial, and not merely testimony *for the plaintiff* by competent witnesses, as in this case. Else the statute, instead of the words used, would have simply made the defendant competent "whenever any evidence of the personal transaction * * * is introduced in behalf of the plaintiff administrator or executor." On the contrary, to make the defendant competent, either the plaintiff executor (or administrator) must himself testify as to the transaction, or he must introduce the testimony of the deceased—not, as here, the testimony of disinterested and therefore competent witnesses—to prove the transaction.

(36) This exact point was decided in *McRae v. Malloy,* 90 N. C., 521, and it was held that third persons present at such conversations "may be examined by either party to the action, but the disqualifications of a party to the cause is not removed thereby, as the statute makes no exception where others were present." To the same purport is *Sumner v. Candler,* 92 N. C., 637, where the facts are "on all-fours" with this. The plaintiff administrator introduced the son of the deceased as a witness, who testified as to the conversation, and the Court held that the defendant was not thereby rendered competent because the plaintiff had neither testified himself nor put in evidence any testimony of his intestate.

The rule is stated in *McCanless v. Reynolds,* 74 N. C., 301, quoted and approved in *Armfield v. Colvert,* 103 N. C., at p. 156: "Unless both parties can be heard on oath, a party to the action is not a competent witness." As said in *Blake v. Blake,* 120 N. C., 179: "The very words of the statute forbid the transaction with a decedent being given in evidence, unless the person claiming under the deceased, as executor, * * * is first examined in his own behalf, or gives in evidence, it may be added, the testimony of the deceased himself—not, as here, testimony of disinterested witnesses. It has been repeatedly held that, in such cases, agents and attorneys of the parties are competent, their bias, if any, being a matter for the jury. *Propst v. Fisher,* 104 N. C., 214; *Sprague v. Bond,* 113 N. C., 551. A. V. Hall, husband of the plaintiff administratrix, is not a

party to the action and has no interest in the event thereof, and is a competent witness. *Bradsher v. Brooks,* 71 N. C., 322.

In *Burnett v. Savage,* 92 N. C., 10, and *Hughes v. Boone,* 102 N. C., 138, the defendant was made competent because the plaintiff, the personal representative, testified in his own behalf to the transaction. In *Nixon v. McKinney,* 105 N. C., 23, the deposition of the deceased was read in evidence, which, of course, made the defendant competent. *Peacock v.* (37) *Stott,* 90 N. C., 518, and *Johnson v. Townsend,* 117 N. C., 338, are clearly distinguishable for the reasons given in *Blake v. Blake,* 120 N. C., 179.

Error.

SEARS v. WHITAKER.

(Filed 20 September, 1904.)

MASTER AND SERVANT—*Penalty—The Code, Secs. 3119, 3120.*

The statute making it penal to entice a servant who has contracted to serve to unlawfully leave the service of his employer does not apply when the servant has merely made a contract to serve.

ACTION by J. G. Sears against T. L. Whitaker, heard by Judge *Frederick Moore* and a jury, at June Term, 1904, of HALIFAX. From a judgment for the defendant the plaintiff appealed.

W. A. Dunn and *Albion Dunn* for the plaintiff.
Kitchin, Smith & Kitchin and *Day & Bell* for the defendant.

MONTGOMERY, J. This action was commenced before a justice of the peace for the recovery, by the plaintiff of the defendant, of the penalty afforded by section 3120 of The Code. The complaint before the justice of the peace was that the plaintiff hired Redmond Whitaker to serve him as a farm laborer from 30 January, 1904, till August 1st of that year; that the defendant enticed, persuaded and procured Redmond Whitaker to unlawfully leave the plaintiff's service, and did also unlawfully and knowingly harbor and detain him in his (38) (the defendant's) own service from the service of the plaintiff after said Whitaker had unlawfully left the plaintiff's service and after the defendant had been notified of such unlawful leaving.

In the Superior Court, after all the evidence was in on the part of the plaintiff, judgment as in case of nonsuit under the act of 1897 was entered against the plaintiff on the defendant's

motion. It appeared in the evidence, which for the purposes of this action must be taken as true, that on 26 January, 1904, said Whitaker agreed to enter the service of the plaintiff at the wages of $10 per month until the first of August, the service to begin in the future—when the servant should have picked out a bale of cotton and housed his crop of the last year. Afterwards the plaintiff and the defendant (the said Whitaker having been in the service of the defendant for the year 1903) had a conversation about the matter of hiring him, in which the plaintiff gave his consent for Whitaker to leave his premises and enter the service of the defendant. Whereupon the plaintiff sent his team, in charge of Whitaker, the servant, to the premises of the defendant for the purpose of moving his household property and goods from the premises of the defendant to those of the plaintiff. The defendant detained, or, as the witness said, "kept" Whitaker in his employment, and sent his team back by some other person to the plaintiff.

Section 3119 of The Code, under which this action was brought, is in the following language: "If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted, in writing or orally, to serve his employer, to unlawfully leave the service of his master or employer, or if any person shall knowingly and unlawfully harbor and detain in his own service and from the service of his master and employer any servant who shall unlawfully leave the service of his master or employer, then in
(39) either case such person and servant may be sued singly and jointly by the master, and on recovery he shall have judgment for the actual double value of the damages assessed."

Section 3120 is as follows: "In addition to the remedy given in the preceding section against the person and servant violating the preceding section, such person and servant shall also pay a penalty of one hundred dollars." * * *

These statutes are penal statutes and must be strictly construed. The culpable acts set forth in section 3119, and for which the penalty provided in section 3120 may be enforced, are: first, the enticement, persuasion or procurement of any servant, whether the contract to serve be by indenture or in writing or oral, to unlawfully *leave the service* (italics ours) of his master or employer; and second, the knowingly or unlawfully harboring or detaining in his own service and from the service of his master or employer any servant who shall unlawfully *leave the service* (italics ours) of such employer. Redmond Whitaker, the servant, according to the plaintiff's evidence, never worked for the plaintiff, and therefore he never

could have left the service of the plaintiff. It is true that the plaintiff sent him with his team to bring his household goods to the plaintiff's premises, but we think that is no evidence that Whitaker had entered the service of the plaintiff, but only that he was making preparations to do so. The statute does not subject persons who induce servants to break their contracts as laborers with their employers before entering into such service. Such conduct, to be sure, is actionable on the part of the party aggrieved, and damages are recoverable accordingly as the circumstances and conditions might justify, and such as the party had reasonably suffered. The case of *Haskins v. Royster*, 70 N. C., 601, 16 Am. St., 780, to which the plaintiff's counsel referred us, was a case not under the two sections of The Code which we have been discussing, but an action in (40) damages for the inducing by the defendant of certain persons, who had contracted to render personal service to the plaintiff, to quit such service. The Court there said: "We take it to be a settled principle of law that if one contracts upon a consideration to render personal services for another, any third person who maliciously—that is, without a lawful justification—induces the party who contracted to render such service to refuse to do so, is liable to the injured party in an action for damages. In that case the persons employed by the plaintiff had been in the service of the plaintiff and were in his service at the time they were enticed away.

We think the plaintiff in this action was properly nonsuited.

No error.

Cited: Cox v. R. R., 148 N. C., 460.

MAHONEY v. TYLER.

(Filed 20 September, 1904.)

1. ATTACHMENT—*Domicile.*

That a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence, if desirable, does not sustain an attachment on the ground that the defendant was a nonresident.

2. ATTACHMENT—*Damages—The Code, Secs.* 356, 302, 341, 360, 372, 373—*Actions—Bonds.*

The successful defendant in attachment must seek relief for damages in a separate action on the undertaking.

3. ATTACHMENT—*Damages—Sheriffs.*

An attaching creditor is not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property.

ACTION by J. Mahoney and others against P. C. Tyler, heard by Judge *W. B. Councill* and a jury, at February Term,
(41) 1904, of BERTIE. From a judgment for the defendant the plaintiff appealed.

J. B. Martin and *Day & Bell* for the plaintiffs.
Francis D. Winston for the defendant.

WALKER, J. The plaintiff brought this action to recover a debt, and caused a warrant of attachment to be issued, upon the ground that the defendant was at the time a nonresident. There was a motion to vacate the attachment which had been levied on the defendant's property, and, upon the affidavits filed by the respective parties, Judge *Cooke* found as facts that the defendant went to South Carolina in July, 1903, to procure some profitable employment until his crops should mature, intending to return and harvest his crops. He had the "further purpose of prospecting with a view to a change of his residence if the field should appear satisfactory. His wife and children remained at their home in this State. The defendant returned to his home on September 11, 1903, for the purpose of harvesting his crops, and has remained there ever since." Upon this finding the Judge concluded that the defendant was still a resident of this State, and at November Term, 1903, vacated the attachment. The ruling, in our opinion, was correct. *Wheeler v. Cobb,* 75 N. C., 21, and *Carden v. Carden,* 107 N. C., 214, 22 Am. St., 876, which were cited by the plaintiff's counsel, are not in point. In each of those cases it was found as a fact that the defendant had voluntarily left this State with the intent and purpose of residing in another State as the incumbent of a public office, the term of which was of indefinite duration. Not so in this case, in which it appears that the defendant never abandoned his residence here, but went to South Carolina with the intention of remaining for a definite time, unless he decided, after he arrived there and "looked over the
(42) field," to remain, which he never did, but returned to this State. We think both of the cases cited sustain the ruling of the Court.

With the intendment of the attachment law, there was no "cessation to dwell within this State for an uncertain period, without definite intention as to a time for returning, although a general intention to return may have existed," so as to constitute nonresidence. *Carden v. Carden, supra; Weitkamp v. Loehr,* 53 N. Y., 83.

In the order vacating the attachment there is this provision:

"This cause is retained for further order in respect of the right of the defendant to an accounting for the property seized in said attachment proceedings." At the same term this order was made, a judgment was entered in favor of the plaintiff for the amount of his debt and costs.

At February Term, 1904, the court submitted an issue to the jury, at the request of the defendant, to ascertain what damages the defendant had sustained by reason of the attachment, the court holding that the defendant was entitled to have his damages assessed in this action, and, besides, that such an assessment had been ordered by Judge *Cooke* when he retained the cause. We do not think the order of Judge *Cooke* referred to such an assessment of damages as was made in this case and which was based solely upon the value of the property seized under the attachment; nor do we think the learned Judge contemplated any assessment at all, but simply an "accounting for the property seized"—that is, a return of the same as provided by the statute. If he intended more than this he was without jurisdiction to make the order, as the court was without any jurisdiction to proceed afterwards in the manner it did to assess damages and charge the plaintiffs with the value of the property levied upon.

In the first place, "all damages which the plaintiffs may sustain by reason of the attachment," and which are secured by their undertaking, must be assessed and recovered in (43) a civil action upon the undertaking, 1 Shinn Attachment and Garnishment, 182. There is no provision in The Code for the assessment of damages in the original action, and section 356 clearly implies that the successful defendant must seek relief in a separate action on the undertaking. It is argued that there is no judgment on the undertaking in this case, but only a judgment against the plaintiffs. That being true, it follows with equal if not greater reason that the defendant's remedy is by civil action, as he could recover at common law damages only for wrongfully suing out the attachment, and his suit would be in the nature of an action for malicious prosecution, in which a want of probable cause must be shown in order to sustain the action. *Burnett v. Nicholson,* 79 N. C., 548; *Kirkham v. Coe,* 46 N. C., 423; *Ely v. Davis,* 111 N. C., 24; *Wiliams v. Hunter,* 10 N. C., 545, 14 Am. Dec., 597; *Falls v. McAfee,* 24 N. C., 236; *Davis v. Gully,* 19 N. C., 360; *Timber Co. v. Rountree,* 122 N. C., 45.

There is no analogy between a proceeding like this and one for the assessment of damages against a defendant where property has been seized under a requisition in claim and delivery

(*Hall v. Tillman,* 110 N. C., 220), nor where the defendant has been arrested in a civil action and held to bail (The Code, sec. 302; *Patton v. Gash,* 99 N. C., 280), nor for assessing damages against the plaintiff where an injunction has been issued on his application (The Code, sec. 341; *Timber Co. v. Rountree, supra*), because the latter cases are governed by special statutory provisions. See, also, *R. R. v. Hardware Co.,* 135 N. C., 73.

By what we have already said we do not mean to imply that if an action is brought on the plaintiff's undertaking it will not be necessary to show that there was not probable cause for issuing the attachment. In some of the cases this Court
(44) seems to intimate that it is necessary to do so, while the language of the statute may be broad enough to give the right to recover all actual damages without reference to the plaintiff's malice or the existence of probable cause. We are not called upon to decide the question at this time, and leave it open for future consideration if it should ever be presented.

The ruling of the court upon the defendant's right to an assessment of his damages was erroneous for another reason. When an attachment is vacated the law requires that the sheriff shall deliver to the defendant all property attached and remaining in his hands, or the proceeds thereof it if has been sold, and all moneys collected by him. The Code, secs. 372 and 373. The sales of property here mentioned have reference to those made before the attachment is vacated, as, for instance, sales made under the order of the court, in accordance with section 360 of The Code, when the property is perishable. The sheriff has no right, after the attachment has been vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. The Code, sec. 373. This being so, how can the plaintiffs be liable in damages to the defendant for the default of the sheriff in failing to comply with the mandate of the law? If the sheriff fails or refuses to deliver the property, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default; but we are unable to see upon what principle the plaintiffs should be liable for the sheriff's neglect. The failure to deliver the property, as required by the statute, is in no sense their default, but solely that of the sheriff. 1 Shinn, *supra,* sec. 395.

We have searched in vain to find authority for the rul-
(45) ing of the court, and counsel did not refer us to any. We are bound, therefore, to conclude that the proceeding is one of first impression.

It might, perhaps, be more convenient if this summary mode of assessing damages in such cases were adopted, but it must be done by the Legislature and not by the courts. Even if the damages could be thus assessed, they would not include such as the defendant may have sustained by the wrongful action of the sheriff, and the defendant's counsel in his brief admits that "he (defendant) is not seeking any damages growing out of the seizure." It follows, therefore, that when the court vacated the attachment and taxed the plaintiffs with the costs of the attachment proceedings, and then gave judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power were exhausted. The end of the case had been fully reached and nothing else could be done except, perhaps, to make an order for the return of the property seized under the attachment to the plaintiffs, if the provision in section 373 is not self-executing (*Devries v. Summit,* 86 N. C., 126; 1 Shinn, *supra,* sec. 395), and such an order is necessary. The general practice, we believe, has been to insert such a direction to the sheriff in the order vacating the attachment. *Jackson v. Burnett,* 119 N. C., 195.

Ordinarily, when there has been error committed in a case wherein judgment has been rendered upon a verdict, we order a new trial, but in this case there would be nothing of which the court has jurisdiction to try, and for this reason the verdict and judgment in favor of the defendant in the proceeding for the assessment of damages will be set aside and the said proceeding dismissed at the cost of the defendant. The defendant may proceed in other respects to obtain relief, as he may be advised.

Error.

---

(46)

WILKINSON v. BOYD.

(Filed 20 September, 1904.)

WILLS—*Legacies and Devises—Specific Performance.*

Where real estate is devised to a person, with a proviso that if such person dies without children, then the said property to go to other persons named in the will, the first taker is invested with a fee defeasible on dying childless.

ACTION by G. L. Wilkinson and wife against H. C. Boyd, heard by Judge *George H. Brown,* at August Term, 1904, of BEAUFORT. From a judgment for the defendant the plaintiffs appealed.

Rodman & Rodman for the plaintiffs.
No counsel for the defendants.

MONTGOMERY, J. The construction of the fourth clause of the will of Moses Windley is the matter before the Court, and, as will be seen, its meaning is largely dependent upon one of the provisions of item 3, which is as follows: "Item 3. I give unto my daughter, Nancy E. Windley, with a proviso that if she should die without no children, the plantation (describing it); that if she should die without children, then I give said plantation above named to my three other children, if a-living, to Henry A. Windley, Martha J. Windley and Mary A. Windley, to be equally divided between them.

"Item 4. I give with the same proviso the plantation (the one in controversy) to my daughter, Martha J. Windley, that if she should die without leaving lawful heirs begotten of her own body, then I give said plantation to my other three children and their heirs, the said plantation above named to be equally divided *been* them."

(47) Upon reading the judgment of the court below it appears that one of the contentions, if not the only one, of the plaintiff appellants—Martha Wilkinson *nee* Windley and her husband—was that Martha, under the fourth clause of the will of her father, took an estate of inheritance under the law known as the "Rule in Shelley's Case." In the appellant's brief filed in this Court, however, that position is not taken, the only contention therein made being that all general devises of land are presumed to be given in fee, and that in the present case the intention of the devisor was to devise the land in fee simple to Martha, his daughter, provided she should leave "lawful heirs begotten of her body," and that as she had married and had children, the only condition by which the estate was intended to be defeated had been complied with, and thereupon that Martha, the devisee, became seized of an indefeasible estate in fee simple.

There could be in this case no application of the Rule in Shelley's Case. If it should be contended that under the fourth item Martha, the appellant, was given a life estate in the property, with remainder over "to the lawful heirs begotten of her own body," those words would have to be construed to mean her *children,* for in item 3 the word "children" is used in connection with the devise to the devisor's daughter, Nancy, and that proviso is carried into item 4 in connection with the devise to the appellant, Martha, and in cases where the subsequent takers are designated as *children* the Rule in Shelley's Case does

not apply. *Leathers v. Gray,* 101 N. C., 162, 9 Am. St., 30; *Hauser v. Craft,* 134 N. C., 319.

As to the contention of the appellant, as it is set out in the brief of counsel and which we have already stated, it cannot be maintained. In *Whitfield v. Garris,* 131 N. C., 148, where the language of the devise is almost identical with that in the case before us, except as to names and description of property, it was decided that where property is devised to one gen-
(48) erally, and if he should die without leaving children or heirs of his body, then over to others, the first taker is invested with a fee defeasible on his dying childless. But that if he die leaving children and not having disposed of the property, then the children take no estate as purchasers by implication under the will, unless that was the testator's intention, expressed in the will or to be clearly inferred therefrom, and the primary devisee takes the estate of inheritance.

In the present case the devisee, Martha, has children, but it does not necessarily follow that any of them will be alive at the time of her death. And the condition of the will is only fulfilled if she have children living at that time. If, then, the devisee, Martha, should have no children at the tme of her death, the limitation of the contingent remainder to the other three children of the testator would take effect, and his Honor properly held that the appellant, who had contracted to sell and convey the property to the appellee, could not make a good and indefeasible title in fee thereto.

Affirmed.

---

(49)

CRAFT v. RAILROAD CO.

(Filed 20 September, 1904.)

1. EVIDENCE—*Waters and Watercourses—Questions for Jury.*

   In this action to recover damages for the diversion of water, the evidence is sufficient to be submitted to the jury.

2. NONSUIT—*Evidence—Laws* 1897, *Ch.* 109—*Laws* 1899, *Ch.* 131.

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

3. WATERS AND WATERCOURSES—*Damages.*

   The act of the defendant in cutting a ridge or natural water-shed between two streams, causing the waters of one to flow into the waters of the other, which formed the boundary of plaintiff's land, the new channel being cut into the old at a right angle, so that the water would be carried by its own momentum across the channel and onto the plaintiff's land, renders the defendant liable for the resulting damage.

ACTION by J. D. Craft against the Norfolk and Southern Railroad Company, heard by Judge *Walter H. Neal* and a jury, at January (Special) Term, 1904, of WASHINGTON. From a judgment for the defendant the plaintiff appealed.

Bragaw & Ward and *W. M. Bond* for the plaintiff.

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

DOUGLAS, J. This is an action to recover damages for the alleged unlawful diversion of water. The plaintiff testified that the defendant cut a canal, whereby the waters of Pine Island Branch, which previously thereto flowed into Kendrick's Creek below his land, were turned into said creek at a
(50) point above his land; that such diversion caused the water in the creek, which is his eastern boundary, to rise and overflow his land to such an extent as to destroy his crop; that he had lost his crop during the years 1901 and 1902, and that he had been damaged not less than three hundred dollars up to the time of bringing this action. Another witness testified for the plaintiff in substantial corroboration. At the close of the plaintiff's testimony the defendant moved for judgment as of nonsuit under chapter 109, Laws 1897, as amended by chapter 131, Laws 1899. This motion was allowed, wherein we think there was error.

The plaintiff's testimony as to the illegal diversion and the resulting damage would, if believed by the jury, make out a *prima facie* case. The credibility of the testimony was a matter exclusively for the determination of the jury. It is well settled by a long line of decisions that upon a motion for nonsuit the evidence of the plaintiff must be taken as true and construed in the light most favorable to him, and when so considered, if there is more than a scintilla of evidence tending to prove the plaintiff's contention the question must be left to the jury, who alone can pass upon the weight of the testimony and the credibility of the witnesses. *Cox v. R. R.*, 123 N. C., 604; *Coley v. R. R.*, 129 N. C., 407, 57 L. R. A., 817; *Hopkins v. R. R.*, 131 N. C., 463; *Butts v. R. R.*, 133 N. C., 82, with the cases cited in those opinions.

In *Purnell v. R. R.*, 122 N. C., 832, Justice FURCHES, speaking for the Court, says, on page 836: "This motion is substantially a demurrer to the plaintiff's evidence. And this being so, and the Court having no right to pass upon the weight of the evidence, every fact that the plaintiff's evidence proved or tended to prove must be taken by the Court to be proved. It

must be taken in the strongest light as against the dfendant."

In *Printing Co. v. Raleigh,* 126 N. C., 516, FAIRCLOTH, C. J. speaking for the Court, says: "The de- (51) fendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be considered as true and taken in the most favorable light to it." Citing *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551, 6 Am. St., 552. In *Snyder v. Newell,* 132 N. C., 614, CONNOR, J., speaking for the Court, says: "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."

In *Brittain v. Westhall,* 135 N. C., 492, WALKER, J., speaking for the Court, says: "It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to the evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony."

It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert. *Hocutt v. R. R.,* 124 N. C., 214; *Mizell v. McGowan,* 125 N. C., 439; *S. c.,* 129 N. C., 93, 85 Am. St., 705; *Lassiter v. R. R.,* 126 N. C., 509; *Mullen v. Canal Co.,* 130 N. C., 496, 61 L. R. A., 833; *Rice v. R. R.,* 130 N. C., 375. It appears from a map in the case that the new canal empties its waters into Kendrick's Creek at a right angle, which would have a natural tendency to cut out the opposite bank as well as to carry the water by its own momentum upon the plaintiff's land. In *Briscoe v. Young,* 131 N. C., 386, this Court has said, on page 388: "Water may be diverted in two ways, which are somewhat dif- (52) ferent in their results and in the legal principles by which they are governed. The first, which has been more frequently before this Court, is where a ridge or natural watershed has been cut through so as to change the entire direction of the waters beyond and bring them where nature never intended them to go. *Mullen v. Canal Co.,* 130 N. C., 496, and cases therein cited. The other form of diversion is where the current of the stream is changed without turning into it any waters that would not naturally have gone there. Where both the natural and the artificial channels are on the defendant's own land, we do not see how he would be liable. *Mizell v. McGowan,* 129

N. C., 93; 85 Am. St., 705. But where the natural channel is the boundary line between adjacent proprietors, different questions arise, some of which are not necessarily involved in this case. If, under the circumstances, the defendant cut the new channel into the old at a right angle, so that the water would be carried by its own momentum across the channel and onto the plaintiff's land, he would be liable for the resulting damage."

It cannot be said that there was no evidence tending to prove a fact to the existence of which the plaintiff had directly testified.

New trial.

Cited: Busbee v. Land Co., 151 N. C., 514.

---

(53)

HINTON v. JONES.

(Filed 20 September, 1904.)

FORECLOSURE OF MORTGAGES—*Mortgages—Payments—Negotiable Instruments—Interest.*

Where a note is payable one-tenth annually, and the interest semi-annually, a provision in the mortgage securing the same, that if the mortgagor fail to well and truly pay the note as it falls due, then the mortgagee may sell, a sale by the mortgagee for the nonpayment of the first installment, but before the maturity of the entire note, is void.

ACTION by John L. Hinton against H. J. Jones, heard by Judge *W. A. Hoke* and a jury, at January (Special) Term, 1904, of PASQUOTANK.

This was an action to recover possession of a house and lot. The plaintiff sold to the defendant the lot in question on 23 October, 1899, for the sum of $6,000 and a policy of insurance upon the life of the said Jones in the sum of $4,000. On the same date Jones executed to one C. L. Hinton, a son of the plaintiff, a deed of trust upon said land to secure the purchase money, no part thereof being paid in cash. His note of even date was executed to the plaintiff in the sum of $6,000, "with interest from date, to be paid semi-annually, and the principal to be paid one-tenth annually until the said note is paid in full." The deed of trust provided that "should the said Jones well and truly pay said note as it falls due, then this deed shall

be null and void. But should he fail to do so, then the said C. L. Hinton may sell," etc.

The deed of trust was foreclosed by a public sale of the land on 16 January, 1901, when and where the plaintiff became the purchaser at the price of $150. Subsequently he brought this action for the recovery of the land. The issues and answers thereto were as follows:

"1st. Was the deed of trust referred to and described (54) in complaint and answer procured by fraudulent and false representations on the part of the plaintiff or his agent, W. T. Davis?" Ans. "No."

"2d. Was the sale under which plaintiff purchased had and made before the power of sale had arisen or become absolute?" Ans. "No."

"3d. Is plaintiff owner of the lot sued for and described in the complaint?" Ans. "Yes."

"4th. Does defendant wrongfully withhold possession of said lot?" Ans. "Yes."

"5th. What damage is plaintiff entitled to recover by the wrong and injury?" Ans. "Five cents."

The court below charged the jury that if they should answer the first issue "No," and believed the evidence in the case, they should answer the second issue "No." The court further charged them that "if they should answer the first issue 'No,' and believed the evidence in the case, they should answer the third and fourth issues 'Yes.'"

From a judgment for the plaintiff the defendant appealed.

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

DOUGLAS, J., after stating the case. The only point that we need consider is the answer directed by the court, which raises the legal question as to whether the power of sale became absolute upon the failure of the defendant to pay the first installment of the purchase money, or must await the maturity of the entire note. There is no direct provision that the entire note shall become due and payable upon default in any of its installments. It is contended that this is implied by the wording of the deed, but it is not so "nominated in the bond," and we do not feel that the policy of the law or the equities of this case require us to enlarge by mere implication the rights (55) or powers of a mortgagee or trustee to so dangerous an extent. It is true the parties could have so stipulated, but if there had been any such stipulation there might not have been

the same inducement on the part of the defendant to pay a price so largely in excess of the apparent value of the property. We do not see any substantial difference in legal effect between the material facts in the case at bar and that of *Harshaw v. McKesson,* 66 N. C., 266. In that case the condition of the mortgage was as follows: "Now if the said W. F. McKesson shall well and truly pay and discharge said several debts according to the agreement now made—the one-third part thereof in three years, one-third part in four years, and the remainder in five years from this date—then this deed to be void and at an end; otherwise to remain in full force and virtue." The plaintiffs began foreclosure proceedings after the first installment became due, but before the maturity of either the second or third installment. This Court held that the second and third installments did not become due by default in the payment of the first, and that therefore the mortgage could not then be foreclosed. The Court says: "A court of equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate in consequence thereof forfeited to the mortgagee, for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected. 3 Powell Mort, 965. If this mortgage had expressly stipulated that the estate should be forfeited on the failure to pay the specified installments of the debts, then on said failure the mortgagee might have called for his money or proceeded immediately to foreclose. 2 Eden, 197. The time of payment being delayed was evidently the inducement which caused the mortgagor to enter into the contract, and the
(56) security thus furnished was satisfactory to the mortgagee. The fact that the mortgagee did not commence his proceeding to foreclose upon the failure of the first payment shows that he understood the agreement, as is insisted upon by the defendants. If the agreement of the parties was that the estate should be forfeited upon failure of the first payment, it could easily have been inserted in the contract." We see no difference in legal effect between the words in that case—"shall well and truly pay and discharge the said several debts according to the agreement now made"—and the words in the case at bar—"should well and truly pay said note as it falls due." Harshaw's case has been repeatedly cited and approved by this Court. *Hemphill v. Ross,* 66 N. C., 477; *Jones v. Boyd,* 80 N. C., 258, 261; *Molyneux v. Huey,* 81 N. C., 106; *Ely v. Bush,* 89 N. C., 358; *Bank v. Bridgers,* 98 N. C., 67, 2 Am. St., 317; *Brame v. Swain,* 111 N. C., 540; *Barbee v. Scoggins,* 121 N. C., 135.

The plaintiff cites but two cases in support of his contention —*Hyman v. Devereux,* 63 N. C., 624, and *Barbee v. Scoggins,* 121 N. C., 135—neither of which cases is in point. In the former case the mortgage contained the following express stipulation: "Secondly, when any amount, principal or interest, on any one of the said six notes shall be due and payable, then said Devereux shall call on the said Clark for the amount so due, and if the said Clark shall make payment, no steps shall be taken, but if he shall fail to make payment the said Devereux shall advertise twenty days and sell enough of the estate herein conveyed to him to pay said amount then due." * * * In that case there was an express stipulation to sell upon default in the payment of any one of the notes. Moreover, it seems that all the notes had become due, and that the real point before the court was the sufficiency of the power to sell in any event, and not as to the time when it could be exercised. In *Barbee v. Scoggins* the Court says, on (57) page 142: "It is true that, in the absence of a stipulation to the contrary a mortgage to secure a debt payable in installments cannot be foreclosed till default in the last payment (citing *Brame v. Swain,* 111 N. C., 540, and *Harshaw v. McKesson,* 66 N. C., 266). But here the mortgage expressly states that upon default in any installment all were to become due and the mortgagee could proceed to collect under the powers herein given." This is a reaffirmation of the principle laid down in Harshaw's case and against the contention of the defendant in that at bar.

The case of *Gore v. Davis,* 124 N. C., 234, apparently the latest upon the subject, is not directly in point, as it is the converse of that at bar, but by implication sustains the principle herein upheld.

It follows that in the absence of express stipulations to the contrary, the entire note in question did not become due and payable upon default in the payment of any of its installments, and that the power of sale had not become effective at the time the sale was made by the trustee. Therefore the plaintiff acquired no title to the land under the trustee's deed.

Error.

(58)

WILLIAMS v. HUGHES.

(Filed 20 September, 1904.)

FRAUDULENT CONVEYANCES—*Evidence—Deeds—The Code, Sec.* 1547.

In an action to set aside a deed, evidence that the grantor retained $11,625 to pay debts to the amount of $11,500 is not sufficient to show that the grantor retained property sufficient to pay his debts.

ACTION by P. H. Williams against J. G. Hughes and others, heard by Judge *W. B. Councill* and a jury, at Fall Term, 1903, of CAMDEN. From a judgment for the defendant the plaintiff appealed.

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

Ward & Thompson and *E. F. Aydlett* for the defendants.

MONTGOMERY, J. Upon a reading of the statement of the case on appeal, and especially the charge of his Honor, the special instructions asked by both parties and the evidence, it is apparent that on the trial below the case was determined upon the question whether or not the plaintiff's testator, who had made in his lifetime a voluntary deed for land for the benefit of two of his children, retained property at the time of the execution of the deed "fully sufficient and available for the satisfaction of his *then* creditors." The Code, sec. 1547. The first issue was in the following words: "Did plaintiff's testator, D. L. Pritchard, convey the tract of land described in the deed of 25 January, 1886, with intent to defraud his creditors?" The most favorable evidence tending to show that the donor did retain a sufficiency of property to satisfy his indebt-
(59) edness fixed the value so retained at $11,625. There was evidence for the plaintiff that the amount was no more than $8,500. The indebtedness of the plaintiff's testator when the deed was made was $11,500. His Honor was requested by the plaintiff to instruct the jury as follows: "That there is not sufficient evidence in this cause to show that the testator retained property ample and available to pay his existing debts, and you will answer the issue 'Yes'; that upon all the evidence in this cause you will answer the first issue 'Yes.'"

The court refused to give the instructions, and the plaintiff excepted. There was error. As a matter of law, upon the evidence in the case the amount of property retained by the debtor

was not fully sufficient and available for the satisfaction of the donor's creditors at the time of the execution of the deed. In *Black v. Saunders,* 46 N. C., 67, PEARSON, J., wrote for the Court: "We are not called on to say what proportion the amount of debts may bear to the amount of property retained; it is sufficient to say that twenty negroes and two small tracts of land, valued in all at $7,250, is not property fully sufficient and available to pay debts amounting to $6,848, which was the condition of things in this case. No man would lend money upon such security; he would require property of this description to exceed the debt at least one-third, if not one-half. Should one of the negroes die the fund is at once insufficient, to say nothing of the accumulation of interest and the fact that the debtor must have something to live upon." In the case before us the debtor retained, as we have seen by the defendant donee's best witness, only $125 worth of property more than his indebtedness, and $1,000 worth of that was of perishable nature; and, besides, the donor was entitled to $1,000 worth of real estate as his homestead exemption, which could not be subjected to his debts against his will during his life, and could reserve also, if he chose to do so, $500 worth of property as his personal property exemption. (60)

The prayers for instruction should have been given.

Error.

Cited: S. c., 139 N. C., 17.

GRUBBS v. FERGUSON.

(Filed 27 September, 1904.)

1. ISSUES—*Compromise and Settlement.*

In an action to recover money paid under protest, the submission of an issue as to whether on a certain date the plaintiff and the defendant had compromised their differences was error.

2. EVIDENCE—*Compromise and Settlement—Accounts.*

In an action to recover certain money paid under protest, a note alleged to have been given by plaintiff to defendants in settlement of his accounts, which plaintiff had paid, is competent to show an absence of indebtedness.

3. EVIDENCE—*Compromise and Settlement.*

In an action to recover money paid under protest, evidence of the arrest of plaintiff is not material to an issue as to whether a note

executed by the plaintiff to the defendant prior to the arrest was a final settlement between the parties.

4. AGENCY—*Compromise and Settlement—Evidence.*

Where the plaintiff claimed to have compromised a matter with an agent, the defendant may show that the authority of the agent was limited.

5. ACTIONS—*Dismissal—Abatement.*

Where two actions for the same cause are pending, and the first action is dismissed for that reason, the second action will not be dismissed on account of the pendency of the former action at the time of the commencement of the subsequent action.

(61) ACTION by W. F. Grubbs against W. B. Ferguson and Company, heard by Judge *M. H. Justice* and a jury, at August Term, 1903, of NORTHAMPTON. From a judgment for the plaintiff the defendants appealed.

Gay & Midyette and *W. E. Daniel* for the plaintiff.

Peebles & Harris and *Winborne & Lawrence* for the defendants.

MONTGOMERY, J. In the original complaint the plaintiff set forth two causes of action. The first one was in the nature of an action for damages for false arrest, and the second was for breach of a contract. The allegations of the first cause of action were, in substance, that the plaintiff in January, 1894, settled all matters of account between him and the defendants by the execution of his promissory note to the defendants in the sum of $325, and that he paid that note at maturity; that after the note had been paid, the defendants sued out of the Circuit Court of Nansemond County, in the State of Virginia, two writs against the plaintiff, one in debt for $528 and one in assumpsit for $700, and caused the plaintiff here, the defendant there, who was then on a visit to Suffolk, Va., to be arrested and held to bail for his appearance; that the defendants in issuing the writs against the plaintiff were actuated by malice and without probable cause, and that the plaintiff was injured to the amount of $5,000.

The second cause of action was that the plaintiff was forced and compelled by the bringing of those suits in Virginia by the defendants to pay to them, under protest, the amount of $770, when in truth and in fact he owed the defendants nothing; that at the time the plaintiff paid the $770 it was agreed (62) between him and the defendants that they would pay back to the plaintiff so much of the amount as the plaintiff could show was not due to the defendants, and that no

part was due to the defendants and no part thereof has been paid back to the plaintiff.

The first cause of action was *nol prossed* at the Fall Term, 1899, of Northampton Superior Court, and we have only to consider on the appeal matters connected with the second cause of action.

Two issues were submitted to the jury as follows: "1. Were all the matters of account and all other indebtedness by note or otherwise between the plaintiff and the defendants, or either of them, compromised or settled on or about 30 January, 1894, and fixed at the sum of $325, for which a note was given by the plaintiff to defendants, as alleged in the complaint?" "2. Are the defendants indebted to the plaintiff, and if so, in what amount?"

The defendants objected to the first issue on the ground that it did not arise on the pleadings, that is, upon the plaintiff's second cause of action (the first having been *nol prossed*) and the answer. We think that the objection to that issue was well taken. As we have before said, the second cause of action was for the recovery of an amount of money because of a breach of contract on the part of the defendants, which we have stated in substance in setting out the plaintiff's second cause of action. The allegation of the plaintiff, as we have seen, was that the defendants forced the plaintiff to pay them $770 which he did not owe to the defendants, through the process of the courts, by means of which the amount was extorted from him, with a promise, however, on the part of the defendants to pay back to the plaintiff so much thereof as the plaintiff could show was not due to them. The present action, then, on the part of the plaintiff, as we have seen, is to recover the amount which he paid to the defendants under duress on the ground that he did not owe it or any part of the same, and that the (63) defendants agreed to do so if he could show that it was not due. The first issue, then, did not arise on the pleadings in the second cause of action, and had no connection with the matters there involved, except as a matter of evidence, which we shall presently discuss.

The second issue: "Are the defendants indebted to the plaintiff, and if so, in what amount?" is the issue which ought to have been submitted, and the only one which ought to have been submitted to the jury. Under the second issue the plaintiff could, of course, have used as evidence the note for $325 executed by himself to the defendants in January, 1894, itself to show that he did not owe the defendant anything at the time they sued him in Virginia, or any other facts tending to show

that that note was given in full settlement of all demands against him by the defendants.

But if the issue had been a proper one his Honor committed error in refusing to give without qualification the first prayer for instructions of the defendants, which was in these words: "That the fact that the defendants entered suit in the Circuit Court in Virginia against the plaintiff to recover a debt due by him to the defendants, and had the plaintiff arrested, as appears in the evidence, the arrest should not be considered by the jury in deciding the first issue." His Honor qualified that instruction by telling the jury that the evidence is competent and may be considered to throw light on the transaction of 30 January, 1894, if it does so. That evidence could in no sense throw any light on the question whether or not the note executed by the plaintiff to the defendants in January, 1894, was a final settlement between the parties. It was greatly prejudicial to the defendants in that it had the effect of placing them, in the eyes of the jury, as men who had used the machinery
(64) of the law to extort money which was not due to them. For the error pointed out there must be a new trial.

But there was another one on so vital a point that we deem it necessary to call attention to it. The plaintiff had undertaken to show that Butler, the bookkeeper of the defendants, was sent out by them to the home of the plaintiff in North Carolina with full power to settle all matters of difference between the plaintiff and the defendants, and that such a settlement was made when the note for $325 was executed in January, 1894. Butler testified that his agency was limited; that he told the plaintiff the extent of it, and that he was only authorized to settle one particular matter of business out of many transactions which were then outstanding between the parties. The defendants offered to show by Ferguson, one of the defendants, that the agency of Butler was a limited one and did not extend to a settlement of all the business matters between his firm and the plaintiff. His Honor refused to receive it as substantive evidence, and admitted it only as corroborative of the testimony of Butler.

A bookkeeper, as such, of a business man, would not be authorized in law to adjust and settle matters in dispute between his employer and others. If he made such a transaction he would have to be specially authorized to do so; and it seems to us to be evidence, most natural and substantive, to show by the employer the nature and extent of his agent's authority. That persons who deal with an agent must look to the extent of the agent's authority is a principle of law too familiar to need the support of authority.

It is not necessary to notice any other of the exceptions of the defendants, and we do not pass upon them one way or the other, except that one to the failure of his Honor to dismiss the action on the ground that there was another action similar in character in all respects to the present one when the latter was commenced. This was true, but nearly two years after the present action was instituted the defendants instead (65) of moving to dismiss the latter one made a motion to dismiss the former, and a judgment to that effect was rendered and the case stricken from the docket. They made the way clear for the present action.

For the errors pointed out there must be a

New trial.

HARRINGTON v. RAWLS.

(Filed 27 September, 1904.)

1. PARTITION—*Deeds—Husband and Wife.*

Where partition deeds are executed to husband and wife for land in which the wife was tenant in common with the grantors, the deeds carry no title, but operate simply as a severance of the unity of possession.

2. MORTGAGES—*Husband and Wife.*

The provision in a mortgage to pay the surplus to the two mortgagors means to pay it to them as their several interests in the property may appear.

3. MORTGAGES—*Husband and Wife—Curtesy.*

Where land of a wife is mortgaged to secure her husband's debt, and is sold on foreclosure after her death, the husband's entire curtesy interest should be first applied in payment of the debt; but if the debt secured is joint, such curtesy interest should be charged with only a moiety thereof.

4. MORTGAGES—*Husband and Wife.*

Where the land of a wife is mortgaged and the mortgage is foreclosed after her death, the surplus goes to her heirs charged with the curtesy of the husband.

5. COSTS—*Appeal—The Code, Sec.* 527.

Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded.

6. APPEAL.

A decision by the Supreme Court on a prior appeal constitutes the law of the case both in subsequent proceedings in the trial court and on a subsequent appeal.

7. IMPROVEMENTS—*Betterments.*

Where a deed is made to a husband and wife in partition of land in which the wife is a tenant in common with the grantors, and the husband and wife mortgage such land for the debt of the husband, a grantee of the husband after the death of the wife is not entitled to pay for improvements placed on the property, where the curtesy interest of the husband does not more than pay the mortgage debt.

(66) ACTION by W. H. Harrington and others against M. O. Rawls and others, heard by Judge *Frederick Moore,* at November Term, 1903, of PITT. From a judgment for the plaintiffs the defendants appealed.

Jarvis & Blow, for the plaintiffs.

Skinner & Whedbee, and *Fleming & Moore,* for the defendants.

CLARK, C. J. The deed of partition, by mutual deeds, wherein the other party conveyed in severalty to J. A. Briley and Elsie Briley one part of the tract in which Elsie Briley was a tenant in common carried no title, but was simply a severance of the unity of possession. *Harrison v. Ray,* 108 N. C., 215, 11 L. R. A., 722, 23 Am. St., 57. Hence J. A. Briley acquired no title, and not holding by entireties with his wife, upon her death his sole interest in the land is a life estate as tenant by the curtesy. This was decided upon the first appeal,
(67) *Harrington v. Rawls,* 131 N. C., 39, and was not open for consideration by the Judge below, and consequently not upon a subsequent appeal. *Holley v. Smith,* 132 N. C., 36; *Perry v. R. R.,* 129 N. C., 333, and cases cited.

On 16 December, 1889, J. A. Briley and wife executed a mortgage upon said premises to secure the payment of $800 borrowed money. On 28 April, 1898, and after the death of his wife, J. A. Briley conveyed the land to defendant Tyson by a deed purporting to convey the fee, but whose legal effect was to convey only the life estate of J. A. Briley therein as tenant by the curtesy. On 24 March, 1902, the land was sold under the mortgage and the net surplus arising from said sale ($1,920.65) was ordered paid into the Clerk's office, which order was affirmed upon appeal. *Harrington v. Rawls,* 133 N. C., 782.

Had the land been sold prior to the wife's death, the surplus would have passed to her administrator as personalty. But being sold after the death of the wife, it had previously to such sale descended to her heirs charged with the mortgage and the husband's tenancy by the curtesy and the surplus must be treated as realty. The provision in the mortgage, "pay over the

surplus, if any, to J. A. Briley and wife Elsie," means only, as in other joint mortgages, "as their several interests shall appear." It is not a conveyance of any interest by one mortgagor to the other.

The complaint avers that the mortgage debt was the indebtedness of J. A. Briley. If so, the entire value of his interest as tenant by the curtesy should be applied to the payment thereof, to the exoneration of the wife's interest, which has descended to her heirs. *Shinn v. Smith,* 79 N. C., 319; *Mebane v. Mebane,* 80 N. C., 40; *Davis v. Lassiter,* 112 N. C., 128. And she having died, her heirs are entitled to the same protection. *Weil v. Thomas,* 114 N. C., 197. *In re Freeman,* 116 N. C., 199, differs in that there the money was borrowed for (68) improvements upon the wife's land; hence it was held that there the curtesy interest should not be charged with the debt, but the debt should first be paid and the value of the curtesy in the surplus ascertained and paid to the husband.

The answer alleges that the debt was the joint debt of husband and wife. If so, half of the debt should be paid out of the husband's curtesy interest. Which of the contentions is true is a fact not decided, and it does not appear but that in either case the husband's interest has been absorbed by his indebtedness. Until the fact as to this appears, the exception of Tyson, who has no greater interest than the husband, his assignor, cannot be passed upon, for it must appear both that there was error and that the party excepting was injured thereby. It appears that J. A. Briley was born 10 April, 1844. If the husband's interest in the property was not more than enough to pay off his indebtedness Tyson has suffered no detriment. The cause must be remanded, to the end that proper proceedings be had in the Court below in accordance with this opinion.

The appellant will be entitled (Laws 1887, ch. 214) to have the life interest valued, and if after deducting the amount of the husband's indebtedness there remains anything due it shall be paid to Tyson out of the surplus in the Clerk's office, but having failed to show that he has any interest in the fund and has sustained detriment by the order appealed from the appellant will pay the costs of the appeal. The Code, sec. 527.

The Court below correctly held that "the character of the improvements and the circumstances of the purchase and occupation of the land by the defendant Tyson do not entitle him to any allowance for said improvements."

Remanded.

Cited: Sprinkle v. Spainhour, 149 N. C., 226.

(69)

STALLINGS v. ELLIS.

(Filed 27 September, 1904.)

PARENT AND CHILD—*Executors and Administrators—Presumptions.*

Where there is no evidence that a daughter expected to be paid or the father expected to pay for services rendered him during his last illness, it will be presumed that the services were gratuitous, and in such case the plaintiff should be nonsuited.

ACTION by R. B. Stallings and wife against O. L. Ellis, heard by Judge *Frederick Moore* and a jury, at January Term, 1904, of FRANKLIN.

The plaintiff alleges that her father, H. G. Leonard, died in May, 1901, and defendant qualified as his administrator. That during the last four and a half years of his life he was almost helpless on account of age and disease. That during this time he lived with her and that she gave him care and attention. She says "She gave to him as untiring devotion and as much watching and attention as if he had been one of her children." In the fifth allegation she avers that "the nursing, care and attention given by this plaintiff to said H. G. Leonard during said period was reasonably worth the sum of seventy-five dollars a year or a total of $337.50." That he left a small amount of personal property and a tract of land, which has been sold for division and the proceeds are in the hands of the commissioner appointed for that purpose. That the personal estate is wholly inadequate to pay the plaintiff's claim. She demands judgment for $337.50 and that the same be paid by the commissioner out of the proceeds of the land now in his hands. The defendant admits the allegations except the fifth, and denies that her services were worth the amount named. He set out, by way of defense, the terms upon which the intestate resided with the plaintiff. The plaintiff testified that her father was 69

(70) years old when he died, and that his health was bad for four years and six months before he died; he had two spells of sickness in one year; when he was sick he had to have the same attention as a child; the first year her father was with her she and her husband lived on her father's land; they then went to the Hollingsworth place and stayed one year, and then moved to her present home; the first year her father had grippe, after which his health failed; Dr. Wheeler attended him; he had four children; her father held his land in possession and rented it out—does not know how much rent he got; he consumed the rent, and he fed and clothed himself, and contributed

to the family expenses; he estimated what his board would amount to and put in that amount; he was sick a large part of the time but died suddenly.

Dr. Wheeler testified that the plaintiff's father was sick and required a great deal of attention, which was given him by the plaintiff. He corroborated the plaintiff as to her father's condition and the services she rendered to him; her father paid the medical bills. The plaintiff introduced other corroborative testimony as to the condition of her father and her services.

The plaintiff's husband has died since this action was brought. The defendant at the close of the plaintiff's evidence moved to dismiss the action as upon a demurrer to the evidence. The motion was denied and the defendant excepted.

The Court submitted to the jury the following issue: "Is the defendant indebted to the plaintiff, and if so, in what sum?" The defendant in apt time requested the Court to charge the jury that on all of the evidence they should answer the issue in the negative. This request was refused and the defendant excepted. Verdict for the plaintiff. Judgment accordingly. The defendant excepted and appealed. (71)

Wm. H. Ruffin and *F. S. Spruill,* for the plaintiffs.
W. M. Person and *T. W. Bickett,* for the defendant.

CONNOR, J. The plaintiff declares upon a *quantum meruit* for services rendered her father during the last four years of his life. It is elementary learning that right to recover upon this count or cause of action is based upon implied assumpsit, that is, that in the absence of a special contract, the law implies a promise to pay so much for services as they are reasonably worth. When, however, the relation existing between the party rendering and the one receiving the services is that of parent and child, there is a presumption, on account of the relationship, that the services are rendered because of mutual affection or reciprocal benefits, and in the absence of any evidence tending to rebut the presumption no recovery can be had. The presumption may be rebutted by showing that the party rendering the services expected to recover and the other party expected to pay for them. The law is well stated in 21 Am. & Eng. Enc. (2 Ed.), p. 1061. "The general rule deducible from the authorities is that when the child, after arriving at majority, continues to reside as a member of the family with a parent, or with one who stands in the relation of a parent, or when the parent resides in the family of a child, the presumption is that no payment is expected for services rendered or support fur-

nished by the one to the other. This presumption is not, however, conclusive, but may be overcome by proof of an express agreement to pay, or of such facts and circumstances as show satisfactorily that the parties at the time expected payment to be made." The editor cites a large number of cases to sustain the text. This rule has been adopted and uniformly ad-
(72) hered to by this Court. RUFFIN, C. J., in *Williams v. Barnes,* 14 N. C., 348, states the law clearly and defends it in strong language. PEARSON, J., in *Hudson v. Lutz,* 50 N. C., 217, says: "When work is done for another, the law implies a promise to pay for it; this is the general rule; it is based on a presumption growing out of the ordinary dealings of men. But an exception is made whenever this presumption is rebutted by the relation of the parties. The case of a parent and child is exception." The same doctrine is adhered to in *Dodson v. McAdams,* 96 N. C., 149, 60 Am. Rep., 408; *Young v. Herman,* 97 N. C., 280; *Callahan v. Wood,* 118 N. C., 752; *Avitt v. Smith,* 120 N. C., 392; *Hicks v. Barnes,* 132 N. C., 146.

The plaintiff's counsel cites several cases decided by other Courts which are not entirely in harmony with the law as announced by this Court. It may be that some of the Courts have made the distinction contended for by the plaintiff, that when the child rendering the service is of full age and married, the legal status of the parent and child being in a sense severed, the law implies a promise to pay for services. Certainly in such cases it would require less evidence to rebut the presumption than in those where there is a continued, unbroken residence. However this may be, we prefer to adhere to our own decisions and uphold that view which we think is most creditable and more in consonance with the sentiment and practice of our people. We are not willing to have the law attribute, in the absence of a contract, to a child mercenary motives in the rendition of services to an aged parent in sickness and adversity. It is evident that the plaintiff has rendered to her aged and infirm father faithful services, and it may be that it would be proper and generous in the other children to consent that such services should in some measure be recognized in the dis-
(73) tribution of his estate. We have no power, however, to enforce the performance of such duty.

In the view which we take of the testimony, the relation which existed between the father and the plaintiff and her family is the same which is frequently found among our people. He was old and in bad health. He had a small farm upon which they first lived. The rents, after removing from it, he applied to his board and actual expenses. The services which the

daughter rendered, in her own language, were such as she would have rendered to her own child. There is no suggestion in the complaint or the evidence that she expected to be paid for them, and in the absence of such suggestion the law raises no implication to that effect.

The demurrer to the evidence should have been sustained and the action dismissed. His Honor erred in refusing the motion. Let it be so certified.

Error.

Cited: Dunn v. Currie, 141 N. C., 127; *Winkler v. Killian, Ib.,* 579, 580.

CHEMICAL CO. v. EDWARDS.

(Filed 27 September, 1904.)

INSOLVENCY—*Executors and Administrators—Contracts—The Code, Sec.* 1416.

Where a debtor holds certain notes as the property of the creditor, to be applied on his debt when collected, any amount collected on the notes is part payment of the debt and the debtor shares in the funds belonging to the administrator only in proportion to the balance of the debt due.

ACTION by the Virginia-Carolina Chemical Company against B. W. Edwards, heard by Judge *Frederick Moore,* at December Term, 1903, of GREENE.

Controversy submitted without action, under section 567 of The Code. (74)

In order to present the point decided in this Court it will be necessary to state only the substance of the case agreed. The plaintiff in January, 1902, sold and delivered to George W. Sugg, intestate of the defendant, several lots of fertilizers, for which Sugg gave his notes in different amounts and due on the dates (in 1902) therein mentioned. It was stipulated in the written contract of the parties, annexed to the case agreed, that the fertilizers and all the proceeds of any sales of the same, "including cash, notes, open accounts and collections," should be kept separate and held by Sugg for the use and benefit of the plaintiff and subject to its order, and should be and remain its property until the entire indebtedness of Sugg had been paid. It is also provided by the contracts that the plaintiff should have the right to enforce payment of Sugg's notes given to it

for the fertilizers at any time after maturity, whether the fertilizers had all been sold and paid for or not, and that Sugg should receive as his full compensation for selling fertilizers and making collections the difference between the price he paid for the fertilizers and the price at which he sold them. It is provided further, as follows: "That the customer (George W. Sugg) will pay over to the company (plaintiff) all the cash proceeds of sales collected at the time of the sales, and on or before 1 May, 1902, will send to the company a complete list of his time sales, and endorse and surrender to the company all notes received by him from the purchasers of said fertilizers, which notes are to be returned by the company to him, if no contrary reason arises, for the purpose only of collection and remittance to the company." Sugg guaranteed the payment in full of all sums due for fertilizers sold at the prices stated. At the time of his death Sugg had in his possession and held in trust for collection, for the use and benefit of the plain-
(75) tiffs, under the terms and conditions of said contracts, all the notes and accounts taken by him for fertilizers, and after his death the defendant administrator received notes and accounts on the same trusts and conditions. The case agreed contains the following clauses: "1. That at the time of the death of Sugg and the qualification of his administrator, there was justly due from Sugg on his indebtedness, evidenced by said notes unpaid, to the said Virginia-Carolina Chemical Company, the sum of $1,747.51, as evidenced by said notes, and due respectively as follows: Three notes due November 15, and three notes due 1 December, 1902." "2. That since the death of Sugg (November, 1902), the defendant administrator has collected on said notes and accounts so held by him and paid over to the said Chemical Company, to be credited upon said indebtedness, the sum of $700, of date 22 January, 1903; $148.55, 22 April, 1903, leaving a balance due at the present time, after giving credit for $87.60 worth of guano returned on said indebtedness, of $...." The estate of Sugg is insolvent, and the general creditors will not therefore receive the full amount of their claims. The plaintiff contends that it should be allowed to prove against the estate of Sugg the full amount of his indebtedness to it at the time of his death, without any abatement or deduction on account of the payment made or the proceeds of collections remitted since his death, by the administrator; and the defendant contends that the plaintiff is entitled to prove only for the original claim, less the amount remitted by the administrator. The Court adjudged that the plaintiff should prove only for the balance due after deducting from the orig-

inal indebtedness the amount of the payment, and the plaintiff excepted and appealed.

L. V. Morrill and *Pou & Fuller,* for the plaintiff.
George M. Lindsay, for the defendant.

WALKER, J., after stating the facts. The plaintiff (76) claims that it is entitled to receive from the defendant, as administrator of its debtor, Sugg, out of the assets of the latter's estate, a dividend on the full amount of its debt, that is, on the debt unreduced by the amount which was received from the defendant, and which represented collections made by him on the notes and accounts held by his intestate for fertilizers which he sold. This, it is insisted, is the rule which the courts of equity adopt and apply in the adjustment of claims against the estates of insolvent debtors, as distinguished from the rule in bankruptcy. The former rule may be thus stated: If a creditor has a right to resort to a fund which is open to him alone, he shall not be thereby precluded from coming in upon the assets of an insolvent estate which are common to all the creditors of the deceased debtor and obtaining a dividend on the full amount of his debt, subject to the common sense and necessary qualification that he does not receive more than the sum due; and the rule in bankruptcy is that the creditor shall be entitled to prove only for the residue, the right to resort to the special fund or to any collateral security held by him being treated *pro tanto* as a payment. Bispham Eq. (6 Ed.), pp. 460, 461.

The counsel for the plaintiff argue that the rule by which the adjustment should be made as between a secured creditor, his insolvent debtor's estate and the other creditors of the latter, should not be at all different from that which obtains in the settlement and payment of claims against an insolvent living debtor, who has made a general assignment for the benefit of his creditors, where one or more of the creditors has been previously secured and the assignee has in his hands a fund for distribution, and that the adjustment should be according to the principle laid down in *Winston v. Biggs,* 117 N. C., 206.

The defendant, on the other hand, contends that the plaintiff should prove only for the amount of its claim left after deducting the sum received from the defendant, (77) according to the rule in bankruptcy.

Strong arguments have been advanced by many of the Courts in favor of the adoption of the former rule, and it is asserted that there is no principle of equity which can take from the

diligent creditor any part of his security until he is completely satisfied. He has the right to proceed against both the security he may hold and the general estate of his debtor, and to make the best he can of both. This rule must be conceded to apply when the debtor is living, and it is said that no good reason can be given why it should not apply equally as well if the debtor dies insolvent. *Brown v. Bank,* 79 N. C., 244; *People v. Remington,* 121 N. Y., 328, 8 L. R. A., 458; Bispham, *supra,* p. 461; *Pace v. Pace,* 95 Va., 792, 44 L. R. A., 459; *Morrill v. Bank,* 173 U. S., 140; *Kellogg v. Miller,* 22 Or., 406, 29 Am. St., 618; *Kelloch's case,* L. R., 3 Ch., App., 769; *Hess' Estate,* 69 Pa., St., 272; *Furness v. Bank,* 147 Ill., 570; *Day v. Graham,* 97 Mo., 398; *Jennings v. Loeffler,* 184 Pa., 318; *Knowle's Petition,* 13 R. I., 90; *Bank v. Armstrong,* 59 Fed., 378, 28 L. R. A., 231. It is further argued that the rule in bankruptcy is peculiar to that court, and was adopted for the purpose of preventing even an indirect preference of one creditor over the other creditors of the banrupt, and that no such reason exists in a forum the law of which allows preferences to be made by the debtor as between his creditors. The defendant meets this argument, and the authorities cited to support it, with the assertion that whatever may be the law elsewhere, this Court has recognized and applied, as the true rule, the one which obtains in the courts of bankruptcy, and for this position he cites and relies on *Creecy v. Pearce,* 69 N. C., 67; *Moore v. Dunn,* 92 N.
(78) C., 63, and *Askew v. Askew,* 103 N. C., 285, and The Code, sec. 1416, by which the administrator is required to pay, as a first class, having priority over all others, the debts which by law have a specific lien on property to an amount not exceeding the value of such property.

The question raised by the contentions of the respective parties is a very interesting and important one, but we are not put to the necessity of choosing between the two rules in this case that which we deem to be the best, if, as contended by the defendant's counsel, a choice has not already been made by this Court in the cases cited by him. We leave the question entirely open for future consideration, without the expression or intimation of an opinion as to what the law is or should be in such a case, as we do not think that either of the rules is applicable to the facts of this case. Our decision must depend upon the special provisions of the contract and the facts stated in the case agreed. By the terms of the former the fertilizers and all notes and accounts held by Sugg for such as were sold by him remained the property of the plaintiff, and were held by him and afterwards by his administrator in trust for the plaintiff's

use and benefit. The amount collected by the administrator on the notes and accounts was paid over to the plaintiff to be credited upon Sugg's indebtedness, and it is expressly stated in the case that it was so credited, as follows: The sum of $700 on 22 January, 1903, and the sum of $148.55 on 22 April, 1903, and there was also credited $87.50 for guano returned "leaving a balance due on said indebtedness at the present time" (18 December, 1903, the date of the case agreed) of so many dollars, the amount not being given, but being, as the case shows, the difference between $1,747.51 and the total amount of the payments, including the item of $87.60, which would be in round numbers, $800. So that the notes and accounts in the hands of the administrator, which he afterwards collected, and the proceeds of which collection he remitted (79) to the plaintiff, belonged to the latter, according to the terms of the agreement (*Drill Co. v. Allison,* 94 N. C., 548), and only needed to be converted into money to ascertain their value and the amount to be credited on the debt. They were in no sense collateral securities held by the plaintiff as a creditor of Sugg. As soon as they were collected by the administrator, as the agent of the plaintiff, and certainly as soon as the proceeds were received by the latter, the debt was paid *pro tanto.* This result followed, not only by reason of the provisions of the contract, but the parties have actually agreed that the money was so applied and the debt reduced to the sum of about $800. Can we say that a fact which the parties have agreed on in the case shall not be as they have stipulated it shall be, and shall not have its intended effect, or that the law so determines the rights of the parties as to defeat the intention which has been clearly expressed by them? If the plaintiff was the owner of the notes and accounts and they were collected and the proceeds actually applied to the payment of the debt by the plaintiff, leaving a certain balance due by the defendant as administrator of Sugg, we do not see any ground upon which the plaintiff can claim that the facts bring the case within the said rule of equity, even if it has been adopted by this Court. He was not the holder of any collateral security, mortgage, lien or pledge within any accepted definitions of those words. By the very terms of the contract, the debtor, Sugg, was excluded from any interest in the notes and accounts until the debt should be paid in full, and until then they belonged to the plaintiff. It was competent to the parties to make such an agreement, if they chose to do so, and having so chosen, we must construe their contract as it is written. In *Bank v. Alexander,* 85 N. C., 352, it appeared that the debtors in 1876 made their several promis-

(80) sory notes to one Brem, who immediately endorsed them to the bank for the accommodation of the debtors. The endorser died in the same year and the defendant qualified as his administrator. In the next year the debtors executed a general assignment for the benefit of their creditors, and a dividend was paid by the assignee to the plaintiff, who afterwards claimed the right to prove its entire debt against a fund in the hands of the defendant as administrator of the endorser. It was held that the payment extinguished the debt *pro tanto,* the Court, in this connection, saying: "Here, funds provided by the principal debtors who are primarily liable, have been appropriated to their own indebtedness, nearly two-thirds of which is thus extinguished, and the estate of the testator, their surety, relieved of liability to that extent. The present contention is to revive the discharged indebtedness against the surety for the purpose of obtaining a larger dividend from his estate. The measure of the provable debt is what remains of it unpaid, and as the discharged part could not be asserted against the principal, still less can it be against the surety upon his subsidiary liability." The case was distinguished from one in which there is a fund to be distributed among creditors under a general assignment made before there has been any actual application by a creditor of securities held by him to the payment of a part of his debt, where he is entitled to prove for the whole debt although after the assignment is made there is such an application, and for the reason that by the assignment each creditor becomes the equitable owner of his share of the assigned property and this vested interest cannot be impaired by any subsequent payment. *Brown v. Bank,* 79 N. C., 244; *Winston v. Biggs,* 117 N. C., 206. If the payment made under the circumstances stated in *Bank v. Alexander,* reduced the debt by the amount received from the assignee, so that only the bal-
(81) ance was provable, it must surely be that the payment in this case produces a like result without regard to the rule in equity or in bankruptcy to which we have referred.

There is no error in the judgment of the Court upon the case agreed.

Affirmed.

Cited: Guano Co. v. Edwards, post, 88.

IN RE DRURY.

(Filed 27 September, 1904.)

REHEARINGS—*Supreme Court.*

The petition to rehear a case will be dismissed where there is no reversible error.

For former judgment, see 133 N. C., 785.

J. T. Perkins and *E. J. Justice,* for the petitioner.
Avery & Avery and *Avery & Ervin,* in opposition.

PER CURIAM. Upon the petition to rehear, argued at the last term, we have again examined with care the record and briefs in this cause. We find no new principle of law involved. Specific questions in regard to the boundary of the *locus in quo* were submitted to the jury. Evidence fit to be considered by them was introduced by the several parties to sustain their contentions. The settlement of the controversy depended almost entirely upon the questions of fact. Upon a careful examination and consideration of the entire record and argument of counsel we find no reversible error. Let the petition be dismissed.

(82)

WILLIAMS v. TELEGRAPH CO.

(Filed 27 September, 1904.)

TELEGRAPHS—*Damages—Messages.*

In an action to recover damages for failing to correctly transmit a telegram, the meaning or import of the message not appearing by its own terms or made known to the agent of the company, no damages can be recovered for such failure beyond the price paid for the service.

ACTION by C. A. Williams against the Western Union Telegraph Company, heard by Judge *W. B. Councill* and a jury, at March Term, 1904, of HALIFAX.

The plaintiff brought this action to recover damages for failing to correctly transmit a telegram. The telegram as sent was in the following words:

"RICHMOND, VA., 11 Nov., 1903.

J. H. DURHAM,
Tillery, N. C.

Have Dr. Register meet me at Weldon Friday.
"C. A. WILLIAMS."

Plaintiff alleged that he had gone to Richmond for the purpose of bringing the invalid sister of his wife to his home at Tillery, and upon leaving home Dr. Register, his family physician, had agreed to meet him at Weldon, when notified to do so, to give his sister-in-law necessary medical attention on her journey. In the message, as shown to Dr. Register at Tillery, "Wednesday" was inserted for "Friday," and the doctor, by reason of the mistake, was induced to go to Weldon on Wednesday instead of Friday, and remained there until the next morning. That in consequence of defendant's negligence he
(83) could not get for his relative, when he arrived at Weldon, the medical attention which she so much needed, and he suffered thereby great mental anguish and distress. The plaintiff's allegations were denied by the defendant, except the allegations that there was a mistake in the message as shown to Dr. Register and that he went to Weldon on Wednesday.

The Court submitted two issues to the jury, one as to defendant's negligence and the other as to the damages. Plaintiff introduced evidence tending to sustain the allegations of his complaint. Dr. Register, one of the plaintiff's witnesses, testified that he was informed by Mr. Whitehead, who wrote the message in Richmond for the plaintiff, that the day written in the message was "Friday" and not "Wednesday"; that he had confidence in Mr. Whitehead, who was highly regarded by him as a man of character, and he had no reason to doubt his statement, but thought it best to rely on the message as more certain than Mr. Whitehead's recollection, and that he could have gone to Weldon on Friday. Defendant did not introduce any testimony but requested the Court to give certain instructions, the only one which it is necessary to set out being as follows: "If you find the evidence to be true, the second issue should be answered twenty-five cents, the cost of the message." The Court refused to give the instruction and the defendant excepted. Among other instructions, the Court gave the following: "The plaintiff is entitled to recover damages, if any be sustained, for his mental suffering and anxiety caused by the negligence of the defendant." Defendant excepted. There was a verdict for the plaintiff for $131.25. Motion by defendant for a new trial upon exceptions taken. Motion refused. Judgment and appeal by defendant.

W. H. Dunn and *Albion Dunn,* for the plaintiff. (84)
R. C. Strong, F. H. Busbee and *Philip Busbee,* for the defendant.

WALKER, J. This case was so ably presented to us by the learned young counsel who argued for the plaintiff in this Court that we were at first almost persuaded to believe that the legal merits were with him, but after a careful examination of the facts in the light of well settled principles of law, we are convinced that the Court erred both in giving the instruction to which exception was taken and in refusing to give the instruction requested by the defendant.

In order to ascertain the damages which a plaintiff who sues for a breach of contract is entitled to recover, the rule laid down by Baron *Alderson* for the Court in *Hadley v. Baxendale,* 9 Enc., 341, has generally been adopted as the one which will give the complaining party a fair and reasonable recompense for any loss he may have sustained or for any injury he may have suffered. The rule is thus stated in that case: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." This Court has fully approved the rule. *Ashe v. DeRosset,* 50 N. C., 299, 72 Am. Dec., 552; *Spencer v. Hamilton,* 113 N. C., 49, 37 Am. St. 611; *Herring v. Armwood,* 130 N. C., 177, 57 L. R. A., 958. It has been applied in actions against telegraph companies for negligence in transmitting and delivering messages. *Telegraph Co. v. Hall,* 124 U. S., 444; *Cannon v. Telephone Co.,* 100 N. C., 300, 6 Am. St., 590; *Kennon v. Telegraph Co.,* (85) 126 N. C., 232; *Mackay v. Telegraph Co.,* 16 Nev., 222; *Frazer v. Telegraph Co.,* 84 Ala., 487; *Baldwin v. Telegraph Co.,* 45 N. Y., 744, 6 Am. Rep., 165; *Telegraph Co. v. Gildersleeve,* 29 Md., 232, 96 Am. Dec., 519; *Landsberger v. Telegraph Co.,* 32 Barb., 530; *Candee v. Telegraph Co.,* 34 Wis., 471, 17 Am. Rep., 452; *Beaupre v. Telegraph Co.,* 21 Minn., 155. The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered

for failure to correctly transmit and deliver it beyond the price paid for the service. As said by the Court in *Squire v. Telegraph Co.,* 98 Mass., 237, 93 Am. Dec., 157, in commenting upon and approving the rule as laid down in *Hadley v. Baxendale, supra:* "A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor." The application of this principle, which has been settled by the best considered precedents, must be fatal to the plaintiff's contention. In order to enable him to recover substantial damages, based upon his mental distress and suffering, it is necessary for him to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit correctly, or that it had extraneous in-
(86) formation which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff. We can see nothing in the message itself to indicate that any mistake in its transmission would be likely to cause the plaintiff any mental anguish, and surely none of the kind which he is alleged to have suffered. There is not even a remote reference to his invalid sister-in-law, and, for all that appears, he may have wished to see Dr. Register, not as a physician, but for some purpose entirely foreign to the one mentioned in his complaint. It is quite certain that the object for which he desired to meet Dr. Register at Weldon did not appear by the message to be a very urgent one, as the telegram was sent on Wednesday and the doctor was not to come to Weldon until Friday.

We attach no importance to the fact that the message was addressed to a person who chanced to be a physician. That did not indicate to the company in the least that the special damages now claimed would follow a breach of its contract or duty. Under the circumstances, the message might just as well have related to some mere commercial transaction as to a professional engagement. There was nothing at all in it to notify the defendant that the plaintiff would be accompanied from Richmond by his invalid sister-in-law, who would need medical attention at Weldon, and without this information we do not see how the defendant can be liable for any damages which en-

sued from her failure to receive the proper care and attention from his family physician when they reached Weldon, unless the liability of a telegraph company for errors and delays is without limit, instead of being fixed in its extent by the just and reasonable rule first announced in *Hadley v. Baxendale,* 9 Exch. We think its liability must end somewhere, and that its patrons have no reason to complain if they fail to give such information of the nature of the particular transaction to which the message refers, as the company in all fairness is entitled to have. They are afforded ample protection by the rule, (87) for the message can be so framed as to indicate its meaning, or, if this requires too many words and therefore the payment of an increased toll, they can adopt the inexpensive method of giving orally the information to the receiving agent or operator of the company. In this case, the message, so far as it imparted any information of the special purpose for which Dr. Register was wanted, might as well have been in cipher (*Cannon v. Telephone Co., supra*), or written in an unknown tongue. There is no suggestion that the company had any other information than the message itself furnished as to the object in sending it.

We cannot hold therefore that the damages are such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, and as might naturally, that is, according to the usual course of things, have been expected to follow as the probable result of the breach of it. The message does not appear to us to be any more certain or definite in its terms than the one which was held in *Kennon v. Telegraph Co., supra,* to be insufficient as a basis for the recovery, because of its nondelivery, of the kind of damages the plaintiff now claims. That decision is directly in point and must control in this case. See also *Telegraph Co. v. Eckford,* 68 Miss., 307.

The Court committed an error in giving the instruction, and in refusing to charge as requested by the defendant, for which there must be another trial.

New trial.

Cited: Cranford v. Tel. Co., 138 N. C., 164; *Dayvis v. Tel. Co.,* 139 N. C., 83; *Johnson v. R. R.,* 140 N. C., 577; *Harrison v. Tel. Co.,* 143 N. C., 149; *Helms v. Tel. Co., Ib.,* 390; *Suttle v. Tel. Co.,* 148 N. C., 483; *Holler v. Tel. Co.,* 149 N. C., 413; *Cordell v. Tel. Co., Ib.,* 413; *Shaw v. Tel. Co.,* 151 N. C., 642; *Battle v. Tel. Co., Ib.,* 632; *Williamson v. Tel. Co., Ib.,* 227, 230.

(88)

GUANO CO. v. EDWARDS.

(Filed 27 September, 1904.)

For head-note to this case, see *Chemical Company v. Edwards, ante*, 73.

ACTION by the Pocomoke Guano Company against B. W. Edwards, heard by Judge *Frederick Moore*, at December Term, 1903, of GREENE. From a judgment for the defendant the plaintiff appealed.

L. V. Morrill and *R. W. Peatross*, for the plaintiff.
George M. Lindsay, for the defendant.

WALKER, J. There is no material difference between the facts in this case and those in *Chemical Co. v. Edwards, ante*, 73. It was provided in the contract under which the guano was shipped to Sugg, that the notes and accounts of fertilizers sold by him should be sent to the plaintiff and by the latter returned to Sugg for collection. Then follows this clause: "All proceeds as collected must be first applied to the payment of your obligations to us, whether the same shall have matured or not." This provision, which is not in the contract construed in the other case, requires an immediate application of the proceeds of collections to the payment of the indebtedness, and if it changes the nature of the transaction at all affords still stronger reason why we should adhere to our decision that, under the facts and circumstances presented and the terms of the contract, the plaintiff is not entitled to prove for his full debt against the estate of the decedent Sugg, but only for the amount remaining after deducting the payment.

Affirmed.

LASSITER v. RAILROAD CO.

(Filed 27 September, 1904.)

1. APPEAL—*Amendments—Pleadings.*

An appeal lies from a refusal to allow an amendment of pleadings on the ground of a want of power.

2. AMENDMENTS—*Pleadings—Limitations of Actions—The Code, Sec.* 233 (*Subsec.* 2), 273, 1338.

Where a complaint in an action for wrongful death discloses that the death and wrongful act occurred in another State, but fails to state the law of such State, an amendment pleading it does not state a new cause of action, although the period of limitation prescribed by the foreign statute has elapsed.

3. *Semble,* If not pleaded and proved, the presumption is that the common and statutory law of another State is the same as that of this State.

ACTION by H. C. Lassiter, administrator, against the Norfolk and Carolina Railroad Company, heard by Judge *W. B. Councill,* at March Term, 1904, of NORTHAMPTON. From a judgment for the defendant the plaintiff appealed.

S. J. Calvert, Peebles & Harris, T. W. Mason and *W. E. Daniels,* for the plaintiff.

Day & Bell and *George B. Elliott,* for the defendant.

CLARK, C. J. The complaint is a sufficient statement of the facts constituting a cause of action (if the death had occurred in this State) for negligently causing the death of plaintiff's intestate by ordering him to go between cars not equipped with improved couplers to uncouple said cars, in obeying which order he was run over and killed. The defendant demurred on the ground that the complaint disclosed that "the intes-

(90)

tate came to his death in the State of Virginia by reason of the alleged wrongful acts of the defendant, but does not allege that an action for wrongful death may be maintained in that State." Thereupon the plaintiff asked leave to amend the complaint by pleading the "statute law of Virginia, which gives a right of action for negligently causing death," which motion was refused on the ground that "the Court had no power or discretion to allow the same, and but for such want of power the amendment would be allowed." The Court further gave as a reason why it did not have such power to grant the motion: "1. Such an amendment would introduce a new cause of action and not enlarge or amplify the cause of action pleaded.

2. Such an amendment would deprive the defendant of the benefit of the statute of limitations embraced in the statute law of Virginia."

The refusal of an amendment on the ground of want of power is appealable. *Martin v. Bank,* 131 N. C., 121. The "cause of action" is the "statement of facts," upon the happening or non-happening of which the plaintiff bases his action. The Code, sec. 233 (2), says the complaint must contain a plain and concise "statement of facts constituting the cause of action." Upon those facts, if true, the law gives a "right of action." This right of action is a matter of law of which the Court usually takes judicial notice, but if the tort or contract accrued beyond the State line the law of the foreign State should be pleaded and proved—not because it is in that case a part of the "cause of action" any more than if the transaction had taken place within the State, but because the Court is not presumed to know the law of all other States. Our statutes do not require the foreign statute to be pleaded but that it must be brought to the apprehension of the Court, if a written law, by the mere exhibition of the printed statute "contained in a book or
(91) publication purporting to have been published by the authority" of the foreign State, and "the unwritten or common law of another State may be proved as a fact by oral evidence." The Code, sec. 1338; *Copeland v. Collins,* 122 N. C., 621. There are, however, many decisions that the foreign law should be pleaded and proved. The cause of action, plus the right of action thereon, constitute what our Code styles a "good cause of action." Some authorities call it a *"whole* cause of action." 5 A. & E. Enc. (2 Ed.), 776n. The *subject* of an action is the *thing,* the wrongful act for which damages are sought, the contract which is broken, the act which is sought to be restrained, the property of which recovery is asked. The *object* of an election is the *relief* demanded, the recovery of damages or of the land or personalty sued for, the restraint or other relief demanded.

If not pleaded and proved the presumption under the authorities is that the unwritten or common law of another State is the same as the unwritten or common law in this State. Minor Confl. Laws, sec. 214, says that for as good reason the weight of authority is now that in the same absence of pleading and proof the presumption is that the written law of another State is the same as the writen law here. And citing in a note the authorities, thus sums up: "Certainly the great weight of authority is in favor of the rule. Nor is it in most instances apt to work any material injustice, since a failure of both par-

ties to present to the Court any evidence of the proper foreign law may reasonably justify the Court in presuming that neither party finds anything there which would place him in a position more advantageous than he occupies under the *lex fori,* or which would place his adversary in a less advantageous position. * * * Neither party can be injured by the presumption that the two laws are similar." Among the numerous cases, besides those cited by Minor, *supra,* sustaining this are: *Scroggins v. McClelland,* 37 Neb., 644, 22 L. R. A., 110, 40 Am. St., (92) 520; *Wickersham v. Johnston,* 104 Cal., 407, 43 Am. St., 118; *Kuenzi v. Elvers,* 14 La. Ann., 391, 74 Am. Dec., 434; *James v. James,* 81 Tex., 373; *Haggin v. Haggin,* 35 Neb., 375; *Monroe v. Douglas,* 5 Seld., 447; *Peet v. Hatcher,* 112 Ala., 514, 57 Am. St., 45; *Sandridge v. Hunt,* 40 La. Ann., 766.

But we do not pass upon the point and need not do so. Those authorities are as to the presumption of the law in another State being the same as ours when not shown by the printed volume or by oral evidence if the law is unwritten. An entirely different question is before us, *i. e.,* whether the trial Court has power to permit an amendment to allege the nature of the law in the State where the transaction took place, and prove it when by inadvertence such allegation has been omitted in the complaint. Such allegation does not add to or change the "cause of action" which by The Code, sec. 233 (2), is a "statement of the facts." Those facts, the death and the wrongful negligence, are already fully stated. "In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the *right of action." R. R., v. Babcock,* 154 U. S., 197. The failure to allege this foreign law is merely a defective statement of a good cause of action. But even if there were a failure to allege an essential fact to constitute the cause of action, The Code, sec. 273, expressly gives power to amend "by inserting other allegations material to the case." The rounding out of the complaint to cure a defective complaint, even in material matters, is not changing a cause of action nor adding a new cause, but merely making a good cause out of that which was a defective statement of a cause of action because of the omission of "material allegations" which The Code, sec. 273, authorizes to be inserted by amendment. If the cause of action were not defectively stated there would be no need (93) of amendment.

The difference between a "defective statement of a good cause of action" which can be amended by inserting "other material allegations," as here, and a "statement of a defective cause of action" is that the latter cannot be made a good cause by add-

ing other allegations. *Ladd v. Ladd,* 121 N. C., 121. We have a case exactly "on all fours" with this under the New York Code, sec. 723, which is the same as our Code, sec. 273. In that case, *Lustig v. R. R.,* 20 N. Y., Supp., 477, the administratrix brought suit in New York for the death of her intestate in New Jersey caused by the wrongful act of the defendant. After both sides had rested the defendant moved to dismiss "because there was no allegation in the complaint, nor proof on the trial, of any statute in New Jersey authorizing a recovery of damages for death from wrongful injury, and that as no right of recovery existed at common law no cause of action had been made out." The trial Court reopened the case and allowed the plaintiff to amend her complaint and to supply this defect in her evidence. This was sustained on appeal, the Court holding that it was authorized by the New York Code, sec. 723 (which, in the words of our Code, sec. 273, allows an amendment "inserting allegations material to the case"), and that this "did not add a new cause of action" nor change the cause of action, but merely perfected a defective statement of a good cause of action, defective because of the omission of this averment. For the same reason the plea of the statute of limitations would not run, because the facts of the transaction being stated in the complaint the defendant had notice of the demand from the beginning of this action. The same power of amendment to insert the allegation of the foreign statute (which had been omitted in the complaint) was sustained and the same ruling that the
(94) amendment related back to the beginning and the statute of limitation did not bar was made in *R. R. v. Nix.,* 68 Ga., 572, in effect overruling a former Georgia decision which is the only one found in any Court to the contrary. In Tiffany on "Death by Wrongful Act." sec. 202, it is said that "if the plaintiff's right of action arises under a foreign statute he should allege and prove it," but if the complaint "fails to allege the foreign statute, an amendment alleging it is not open to the objection that it sets up a new cause of action, although the period of limitation prescribed by the foregn statute has elapsed." In *The New York,* 175, U. S., 187, where a Canadian statute was treated as if in evidence, on the trial below, though it was not pleaded and the record did not show that it was put in evidence, the Court held on appeal that it should be treated as if pleaded and put in evidence. In *Steamship Co. v. Ins. Co.,* 129 U. S., 447, the United States Supreme Court held that even after verdict, "if justice should appear to require it," it would remand the case with directions to the lower Court to allow pleadings to be amended and proof of the foreign law (of Great Britain) to be introduced.

Whether this plaintiff should recover must depend upon the facts as to the death of the plaintiff's intestate, which, if proved, as stated in the complaint, was caused by the wrongful act of the defendant. If any material allegation is omitted the Court had power to permit its insertion (The Code, sec. 273), and if the defect can be thus cured by amendment, it is a defective statement of a good cause of action and not a defective cause of action. *Ladd v. Ladd, supra.* This is the very spirit of our present procedure, and it is but justice that when the plaintiff has sustained injury, if the complaint is imperfectly stated he should be permitted by amendment to cure the inadvertence of counsel in drawing the complaint, and receive any relief to which, upon the facts of the transac- (95) tion, he is entitled to recover.

A somewhat similar case is where, in a magistrate's court, in which the jurisdiction is limited by the Constitution to cases "wherein the sum demanded shall not exceed $200," though that essential averment is not made in the warrant or complaint, yet if such is the fact an amendment to make such averment will be allowed even in the appellate court. *McPhail v. Johnson,* 115 N. C., 302, and many cases there cited. In those cases, in the face of the record, there was no jurisdiction, and no cause of action that could be entertained by the court till after the amendment. Where there would be no difference in the proofs of the transaction under the amended complaint, an amendment is allowed even where the action becomes one for the conversion of property instead of one for the recovery of specific personal property. *Craven v. Russell,* 118 N. C., 564. Where, in an action to recover purchase money there was failure to aver that the plaintiff was "willing, ready and able" to tender a good deed, amendment was allowed after the close of the evidence. *Woodbury v. Evans,* 122 N. C., 779. Where the amendment stated title in the plaintiff different from that alleged in the complaint, the Court said that "the cause of action was for the recovery of the crop, and it could make no difference how the plaintiff claimed it." *King v. Dudley,* 113 N. C., 167, cited and approved in *Simpson v. Lumber Co.,* 133 N. C., 99.

Here, there is no change or addition asked either as to the relief sought nor in "the statement of facts," which under The Code, sec. 233 (2), "constitute the cause of action," but an amendment to aver the nature of the law in Virginia and discarding, as we may, the authorities that the law there is presumed to be as here, the amendment would be at the most the "inserting of a material allegation," and so expressly authorized by The Code, sec. 273. In holding that the (96) Court had no power to permit this there was

Error.

WALKER, J., concurring in result only. I concur in the conclusion of the Court that there was error in refusing to permit the plaintiff to amend his complaint upon the ground of a want of power. He alleged facts which would have constituted a good cause of action under the statute of Virginia, if the statute had been pleaded. It is, of course, necessary to "allege and prove the foreign statute in order to recover (*Hooker v. Moore,* 50 N. C., 130), but the failure to allege it is not necessarily fatal, as it is merely the omission of an averment essential to fill out and complete the cause of action. The failure to plead the statute was evidently an inadvertence, as counsel knew very well that the plaintiff could not recover at common law, because it is one of its leading maxims that a personal right of action dies with the person—*actio personalis moritur cum persona*—and that he could not recover under our statute, because it can have no extra territorial operation. The presumption must be that they intended to sue under the statute of Virginia, as the death occurred there and is alleged to have been caused by a negligent act committed there, and an action for the value of a life thus taken can be given only by the statute law of the place where the death occurred. The cause of action, therefore, is not so inherently defective on its face that it cannot be cured by amendment, for it is of such a nature as to be capable of being made good by alleging and showing the local law which would impart vitality to the facts already alleged. Such an amendment is, in no reasonable view, the statement of a new cause of action. The right of amendment is denied only when the Court can see that it is impossible for the cause of action to be
(97) perfected, or, to express the idea a little differently, when it appears affirmatively that there is not, and cannot be, a cause of action. But when the proposed amendment is germane to the facts already stated and does not entirely change their nature, the party will be allowed to reform the pleading, not to state a new cause of action, but to perfect one which has been imperfectly alleged.

I do not think though that *The New York,* 175 U. S., 187, and *Steamship Co. v. Ins. Co.,* 129 U. S., 447, are authorities to support of the right of amendment. They were cases in the Court of Admiralty and were decided upon the rule prevailing in that court—that where merits clearly appear on the record a party will be allowed to assert his rights in a new allegation, and the necessary amendment for that purpose will even be permitted in the appellate court, under certain circumstances, without remanding the case. The difference between the practice in Common Law and Admiralty Courts in this respect is pointed

out in my dissenting opinion in *S. v. Marsh,* 134 N. C., 189, and the authorities cited, and for convenience I refer to it, instead of repeating in this opinion what is there said.

While I assent to the conclusion of the Court, I cannot by my silence give implied approval to what is said as to the presumption of law that there is a statute in another State substantially like ours. There is, in my opinion, no such presumption, and it has been so ruled by this Court for many years and in a long and unbroken line of cases in which the rights involved were or could be only statutory, as they did not exist at common law. In *Hooper v. Moore,* 50 N. C., 130, the Court, by PEARSON, J., says: "What is the law of another State or of a foreign country is as much a question of law as what is the law of our own State. There is this difference, however: the Court (98) is presumed to know judicially the public laws of our State, while in respect to private laws and the laws of other States and foreign countries this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved *as facts,* for otherwise the Court can not know or take notice of them. This is familiar learning. 3 Wooddenson Lec., 175." To the same effect are the following cases: *Knight v. Wall,* 19 N. C., 125; *Moore v. Gwynn,* 27 N. C., 187; *S. v. Jackson,* 13 N. C., 564; *Hilliard v. Outlaw,* 92 N. C., 266. The settled doctrine of this Court might be convincingly shown by multiplying the cases, but I do not deem it necessary to do so, as the numerous decisions upon the subject are perfectly familiar to us. I do not think the principle established by this Court should be questioned, even by an intimation that it can be open to doubt, and, therefore, to discussion. Referring to the rule as thus adopted by this Court, Minor, in his excellent treatise on the Conflict of Laws, at page 531, says: "If the foreign law in issue is the unwritten law of a State not originally subject to the common law, or, in any event, if it is a statute or written law, the above presumption does not apply, and, in strictness, it would seem that there were no other probabilities one way or the other in general that would justify any presumption as to the foreign law. Under this view, it is a fact open to inquiry, susceptible of proof, and, like any other material fact, must be proved, in order to sustain the allegations. Without such proof, the case of the defense founded thereon simply falls to the ground. To this strictly logical view some of the courts have subscribed."

In *The New York, supra,* and *Steamship Co. v. Ins. Co., supra,* cited in the opinion of the Court, it is said: "The rule that the courts of one country can not take cognizance of

(99) the law of another without plea and proof, has been constantly maintained at law and in equity in England and America." And again: "Upon all principles of common jurisprudence, foreign law is always to be proved as a fact."

In the absence of any proof of a statute or of any change of the common-law in another State, it is always presumed in the Courts of this State that the common law as administered in our courts prevails there. *Griffin v. Carter,* 40 N. C., 413; *Brown v. Pratt,* 56 N. C., 202. But this presumption, as I have shown, does not obtain as to the statute law.

I am requested to state that Mr. Justice CONNOR concurs in this opinion.

Cited: *Hall v. R. R.,* 146 N. C., 351.

TRIPP v. NOBLES.

(Filed 27 September, 1904.)

1. WILLS—*Election—Executors and Administrators.*

Where a husband wills land belonging to his wife to her for life, together with certain personal property, and she qualifies as administratrix with the will annexed, she is estopped from afterwards claiming title to the lands devised other than under the will.

2. WILLS—*Election—The Code, Secs.* 2116, 2118.

Where land is charged with debts, the owner has no power by an election to take under a will other property and surrender the property charged, so as to permit it to pass to others discharged of such debts.

WALKER and DOUGLAS, J.J., dissenting in part.

(100) ACTION by W. H. Tripp against S. J. Nobles and others, heard by Judge *M. H. Justice* and a jury, at March Term, 1904, of PITT.

This is a petition filed by the plaintiff, executor of Mary Nobles, deceased, for license to sell her real estate to make assets for the payment of her debts. The defendants are her heirs at law. The petition contains the usual averments prescribed by the statute in such cases. The defendant, S. J. Nobles, filed an answer to the petition, denying the material averments therein. The Clerk, upon the coming in of the answer, transferred the cause to the civil issue docket for trial upon the

issues raised by the pleadings. The only issues and finding thereupon pertinent to the exceptions are: "Did Mary Nobles die in possession of and holding title in fee to the lands described in the petition?" This issue was by consent answered "Yes." "Is the plaintiff estopped to allege title in Mary Nobles at the time of her death of the lands described in the complaint?" The jury, under instruction of the Court, answered the second "No." From a judgment for the plaintiff the defendant, S. J. Nobles, appealed.

Jarvis & Blow, for the plaintiff.
Skinner & Whedbee, for the defendants.

CONNOR, J. The land described in the petition was the property of Simon J. Nobles, the husband of plaintiff's testatrix, and father of the defendants. He conveyed it to Macon G. Moye, who immediately conveyed to said Mary J. Nobles.

Ten years thereafter the husband, Simon J. Nobles, executed his will, bequeathing to his wife, the said Mary, all of his personal property, of the value of $100, and devising to her the land conveyed, as aforesaid, for her life, remainder to his son, the defendant, S. J. Nobles, subject to a charge of $126 in favor of his daughter, Florence L. Moye, and $172 (101) in favor of another daughter, C. F. Crawford, both of whom are defendants herein. Said Simon J. died March, 1891, and his widow, the said Mary, offered the will for probate and qualified as administratrix *cum testamento annexo.* In her application for probate of said will and letters of administration she set forth the value of the estate as $600, of which "$500 is real estate and $100 is personal property." She further set forth that "Simon J. Nobles, Florence L. Moye and Mary Nobles, the widow, are entitled as heirs and distributees." The said Simon J. and wife, Mary, resided on said land during the life of the former, and after his death she remained in possession until her death, November 19, 1902. She retained the personal property bequeathed to her in the will of her said husband. The said Mary Nobles left a last will and testament appointing the plaintiff executor, which was duly admitted to probate. She made no disposition of said land in her will. The defendant, S. J. Nobles, insists that by proving the will of her husband and qualifying as his administratrix *cum testamento annexo,* and taking and retaining the personal property, the said Mary elected to take thereunder, and that she and her representatives are thereby estopped from making any claim to the land inconsistent with the provisions of the will.

GASTON, J., in *Melchor v. Burger*, 21 N. C., 634, says: "Ever since the case of *Noyes v. Mordaunt*, 2 Ves., 581, which was decided in 1706, it has been holden for an established principle of equity that where a testator by his will confers a bounty on one person and makes a disposition in favor of another *prejudicial* to the former, the person thus prejudiced shall not insist upon his old right and at the same time enjoy the bounty conferred by the will. The intention of the testator is apparent that both dispositions shall take effect,
(102) and the conscience of the donee is affected by the condition thus implied that he shall not defraud the design of the donor by accepting the benefit and disclaiming the burden, giving effect to the disposition in his favor and defeating that to his prejudice." The doctrine is so strongly fixed in our jurisprudence, and so uniformly adhered to and enforced by the Court, that it is unnecessary to cite authority for its support. The facts set out in this record bring the case clearly within the operation of the principle, unless, as contended by the plaintiff, there be some distinguishing feature to take it out of the general rule. The land devised to the wife for life, remainder to her son, subject to the charge in favor of the daughters, was the property of the wife. This was well known to the husband. The personal property bequeathed to her in the will was the property of the husband. Upon the death of the husband the wife well knew the status and value of the property and the provisions of the will. She was *sui juris*, and fully competent to elect by dissenting from the will, if she so desired, thereby holding her land and taking the personal property as her year's support by appropriate proceedings for that purpose. She deliberately and by a most solemn and unmistakable act chose to take and *hold under the will*. The principle of law which fixed her status in respect to the property is thus stated: "The doctrine of election as applied to the law of wills simply means that he who takes under a will must conform to *all* of its provisions. He can not accept a benefit given by the testamentary instrument and evade its burdens. He must either conform to the will or wholly reject and repudiate it. No person is under any legal obligation to accept the bounty of the testator; but if he accepts what the testator confers upon him by his will, he must adhere to that will throughout all its dispositions." Underhill Wills, sec.
726. This Court in *Weeks v. Weeks*, 77 N. C., 421,
(103) says: "It is a familiar principle of equity that a devisee or legatee can not claim both under a will and against it. If the will give his property to another he may

keep his property, but he can not at the same time take anything given to him by the will; for it was given to him upon the implied condition that he would submit to the disposition of his property made by the testator." But it is suggested that, as the personal property given the wife was worth only $100 and the land $500, she took no *benefit* under the will; that she was entitled to have the personalty allotted to her as and for her year's support, and, therefore, received no more than by the law she was entitled to have from her husband's estate. We at first thought this fact relieved her of the duty to elect, but upon a careful examination of the works on Equity Jurisprudence, and many cases, we find no suggestion of any such exception to the general rule. The value of the personalty and her right to claim in some other way presented a strong reason to her for exercising her right to dissent from the will and thereby elect to take against it, but with a full knowledge of the facts she elected to prove the will and take out letters of administration, assuming thereby the duty of executing its provisions. If she had been misled or acted under misconception of the condition of the estate and her rights, she might have had relief and been permitted to exercise her right of election to dissent from the will, but there is no suggestion of that kind here. It has been held in New York that when one elected to take a benefit under the will, with burdens attached, he was bound although it turned out that the burden was greater than the benefit. *Brown v. Knapp,* 79 N. Y., 136. "One who accepts a devise or bequest does so on condition of conforming to the will. No one is allowed to disappoint a will under which he takes a benefit, and everyone claiming under a will is bound to give full effect to the legal disposition thereof, (104) so far as he can, and when one is thus put to his election under a will it matters not that what he takes turns out to be greater or less in value than that which he surrenders." *Caulfield v. Sullivan,* 85 N. Y., 153. Certainly this must be so where the person knows at the time she elects to take under the will the value of the property. In *Syme v. Badger,* 92 N. C., 706, Judge Badger, for the purpose of providing for the payment of a debt due his wife, devised and bequeathed to her real and personal property in payment of the debt. He left other property and other creditors. Mrs. Badger qualified as executrix and took possession of the property. It turned out that the property given her was of insufficient value to pay her debts. This Court held that by proving the will and qualifying as executrix she elected to take under the will, and was thereby precluded from resorting to other assets of her testator

to pay her debts. SMITH, C. J., quoting with approval the language of this Court in *Mendenhall v. Mendenhall,* 53 N. C., 287, said: "The act of qualifying as executrix and undertaking upon oath to carry into effect the provisions of the will is irrevocable." The authorities are cited in the opinion in that case. The principle has been approved by this Court in *Allen v. Allen,* 121 N. C., 328; *Treadway v. Payne,* 127 N. C., 436. We can see no distinction between the qualification of the wife as executrix and administratrix with the will annexed. In either case the will is offered for probate, and the party claims under it and assumes the duty of executing its provisions. It is *argued* that the election by Mrs. Nobles can not affect the rights of her creditors. That to permit her thereby to divest herself of her lands would be a fraud upon them. If the debts were in existence at the time of the death of her husband we should concur with the plaintiff in this view. The record does not disclose when the debts were contracted. For (105) the purpose of disposing of this appeal we cannot assume that the outstanding debts were contracted during coverture. If they were so contracted they could not as simple contract debts or bonds be a charge upon her land. Of course, if the debts were chargeable upon her land she could not, by her election to take other property of less value under her husband's will, permit the land to pass to other parties discharged of such debts. This question may be inquired into upon another trial. Her heirs at law and her personal representative, except in so far as the rights of existing creditors may be affected, are bound by her election. "An election once made by a party bound to elect, and under no misapprehension as to his rights, and with knowledge of the value of the properties to be affected by such election, is irrevocable, and binds the party making it and all persons claiming under him and also all donees under the instrument whose rights are directly affected by the election." Eaton Eq., 199; *Cory v. Cory,* 37 N. J. Eq., 198.

A careful examination of the record we think explains the conduct of the parties. The land belonged to Simon J. Nobles. He conveyed it to his son-in-law, who immediately conveyed to the wife. It was the purpose, by these conveyances, to put the title in the wife, doubtless to meet some undisclosed conditions or family arrangement. The husband thereupon makes his will, giving this land to the wife for life, remainder to the son, subject to a charge of about one-half its value in favor of his two daughters. The wife leaves a will in which she makes no mention of this land—the reasonable inference is

that she understood and acquiesced in her husband's disposition of the property. The issue in regard to her ownership is found by consent in the affirmative. It was evidently the purpose of counsel to present the contested question upon the third issue. His Honor instructed the jury to answer the issue "No." Strictly speaking, his Honor was correct. (106) The right of the remainderman, S. J. Nobles, does not accrue by way of estoppel. A court of equity, would, if applied to at the death of the husband and the election of the wife to take under the will, have decreed a conveyance of the legal title in the land to the remainderman, subject to the life estate of the wife; or accomplished the same end by impressing a trust upon the legal title in accordance with the disposition made in the will. Mr. Eaton says: "If the donee elects to take under the will he must carry out all of its provisions, and transfer his own property disposed of thereunder to the person named as the recipient thereunder. Eaton's Eq., 66. The will of Simon J. Nobles did not transfer the legal title, hence it remained in the wife, burdened with the rights of the son and his sisters. We notice this phase of the record because of the apparent inconsistency in the verdict. The legal title to the land is in the heirs of Mrs. Nobles, but as she would have been precluded from asserting it against the devisee in the will, save for her life estate, so her executor may not sell the naked legal title a sagainst the beneficial owner, the defendant, Simon J. Nobles. The cause must be remanded for a new trial in accordance with this opinion. It is so ordered.

New trial.

WALKER, J., dissenting. The facts of this case are well stated in the opinion of the majority of the Court, as written by Mr. Justice CONNOR and it is not necessary therefore to repeat them here. I do not differ with my brethren of the majority in their understanding of the facts, but their views and mine are not at all in accord as to the law applicable to those facts. They think, and have so decided, that a case of election is presented, which deprives the widow of her land, while I do not—my opinion being that the law did not (107) compel her to part with her valuable property in exchange for the paltry sum of one hundred dollars which was given her in the form of a legacy, but which really belonged to her at the time of the pretended gift. The doctrine of election came to us from the civil law and is equitable in its nature. It is based upon no principle, as I conceive, which in its application will work so great an injustice as to take that

which in law belongs to a widow and give it to another upon an inadequate consideration, to say the least of it. "An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same paper. The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he can not accept and reject the same writing." Bispham Eq. (6 Ed.), p. 413, sec. 295. The doctrine, it is said, requires that there should be alternative benefits between which the donee is to make his choice once for all, and it has been settled by the more recent authorities that it is based upon the principle of compensation and not at all upon the idea of forfeiture, as was formerly but erroneously held, by not distinguishing between express and implied elections and cases in which the beneficiary elects to take under and those in which he elects to take against the will. The text writers and the courts are now practically agreed that the underlying principle of this equity is one of compensation to the disappointed donee instead of an entire forfeiture by the other donee who gets the benefit under the will. Fetter's Eq., pp. 51 and 54. The latter must only make compensation out of his share under the will to the per-
(108) son who is disappointed by his election. Indeed, Adams in his work on Equity (2 Am. Ed., by L. & C.), p. 237 (97), says: "The (testator's) intention is at once effected if compensation be the result, but will be manifestely defeated by forfeiture unless the Court can imply a gift to the disappointed donee, for which the testator has given no authority." Eaton on Eq., 182; Snell's Eq., pp. 204, 205; 1 Pom. Eq. Jur., sec. 462; Bigelow on Estoppel (5 Ed.), pp. 674, 675; Bispham's Eq. (6 Ed.), secs. 296 and 395; Herman on Estoppel, sec. 1031. The doctrine is not applicable if there is no fund from which compensation can be made. This follows as a matter of course. Snell's Eq. (1 Am. Ed.), 205, 206; Bigelow on Estoppel, p. 676; Fetter's Eq., p. 54. But it is also necessary, in order to put any one to an election, that the testator should give by his will property actually and absolutely owned by himself to the person required to elect, or, as it is put, some free disposable property which can become compensation for what the donor seeks to take away. Bigelow, 676; Fetter, 52 and 54; Eaton, 185. This doctdine of equity has grown out of the fundamental maxim that he who seeks equity must do

equity, and it does not arise when the conscience of the alleged refractory donee is not so affected as to require him to surrender something of his own for that which his donor has conferred upon him. 1 Pom. Eq. Jur., sec. 461; Snell, p. 202. Applying the principle as thus understood to the facts of our case, let us see if there was any obligation imposed upon Mrs. Nobles to elect between inconsistent benefits, and whether by what she did her title to the land devised in the will has been lost or in the least impaired. In the very beginning it must be conceded that such is not the case, as, in any event, she is required to give up only the pecuniary legacy of one hundred dollars for the purpose of making compensation, and to that extent merely does she lose anything. The authori- (109) ties are all at one in stating that she may keep that which is her own, provided she makes compensation to the losing donee, if the alternative gift to her is sufficient for that purpose, and if not sufficient then *pro tanto,* and if it is more than enough for the purpose she retains the surplus. This is the well-settled rule, as the above citations will substantiate, and it holds good in her favor until by some decree of the Court she has or, if she is dead, her heirs have, been compelled to convey to the other donee. The devisee, S. J. Nobles, could recover at the utmost only the sum of one hundred dollars and interest if the land is worth more than that sum.

It is not necessary though to rely upon the principle of compensation in order to defeat the claim of the defendant, S. J. Nobles. Every widow of an intestate, or of a testator from whose will she has dissented, is entitled, besides her distributive share in her deceased husband's personal estate, to an allowance for the support of herself and family for one year after his death, the value of that "year's allowance" being not less than $300. The Code, secs. 2116 and 2118. Where the value of any gift of personal property to her in her husband's will does not exceed the amount allowed her by law she need not dissent in order to claim her year's support, because it is presumed to be given by the testator as and for her allowance. *Flippen v. Flippen,* 117 N. C., 376. There could be no reason for requiring her to dissent if she will get no more by doing so, and in such a case she takes the amount given in the will as her year's allowance by virtue of the law and not of the will. She is considered as in the possession and enjoyment of it under her paramount title. Statutes, in all material respects like ours, have been thus construed in other States by courts whose decisions are entitled to the highest respect. *Baker v. Baker,* 57 Wis., 382; *Godman v. Converse,* 38 Neb., 657; *Moore*

(110) *v. Moore,* 48 Mich., 271; *Williams v. Williams,* 71 Mass., 24. Why should the widow be compelled to dissent in such a case as this one? Why be required to do so vain and unprofitable a thing? If she had formerly dissented she would have received no more than if she had taken what was given by the will, as the one hundred dollars was all of her husband's personal estate and therefore with or without a dissent she would get the same thing, and much less than the minimum sum to which she was entitled under the law. The benefit which she received, in order to bind her by an election to abide by the devise of her own property, must have been a substantial one, and surely must have been something of which her husband had the absolute right of disposal without any right of veto in her. This is not like the case of a distributee who can take nothing unless the ancestor dies intestate, but must be content, when there is a will, to take what is given by it, and who can not repudiate it in order to take under the law, being dependent altogether on the bounty of the decedent. PEARSON, C. J., notes the distinction in *Harrington v. McLean,* 62 N. C., at p. 260, in citing and commenting on *Mendenhall v. Mendenhall,* 53 N. C., 287. I have been able to find but two cases in which the point presented in this case has been considered. In *Stone v. Vandermark,* 146 Ill., 312, a widow had taken possession of certain land and personal property devised to her by her husband and it was contended that she thereby elected to take under the will, but the Court, finding that the personal property was less in value than she was entitled to receive under the statute as her year's allowance, and that the land was the homestead, to the possession of which, during her life, she was also entitled under the law, held that there had been no election. The case of *Compher v. Compher,* 25 Pa., 31, is much like ours in its facts. There the husband (111) bequeathed to his wife personal property to the value of $300, being the amount of the year's support allowed by the statute, as in this case. She accepted the provision made for her and the Court held that this did not bind her to an election to take under the will, as she claimed under the law, but the Court further said that if she had claimed as distributee it would have been otherwise, making the same distinction that was made by PEARSON, C. J., in *Harrington v. McLean, supra.* In *Smith v. Butler,* 85 Texas, at p. 130, the Court, in discussing this question, said: "The wife would receive, if she took under the will, something she would not otherwise be entitled to, so far as the record shows, either by reason of her community right or as the surviving head of the family; and

by the will the children of the testator would be deprived of some property to which they would have been entitled but for the will. The principle of election is that he who accepts a benefit under a will must adopt the whole contents of the instrument, so far as it concerns him, conforming to its provisions and renouncing every right inconsistent with it. Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away."

The rule requires, therefore, that there must be a benefit which the party claimed to have elected would not have enjoyed if the will had not been executed. What did this widow get under the will that she would not have received under the law by dissenting (if a dissent was necessary) or if her husband had died intestate? The taking of her property under such circumstances, when she gets nothing that can justly be called compensation, would amount to confiscation and would violate the cardinal principle of the doctrine of election.

The cases cited in the opinion do not sustain the conclusion of the Court, because in all of them there was a substantial benefit received by the electing donee. There was (112) something like compensation given for that which was taken and devised or bequeathed to another. In *Syme v. Badger,* the donee was given, not only a specific fund for the payment of the debt due her, but also a large pecuniary or "bond" legacy and also the residue of the testator's estate. Every one of those cases proceed upon the assumption that the donee who was held to have made an election had received something from the testator which would not have been his or hers but for the bounty thus conferred.

The idea that the mere qualification of a person as executor or administrator with the will annexed estops him to claim against the instrument, that is to accept and reject it at the same time, was founded upon the ancient provision of the common law by which the personal representative, after paying debts and legacies, was entitled to the surplus of the estate, and also had the right of retainer against other creditors whose debts were of equal dignity and had other rights and privileges not necessary to be enumerated. All of these have been taken away and the rule founded upon this reason of the common law has ceased to exist. This is in accordance with the maxim of the law. "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." Broom's Legal Maxims (8 Ed.), p. 159. The proposition that an executor is thus estopped by his proving the will

and qualifying under it is distinctly repudiated by this Court in *Allen v. Allen,* 121 N. C., 328, as the following language of the Court in the opinion of MONTGOMERY, J., will clearly show. Discussing the question as to whether proving the will and qualifying as executor estop or amount to an election, the Court says: "This is an important question and is raised in its naked simplicity for the first time in this State. Under the common law the answer to the question was ready
(113) enough, if not entirely satisfactory. By the act of qualification the executor became vested with the whole personal estate and after the payment of debts and legacies was entitled to the surplus, unless it appeared on the face of the will that the testator did not intend for the executor to have it. Therefore, and under that system, it is manifest that the act of qualifying as executor and taking the oath of office to execute the provisions of the will was irrevocable on his part, and the executor had to proceed to execute the will in all its parts and in its entirety. But the reason of the common law is of no force now, for executors, after the debts and legacies are paid, are trustees of the residuum for the next of kin." This repudiates the ancient doctrine. What is said by Chief Justice SMITH in *Yorkley v. Stinson,* 97 N. C., at p. 240, in referring to *Mendenhall v. Mendenhall* and *Syme v. Badger,* must be taken and considered in connection with the peculiar facts of those cases in which it appeared that the donees received a clear benefit. The point we are discussing was not involved in *Yorkley v. Stinson,* but the language used in that case by the Chief Justice, at page 239, shows plainly that he thought it necessary some benefit should be received in order to put the donee to an election. The very essence of the doctrine is that there should be inconsistent benefits. This is implied by the word "election," and the party to chose may keep his own, which is given away by a will, unless an alternative benefit is presented, which one, if accepted by him, renders it inequitable and unconscionable that he should retain the other. As the doctrine is a creature of equity, it should not be allowed to work an injustice and should not be applied to any case upon purely technical principles, and where the person whom it is proposed to bind by the election has received no real or substantial advantage by gift which would affect his conscience and preclude his right to disappoint the will of the
(114) donor. That is the case to be found in this record.

It all comes to this: That the widow did not forfeit her land so as to divest her title and take away the right of her executor to sell it, but if she was put to an election at all,

which I think has been shown not to be the case, she can still claim her own (and her executor succeeds to her right) by making compensation to the extent of the legacy received by her. The subject, in this aspect of it, is so exhaustively discussed and the principle for which I contend is so conclusively vindicated in 2 Underhill Wills, sec. 729, as the only true and equitable one, and the one too which has been generally if not universally accepted, that I must add what is said by that text writer to the other authorities cited. If it is suggested that this view of the case was not presented in the Court below, nor in this Court, I can only answer that the lower Court held the plaintiff was not estopped, and, as the charge to the jury to that effect was correct, it can make no difference what reason for the ruling was in the mind of counsel or the Court. We must presume, in the absence of a reason being assigned, that the decision was based upon the right one.

I conclude that neither the widow nor her executor was estopped to deny the title, nor was she put to an election, and, if she was, the case should have been decided upon the principle of compensation and not upon that of forfeiture or estoppel. In no view of the case can the Court, upon the ground of estoppel or election, deprive the widow or her executor who represents her of that which was rightfully hers and give it to another, who will lose nothing to which he is justly entitled if the money and the land are both adjudged to have been hers at her death. In my judgment, it would be not only against sound law so to do, but against established principles of equity. The defendant would be merely receiving something for nothing. Believing as I do, and for the reasons stated, (115) that the Court committed no error in the trial of the case, and that it should be so declared, I must dissent from the opinion of the Court.

DOUGLAS, J. I concur in the dissenting opinion.

Cited: *Hoggard v. Jordan,* 140 N. C., 611, 16, 18, 19.

DAVIS v. RAILROAD CO.

(Filed 4 October, 1904.)

1. ACTIONS—*Executors and Administrators—Death—Infants—The Code, Sec.* 1498.

An action may be maintained by an administrator for the death of an infant by the wrongful act of another.

2. EVIDENCE—*Death—Photographs.*

In an action for wrongful death, photographs of the deceased just before and after the injury, but before death, are competent evidence.

3. EVIDENCE—*Railroads—Death.*

In an action against a railroad for the wrongful death of a person, evidence as to the distance within which the train could be stopped is competent.

4. CONTRIBUTORY NEGLIGENCE—*Death—Executors and Administrators—The Code, Sec.* 1478.

In an action by the administrator of a deceased infant to recover damages for the alleged wrongful death of the child, the father's contributory negligence is available as a defense to the extent of his interest. *Quere:* Whether the mother does not share now equally with her husband as next of kin of a deceased child.

5. PLEADINGS—*Contributory Negligence—Executors and Administrators—The Code, Sec.* 260.

In an action by a father, as administrator of his deceased infant child, to recover damages for its death, an answer charging the "plaintiff" with contributory negligence will be construed as charging contributory negligence on the part of the father.

(116) ACTION by H. A. Davis, administrator, against the Seaboard Air Line Railway, heard by Judge *W. B. Councill* and a jury, at May Term, 1904, of VANCE. From a judgment for the plaintiff the defendant appealed.

A. C. Zollicoffer and *T. T. Hicks,* for the plaintiff.
J. H. Bridgers and *W. H. Day,* for the defendant.

CLARK, C. J. This is an action under The Code, sec. 1498, by the plaintiff, as administrator of his infant son, two and a half years old, who having wandered off without the knowledge of his parents was injured on the track of the defendant by its train so that the child died, and the plaintiff alleges this was by the negligence of the defendant.

The defendant, among other exceptions, excepted to a refusal to nonsuit at the close of the evidence, and asks us to overrule *Russell v. Steamboat Co.,* 126 N. C., 961, in which it was held that "an action may be maintained by the administrator under The Code, sec. 1498, for the death, by the wrongful act of another, of an infant of a few months old." That decision is fully sustained by the reasoning and authorities there set out and meets our renewed approval.

The objection to the admission of photographs of the child just before its injury and also thereafter, but before its death, can not be sustained. Photographs frequently convey infor-

mation to the jury and the Court with an accuracy not permissible to spoken words, if their admission is properly guarded by inquiry as to the time and manner when taken. The admission of this species of evidence was, it is true, somewhat questioned (by a divided Court) when presented in this Court for the first time. *Hampton v. R. R.,* 120 N. C., 534, 35 L. R. A., 808. But they have since become a well-recognized means of evidence, and are not infrequently used on trials below and are sometimes sent up in the record on appeal, especially in actions for personal injuries. (117)

Nor can we sustain the exception as to evidence of the distance within which the train could be stopped. *Blue v. R. R.,* 117 N. C., 644. Indeed, the jury can take notice thereof as a matter of common knowledge and observation without evidence. *Wright v. R. R.,* 127 N. C., 227, citing with approval *Lloyd v. R. R.,* 118 N. C., 1013, 54 Am. St., 764; *Deans v. R. R.,* 107 N. C., 693, 22 Am. St., 902.

The real point in the case is in the refusal of the Court to submit the issue of contributory negligence upon the ground that negligence would not be imputed to the infant. This is true in an action in behalf of an infant. *Bottoms v. R. R.,* 114 N. C., 699, 41 Am. St., 799, 25 L. R. A., 784, approved in *Smith v. R. R.,* 114 N. C., 749, 25 L. R. A., 287; *Duvall v. R. R.,* 134 N. C., 349. A different rule was laid down in *Hartsfield v. Roper,* 21 Wend., 615, 34 Am. Dec., 273, known as the New York rule, but that ruling has been severely criticised and has been more denied than followed in other States. One of the most pungent criticisms is to be found in *Newman v. R. R.,* 52 N. J. L., 446, 8 L. R. A., 842. What is known as the English rule was laid down in *Waite v. R. R.,* 1 E. B. & E., 719, and denies a recovery only in cases where the parent or custodian is present and controlling the infant and negligently contributed to the injury. This is followed in this country by the Massachusetts courts alone. The doctrine generally sustained is that of *Robinson v. Cone,* 22 Vt., 213, 54 Am. Dec., 67, known as the Vermont rule, and is followed by us in *Bottoms v. R. R., supra,* and which we deem still the proper rule. This latter rule has the weight of authority in judicial decisions, and standard law writers. That eminent text writer, Mr. Bishop (Non-Contract Law, sec. 482), criticising the New York rule, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, (118) not only where he is negligent himself, but where his grandfather, grandmother or mother's maid is negligent, is as flatly in conflict with the established system of the common law

as anything possible to be suggested. The law never took away a child's property because his father was poor or thriftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it." The subject is also discussed in Wharton Neg., sec. 314; Beach Cont. Neg., secs. 38-48, 127-130. Mr. Beach says that the New York doctrine "is an anomaly and in striking contrast with the case of a donkey exposed in the highway and negligently run down and injured (*Davies v. Mann*), or with oysters in the bed of a river injured by the negligent operation of the vessel, in both of which cases actions have been maintained," and he adds: "If the child were an ass or an oyster he would secure a protection denied him as a human being. He is not the chattel of his father, but has a right of action for his own benefit when the recovery is solely for his use." See also, *Ward v. Odell*, 126 N. C., bottom of p. 948.

Shearman & Redfield Neg., sec. 78, also holds that the Vermont rule "is the true rule and is abundantly justified by the reasoning of the Courts which in more than twenty States have adopted it," among them Alabama, Arkansas, Connecticut, Georgia, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Vermont, the decisions of whose courts are cited. Also, 1 Fetter Carriers, sec. 199, p. 532. These authorities hold that "although a child or idiot or lunatic may have escaped into the highway through the fault or negligence of its keeper, and so be *improperly* there, yet if he is hurt by the negligence (119) of the defendant he is not barred of recovery. A greater degree of watchfulness is imposed on the other party, and what would be ordinary neglect in regard to one supposed to be of full age and capacity would be gross negligence as to a child or one known to be incapable of escaping danger. The child, so far as he is personally concerned, is held only to such degree of care as should be expected of a child of his age."

When, however, the parents are authorized, as in some States, to bring an action, their contributory negligence can then be pleaded. S. & R. Neg., sec. 71; *Williams v. R. R.*, 60 Tex., 205; *Westerberg v. R. R.*, 142 Pa. St., 471, 24 Am. St., 510, provided the parent be actually in fault. *Ibid.*, sec. 72. The same rule applies where the parent is suing as administrator but is also the beneficial plaintiff or the *cestui que trust* of the action as distributee of the child's estate. 3 Thompson Neg., sec. 3077; Beach Contributory Neg., sec. 44; Tiffany Death by Wrongful Act, sec. 69; *Smith v. R. R.*, 92 Pa., 450, 37 Am.

Rep., 705; *Reilly v. R. R.*, 94 Mo., 600; *R. R. v. Freeman*, 36 Ark., 41; *Bamberger v. R. R.*, 95 Tenn., 30, 28 L. R. A., 486, 49 Am. St., 909. In *R. R. v. Wilcox*, 138 Ill., 370, 21 L. R. A., 76, the whole subject is admirably discussed with a full review of the authorities, and the conclusion is reached that while the negligence of parents or others *in loco parentis*, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet when the action is by the parent, or the parent is the real beneficiary of the action, as distributee of the deceased child, the contributory negligence of the parent can be shown in evidence in bar of the action. This we think the correct doctrine, though it is held otherwise in *R. R. v. Groseclose*, 88 Va., 267, 29 Am. St., 718, and *Wymore v. Mahaska*, 78 Iowa, 396, 6 L. R. A., 545, 16 Am. St., 449, (120) which sustain on entirely technical grounds that the contributory negligence of the parents is not a defense though they are the beneficiaries of the action brought by the administrator. The underlying principle in our view is that no one shall profit by his own wrong, and if the father's negligence, and not that of the railroad company, was the proximate cause of the death (under the doctrine of the "last clear chance"), it would be obviously wrong to permit him to put money into his pocket for damages proximately caused by his own negligence, because sued for through an administrator (whether himself or another), yet for his benefit. In such cases the contributory negligence of the father is a defense just as in actions brought by the father for loss of services. 1 Fetter Carriers, sec. 199, pp. 534, 535; Beach, *supra*, sec. 131; Tiffany, *supra*, sec. 69; *Wolf v. R. R.*, 55 Ohio St., 530, 36 L. R. A., 812.

Under our Code, sec. 1478, where there is no widow, nor child nor representative of a child, the estate of an intestate "shall be distributed equally to every next of kin who are in equal degree." The father and mother are of course "next of kin in equal degree." Under our former system under which the personalty of the wife became the property of the husband upon its receipt, of course the husband was sole distributee of an infant child dying unmarried and without children. The Constitution, Art. X, sec. 6, now provides that "All property, real and personal, to which she (a married woman) may, after marriage, become in any manner entitled, shall be and remain the sole and separate property of such female." This seems reasonably clear, and it may well be that the wife, jointly with the husband, is the beneficiary of the action brought by the administrator of an infant child in cases like this. We refrain from passing upon the point because it is not raised in this

record, but it may become pertinent in another trial. Interesting questions may arise where one parent is guilty of
(121) contributory negligence and the other is not. This point is presented in *Wolfe v. R. R.,* 55 Ohio St., 517, at page 536, and *R. R. v. Gravatt,* 93 Ga., 369, 26 L. R. A., 553, 44 Am. St., 145, in both of which it is held that "the defense of contributory negligence is available as against such beneficiaries as by their negligence contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others who were not guilty of such negligence."

Of course, as in all other cases, the preliminary question to be decided is whether there was contributory negligence of one parent (or both), which was the proximate cause of the death, *i. e.,* whether the defendant had or not the "last clear chance" to avoid killing the intestate. *Pickett v. R. R.,* 117 N. C., 316, 53 Am. St., 611, 30 L. R. A., 257; *Lassiter v. R. R.,* 133 N. C., 247. The father in this case is the administrator, and the contributory negligence is pleaded as that of the "plaintiff," but it is clear that it was meant by this plea to allege that the contributory negligence was on the part of the father. The Code, sec. 260, abolishes the old rule that the pleadings "should be construed most strongly against the pleader" and requires "the allegations to be liberally construed with a view to substantial justice between the parties." *Stubbs v. Motz,* 113 N. C., 459. In failing, therefore, to submit an issue as to the contributory negligence of the father as prayed there was

Error.

Cited: Duckworth v. Jordan, 138 N. C., 528; *Carter v. R. R.,* 139 N. C., 501.

---

(122)

CHEMICAL CO. v. SLOAN.

(Filed 4 October, 1904.)

EXEMPTIONS—*Attachment.*

In an attachment the defendant is entitled to claim his exemptions out of the attached property at any time before it is appropriated to the payment of the debt.

ACTION by the Virginia-Carolina Chemical Company against Frank Sloan, heard by Judge *G. S. Ferguson,* at March Term,

1904, of DUPLIN. From a judgment for the defendant, the plaintiff appealed.

Grady, Herring & Ward and *Carlton & Williams,* for the plaintiff.

Stevens, Beasley & Weeks, for the defendant.

WALKER, J. This action was brought to recover money, the proceeds of the sale of certain fertilizers, alleged to have been unlawfully converted by the defendant, a resident of this State, as agent of the plaintiff. The latter sued out an attachment upon the allegation in its affidavit that the defendant had not only converted the money, but that he had attempted to dispose of his property and was about to dispose of and secrete the same with the intent to defraud the plaintiff and his other creditors. The attachment was levied on personal property of the defendant, the value of which was less than $500. The property so attached being perishable was sold by the sheriff under an order of the Court, and the sheriff now holds in his hands the proceeds of the sale subject to the further order and direction of the Court. The defendant claims his exemption out of the money so held by the sheriff. The plaintiff resists the claim upon the ground that the demand for (123) the allotment of the exemption was not made until after the sale. The Court found that the demand was made in apt time (which was not a finding of fact but a conclusion of law), but it is also found as a fact that the defendant again demanded that his exemption should be set apart to him out of the fund in the sheriff's hands. The Court ordered the allotment to be made by the sheriff and the plaintiff excepted and appealed. The defendant moved to vacate the attachment but the Court denied the motion. There has been no judgment in the case and consequently no order directing the application of the money to the payment of the plaintiff's claim.

We do not see why the defendant is not entitled to his exemption upon the foregoing facts. The Constitution exempts the personal property of any resident of this State to the value of $500 from sale under execution or other final process. This language is too plain and explicit for any possible misunderstanding of its meaning. It is only when the property is about to be subjected to the payment of a debt by final process that the last opportunity is left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached, he may make his demand and become entitled to an allotment of the exemption. This is perfectly clear without

light upon the subject from any of the authorities. A warrant of attachment is mesne process, and is nothing more than a provisional remedy. It is ancillary to the relief sought in the principal action and is intended to preserve the property, or its proceeds if it has been sold as perishable, in the hands of the sheriff or in the custody of the law to abide the event of the suit. The defendant may demand his exemption when the warrant is levied on his property and it is taken out of his possession, or he may wait until the final process is issued and the property is about to be appropriated by sale to the satis-
(124) faction of the same. *Shepherd v. Murrill,* 90 N. C., 208.

The law is thus stated in *Gamble v. Rhyne,* 80 N. C., 183: "When the execution came to the hands of the sheriff, the debtor, being a resident of the State, had the same right of exemption, although there had been a warrant of attachment, as he would have had in case there had been no attachment." That the defendant is entitled to have an allotment of his exemption, if he so elects, from the personal property in the possession of a sheriff who holds it by virtue of a levy under a warrant of attachment, has been settled by the decisions of this Court for many years. *Comrs. v. Riley,* 75 N. C., 144. In that case the attachment was vacated because the property seized under it did not exceed in value $500, and Justice SETTLE, who wrote the opinion, states forcibly and conclusively the reason of the law by putting this question: "Can a party, who proceeds by attachment, place himself in a better position than one who sues regularly in the courts and obtains a judgment and takes out execution thereon? The answer obviously is, he cannot."

The ruling of the Court below was correct.

No error.

Cited: Goodwin v. Claytor, 139 N. C., 236; *May v. Gatty,* 140 N. C., 318.

---

(125)

CARR v. COMMISSIONERS.

(Filed 4 October, 1904.)

LICENSES—*Constitutional Law—Laws* 1903, *Ch.* 247.

Laws 1903, ch. 247, sec. 74, imposing a license tax on emigrant agents, does not apply to a person who comes into this State and employs laborers to work for him in another State.

ACTION by H. C. Carr against the Commissioners of Duplin County, heard by Judge *Frederick Moore,* at August Term,

1904, of DUPLIN. From a judgment for the plaintiff the defendant appealed.

Rountree & Carr, for the plaintiff.
Carlton & Williams and *Shepherd & Shepherd,* for the defendant.

CONNOR, J. The parties submitted the decision of this case to the Court upon a case agreed. The material facts are: The plaintiff is and has been for five years a resident of Harrison County in the State of Mississippi. He is a producer and manufacturer of naval stores and a dealer in general merchandise. He came to this State during the month of December, 1903, and during the first week in January, 1904, employed and carried with him to the State of Mississippi, to work in his own turpentine business on his own place in said State, ten or twelve laborers. Before taking the laborers away the sheriff of Duplin County required him to pay "an emigration tax," which was paid under protest and to avoid being detained and interrupted in his business. None of the laborers were used or employed in any other business than his own, and were not carried to Mississippi for any other purpose. The plaintiff received no consideration or compensation for carrying the laborers out of the State from any person (126) and is not engaged in the emigration business as such. He has not solicited laborers to leave this State to be employed in any business save his own, and at the time he paid for the license it was not his purpose to carry laborers from North Carolina, except to be used in his own business and under his personal direction. Within thirty days after paying the tax ($200) he demanded in writing of the proper State and county officers that said amount be refunded to him in accordance with section 30, chapter 558, Laws 1901. More than ninety days have elapsed since making the demand. The case was tried by *Moore,* J., upon an appeal from the justice of the peace. Judgment was rendered for the plaintiff, and the defendant appealed.

The money sought to be recovered in this action was demanded by the sherriff pursuant to the provisions of section 74, chapter 247, Laws 1903, imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State." This statute is a part of the Revenue Act of 1903, and has been uniformly held to be imposed pursuant to the power conferred upon the Legislature to tax trades, professions, etc. *S. v. Moore,* 113 N. C., 697, 22 L. R.

A., 472; *S. v. Hunt,* 129 N. C., 686; 85 Am. St., 758; *S. v. Roberson, post,* 587. In these cases it was found by the jury, as a part of their special verdict, that the defendant was engaged in the business of procuring laborers for some other person or corporation. To so construe the statute as to include a person coming here from another State, and making contracts of employment with laborers for himself and in his own business to go out of the State, would present grave and serious constitutional objections. We prefer, as being more reasonable and consistent with the language of the act to adopt the construction put upon the same language by the Supreme Court
(127) of Georgia. In *Theus v. State,* 114 Ga., 53, *Lewis,* J., says: "The legislative enactment imposing a tax upon emigrant agents, and providing a penalty for the failure to register and pay such tax, was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this State to be sent beyond the limits of the State and then employed by others. To extend its application to a resident of another State, who, being in this State, incidentally employs laborers on his own behalf to work for him beyond the limits of this State, would be entirely unwarranted." We fully concur in this construction of the statute. Thus construed, the constitutional objections do not arise. The judgment of his Honor upon the case agreed must be

Affirmed.

Cited: S. v. Meachum, 138 N. C., 749; *Lane v. Comrs.,* 139 N. C., 445.

---

(128)

MACHINE CO. v. HILL.

(Filed 4 October, 1904.)

1. AGENCY—*Burden of Proof—Waiver—Principal and Agent—Contracts.*

   Where a contract for the sale of sewing machines provided against the validity of parol agreements with agents, the burden was on a dealer, claiming a waiver of such provision, to show that the agent making the same had authority to do so.

2. AGENCY—*Contracts—Ratification.*

   Where a foreign sewing machine company had paid a license tax authorizing it to sell machines anywhere within the State, and to employ an unlimited number of agents for that purpose, the fact

that the company sent to a firm a duplicate license authorizing it to sell machines in F. county as the company's agent, after an unauthorized parol agreement had been made between such firm and the company's agent that the firm should be the company's sole agent in such county, did not constitute a ratification of the agent's agreement.

ACTION by the White Sewing Machine Company against K. P. Hill & Son, heard by Judge *Frederick Moore* and a jury, at January Term, 1904, of FRANKLIN. From a judgment for the plaintiff the defendant appealed.

T. W. Bickett and *Pou & Fuller,* for the plaintiff.
W. H. Yarborough, Jr., and *F. S. Spruill,* for the defendants.

CLARK, C. J. The defendants signed and sent to the plaintiffs an order for fifteen sewing machines and a Perry wagon for a sum total of $260. On these orders was printed in plain type: "It is understood that no claim or any understanding or agreement of any nature whatsoever between this company and its dealers will be recognized, except such as (129) is embraced in written orders or is in writing and accepted by said company at its office."

The above machines and wagon were shipped and received by the defendants, who set up as sole defense a counter claim that the same agent made a verbal agreement with them to have the sole agency for sale of the plaintiff's machines in Franklin County, and that they incurred considerable expense, employing an experienced salesman to handle the machines and purchased a horse and wagon for him, but that in violation of such contract the plaintiff shipped machines to said county to rivals in business of the defendants, who undersold the defendants, causing them to sell the machines bought of the plaintiff at a loss, besides causing the loss of salary paid their salesman and the cost of equipping themselves for the handling of the machines under their contract for an exclusive agency.

It is true on one hand that the plaintiff had the right to restrict the powers of its agents by the notice quoted above, and printed on the orders signed by the defendants, and on the other that this restriction could be waived. But the burden to prove that such waiver was within the scope of the agent's authority was upon the defendants. It could not be proved by the agent's own declaration. It must be proved *aliunde. Taylor v. Hunt,* 118 N. C., 173, and cases there cited: *Summerrow v. Baruch,* 128 N. C., 204.

The defendants attempted to prove a ratification, however,

by the fact that the plaintiff sent them a duplicate license authorizing them to sell machines in Franklin County as the plaintiff's agent. But there is nothing in this license to suggest that it conferred, as the defendants contend, the sole agency for that county. The State had issued a license to the plaintiff, upon payment of the $350 tax required by the Revenue Act, to sell anywhere in the State, and the same section provides that

(130) "every one to whom license shall be issued as provided in this section shall have power to employ an unlimited number of agents to sell the machines named in his license." The defendant firm was simply one of this "unlimited number" to whom a copy of the plaintiff's license was sent that the firm might sell undisturbed. There was nothing exclusive about it.

After carefully considering each of the defendant's exceptions, we do not deem that a discussion *seriatim* is requisite. The plaintiff's cause of action was not denied and there was no legal evidence to support the counter claim. The judgment is

Affirmed.

Cited: Platt v. Chaffin, post, 353; *Medicine Co. v. Mizell,* 148 N. C., 387.

COOPER EX PARTE.

(Filed 4 October, 1904.)

1. WILLS—*Legacies and Devises—Rule in Shelley's Case.*

A devise of realty to a person, and if he marries "and has a lawful heir," they to have the land, such devisee takes a fee-simple title.

2. COSTS—*Appeal—Infants—Guardian Ad Litem.*

Where certain infant appellees were not represented by a guardian or next friend, the cost of the appeal would be taxed to the appellants, though the cause was reversed.

PETITION of G. B. Cooper and others for the construction of the will of W. A. Cooper, heard by Judge *W. B. Councill,* at chambers, at Henderson, N. C., 26 May, 1904. From a judgment construing the will, all the petitioners, except B. A. Cooper and wife, appealed.

(131) *F. A. Woodard, F. S. Spruill* and *W. H. Ruffin,* for the appellant.

Jacob Battle, for the appellees.

MONTGOMERY, J. It becomes necessary in this case to construe a clause of the will of W. A. Cooper, which is in the following words: "And I bequeath to M. W. Cooper a certain tract of land (fully described) for the use of Arch Cooper, son of W. D. Cooper, and (if) Arch Cooper ever marries and has a lawful heir they have this land." The appellants make two contentions: First, that the rule in Shelley's case is applicable, and that Arch Cooper took a fee simple estate in the land, and, second, that if the words "lawful heirs" are construed to mean "children," and the will should be made to read "to the use of Arch Cooper and his children if he marries and has any," that then, under the case of *Silliman v. Whitaker,* 119 N. C., 89, Arch having had no children at the time of the death of the testator took a fee simple estate in the land.

The contentions of the appellees are: First, that the devise was an executory limitation to be protected for the benefit of the children of Arch, and that the legal title therefore remains in the trustee, N. W. Cooper and his heirs, until Arch Cooper married and had a child or issue, and, second, that the clause constituted a shifting devise, a limitation of the whole fee upon a future contingency—the marriage of the first named devisee and the birth of issue; to be more particular, that there was to be a substitution of the fee in Arch Cooper by another in his children if he should marry and have children.

We cannot give either one of the appellee's constructions to the clause of the will under consideration. To adopt the first would be to do violence to the plain language of the will and to the intention of the testator as well. It could not have been in his mind to deprive his own son of the benefits of the estate by conferring them upon the first born grand- (132) child. The same result would follow if we adopted the appellees' second contention, for under that contention if the fee shifted from Arch, the father, to his first-born child, no subsequently born child could take. Only those who could answer to the "call of the roll" at the time of the shifting of the fee—the birth of the first child—could be let in. The estate must have become fixed immediately upon the birth of the first child, and that child would have been the absolute owner in fee if the shifting use or fee theory were held to be the correct one. *Dupree v. Dupree,* 45 N. C., 164, 59 Am. Dec., 590; *Walker v. Johnston,* 70 N. C., 576. We must then regard the words "and if Arch Cooper ever marries" as surplusage. That being done, the devisee, Arch Cooper, took a fee simple estate, for the application of the rule in Shelley's case is clear upon the bal-

ance left of the clause. *Leathers v. Gray,* 101 N. C., 162, 9 Am. St., 39; *Nichols v. Gladden,* 117 N. C., 497.

The proceedings before the Clerk of the Superior Court which resulted in a sale of the land devised were utterly void, but as the appellees, children of the devisee, Arch Cooper, had no interest in the land, as we have seen, they were not prejudiced by the decree of sale, and no appeal lay from such decree. However, it appears from the record of the proceedings before the Clerk that they, being infants, were not in fact represented by a guardian or next friend, and we deem it proper to order that the costs of this appeal be taxed against the appellants.

Error.

Cited: Wool v. Fleetwood, post, 470; *Pitchford v. Limer,* 139 N. C., 15.

---

(133)

WOODLIEF v. WOODLIEF.

(Filed 4 October, 1904.)

1. TENANCY IN COMMON—*Estates.*

   The fact that a testator, who owned only a five-eighths interest in certain land, devised the entire tract, does not prevent one of the remaindermen from purchasing certain of the outstanding interests as against his tenants in common.

2. TENANCY IN COMMON—*Adverse Possession.*

   To bar a co-tenant the possession of a tenant in common must be exclusive under a claim of right, with no recognition of the rights of the co-tenant, and for twenty years.

3. TENANCY IN COMMON—*Evidence—Declarations.*

   The acts and declarations of a life tenant are admissible against remaindermen for the purpose of showing that her possession was not adverse to certain of her tenants in common.

ACTION by R. R. Woodlief against T. H. Woodlief and others, heard by Judge *Frederick Moore* and a jury, at January Term, 1904, of FRANKLIN. From a judgment for the plaintiff the defendant appealed.

F. S. Spruill and *W. H. Ruffin,* for the plaintiff.
W. M. Person, for the defendant.

CONNOR, J. This was a special proceeding for partition of the land described in the complaint. The defendants filed an-

swers raising issues of fact and the cause was transferred to the civil issue docket for trial. There are several branches to the litigation growing out of claims of intervenors holding mortgages upon shares of some of the parties. The question presented by the record and argued before us has no connection with these collateral issues and we shall omit any reference to them. The facts in regard to which there seems (134) to be no controversy, are: Henry Merritt died 4 July, 1861, devising to his wife, Polly Merritt, for life "all of his real and personal property." He directs that his daughter, Sallie Woodlief, "remain on the tract of land whereon she now lives, on the north side of the creek, containing sixty-five acres of land, during her life and at her death it is my will that the said sixty-five acres of land remain in the possession of her children till the youngest child becomes 21 years old, then the said tract of land to be equally divided between the heirs of the body of my said daughter," etc. Plaintiff introduced evidence tending to show that Henry Merritt was in possession of the land up to the time of his death; that he put his daughter, Sallie Woodlief, on the land during 1859, and that she remained there until she died, 25 June, 1902. The defendant put in evidence a deed from Henry S. Fuller to Henry Merritt, dated 10 June, 1859, purporting to convey an undivided one-fourth interest in the land, reciting that one-eighth had been bought from Jonathan P. Fuller; also, a deed from James W. Williams and Joseph W. Fuller to said Henry Merritt, conveying all the right, title and interest which they had in the sixty-five acre tract "in right of their mother, Mirah P. Fuller, who was Mirah P. Duke." This deed bears date 15 October, 1859. The defendant introduced J. P. Strother, who testified as follows: "I am 74 years old; I have known the land in controversy for fifty-two years; knew Henry Merritt and his wife, Polly, and daughter, Sallie Woodlief. Henry Merritt told me he had bought five-eighths of the sixty-four acre tract in controversy, and that Rhoda Fuller, Celia Fuller, who married Sabret Card, and Frances Moore, who married F. M. Moore, owned the other three-eighths. The parents of Rhoda Fuller were Solomon Fuller and his wife, who was a Duke. Sallie Woodlief was in possession of the land in controversy (135) until she died, 25 June, 1902. T. H. Woodlief has been in possession since his mother died. T. H. Woodlief has been in possession of a part of that land from the time he bought the Card interest. He went into possession of Rhoda's part and has been in possession of these (three) shares of it. Sallie Woodlief claimed the whole of the sixty-four acres, except three-

eighths. T. H. Woodlief paid his mother rent as long as she lived. Solomon Fuller had eight children. The sixty-four acre tract was known as the Duke land. The description in the deeds of F. M. Moore, Sabret Card and T. H. Woodlief and Rhoda Fuller to Polly Merritt embrace the land in controversy."

T. H. Woodlief swore that he had been in possession of a part of the land since 1864. He was asked what agreement he had with his mother in respect to a part of the land he was to have representing the outstanding shares he had bought. Upon objection this question was excluded and defendant, T. H. Woodlief, excepted.

Defendant put in evidence a deed from Rhoda Fuller to Polly Merritt, dated 17 December, 1864, conveying all of her right, title and interest in the land in controversy which she inherited from her grandmother, Lucy Duke. Deed from Polly Merritt to Sallie G. Woodlief, dated 13 October, 1881, conveying all of her right, title and interest. Deed from Sallie G. Woodlief to T. H. Woodlief, dated 15 March, 1902, conveying "a certain tract or parcel of land (giving boundaries) and known as the Rhoda Fuller interest in the Duke tract of land which said interest the said Rhoda Fuller inherited from her mother, Mirah P. Fuller, containing seven acres of land more or less."

Deed from Sabret Card and wife, Celia, to T. H. Woodlief, dated 12 March, 1866, describing a certain tract of land (giving abutting owners) containing seven acres. Deed from F.
(136) M. Moore to T. H. Woodlief, dated 22 October, 1864, describing "all the right, title and interest which I have in and to a tract of land containing sixty acres more or less, known as the Duke tract of land, which said interest the said Frances M. Moore inherited from her mother, Mirah P. Fuller."

Assuming that the deeds set forth cover the *locus in quo*, and of this there is the uncontradicted testimony of Jno. P. Strother, the title to the land in controversy was, prior to 1859, in the eight children of Solomon Fuller and wife. Five-eighths undivided interest passed to Henry Merritt by the deed set out in the record, leaving three-eighths outstanding. Henry Merritt went into possession of the entire tract and settled his daughter, Sallie, thereon, and by his will gave the land, without reference to his interest therein, to his wife, Polly, for life, with the direction that his daughter, Sallie, would "remain" thereon during her life, and at her death said land "to remain in the possession of her children until the youngest child became 21 years of age, then to be equally divided between the heirs of her body." It does not appear that Polly Merritt was

ever in the actual possession of the land. Rhoda Fuller, in 1864, conveyed her interest in the land to Polly, who, in 1881, conveyed to Sallie Woodlief, who, in 1902, conveyed to T. H. Woodlief. Sallie died in 1902, leaving six children, R. R. Woodlief, who purchased the interest of two others; G. L. Woodlief, D. H. Gill and defendant, T. H. Woodlief. T. H. Woodlief, in 1864 and 1866, purchased the outstanding interest in the tract from Card and Moore, hence, except in so far as the title is affected by the statute of limitations, at the death of Sallie Woodlief, the legal title to five-eighths vested in her six children under the will of Henry Merritt. The other three-eighths vested in T. H. Woodlief. The plaintiff contends, however, that Polly Merritt and Sallie Woodlief having gone into possession under the will of Henry Merritt, devising (137) to them for life the entire tract, could not, by any act of theirs, change the character or effect of such possession by purchasing the outstanding interest of Rhoda Fuller. In other words, that the will of Henry Merritt was an assertion of title to the entire tract, and the possession thereunder by his wife and daughter for life could not change the character of such possession in respect to the owners of the outstanding three-eighths. In *Day v. Howard,* 73 N. C., 1, PEARSON, C. J., says: "There is a fellowship between tenants in common the law assumes that they will be true to each other; the possession of one is the possession of all and one is supposed to protect the right of his co-tenants and is not tolerated in taking an adversary position unless he acts in such a manner as to expose himself to an action by his fellows on the ground of a breach of fealty; that is an actual ouster. * * * If a tenant in common conveys to a third person the purchaser occupies the relation of a tenant in common although the deed purports to pass the whole tract and he takes possession of the whole, for in contemplation of law his possession conforms to his true and not to his pretended title." In *Covington v. Stewart,* 77 N. C., 148, it is held that the possession of one tenant in common is the possession of all, but if one have the sole possession for twenty years without acknowledgment on his part of title in his co-tenant, and without any demand or claim on the part of such co-tenant to rents, profits or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful, and will protect it. It is also held in that case that under our statute of limitations such sole possession vests title. *Neely v. Neely,* 79 N. C., 478; *Caldwell v. Neely,* 81 N. C., 114; *Ward v. Farmer,* 92 N. C., 93; *Hicks v. Bullock,* 96 N. C., 164. The possession of Polly Merritt

(138) and Sallie Woodlief, being consistent with the rights of their co-tenants, we can see no good reason why they could not buy the interest of their co-tenant, Rhoda Fuller. The doctrine of election does not apply to the facts in this case. *Horton v. Lee,* 99 N. C., 227, and *Brown v. Ward,* 103 N. C., 173, cited by counsel, are distinguishable from our case. In both those cases there was an attempt to assert title to land at the time of making the will in the devisee, who had taken the same land under the will. This, upon the familiar equitable doctrine of election, cannot be done. The principle in regard to the estoppel is that when the plaintiff and defendant claim from a common source, the defendant cannot prevent a recovery by simply showing an outstanding title in a stranger, unless he connects himself with such title, or shows that he has acquired it. *Copeland v. Sauls,* 46 N. C., 70; *Caldwell v. Neely, supra; Ray v. Gardner,* 82 N. C., 146. The rule is not based upon the equitable doctrine of election, but is a rule of practice adopted for convenience. It does not go to the extent of saying that a grantee may not buy in an outstanding interest and assert it in an action brought agaist one claiming under the same grantor, but that he may not show it for the purpose of defeating the action unless he has purchased or by other means acquired it. *Bickett v. Nash,* 101 N. C., 579; Bigelow on Estoppel, 357. In this case Polly Merritt nor those claiming under her have purchased any hostile claim to the land. Henry Merritt owned five-eighths interest, which passed to Polly and Sallie for life. They simply bought a one-eighth interest and conveyed it to T. H. Woodlief, who is setting it up, not to defeat any title acquired under Henry Merritt, but admitting the title as he owned and claimed to own, in the devisees. He says: "I own by this conveyance the one-eighth owned by Rhoda Fuller." We can see no reason why he may not do so, unless he has lost it by

(139) the statute of limitations. As to the other two-eighths he purchased directly from the owners, there was certainly nothing in his relation to the title or the other parties to prevent his doing so. The plaintiff, however, insists that he has lost whatever right he acquired by such purchase by the lapse of time. This brings us to consider the character and effect of Sallie Woodlief's possession as against her son, T. H. Woodlief. Polly Merritt was never in possession. We will assume, however, that Sallie Woodlief was in, under the will, and that her possession so far as it operated to bar the entry of the owners of the three-eighths undivided interest inured to the benefit of her children. What was the extent and character of such possession? It must be kept in mind that to work an ouster

and bar the other tenants, her possession must be exclusive and under a claim of right with no recognition of their rights continuing for twenty years. His Honor so charged the jury. As the plaintiffs are claiming that the title to the *three-eighths* was extinguished by her actual possession, working an ouster, they are bound by her acts and declarations in regard to the *possession,* its extent and character. It must be remembered that we are not now dealing with *title* but with *possession.* The life tenant certainly could not by her acts or declarations disparage or injuriously affect their title. It is not claimed that Henry Merritt, their devisor, had or could confer upon them title to more than five-eighths, but that by an assertion which was not true, by a breach of fealty on his part he put Sallie Woodlief in a position which if maintained enabled her at the end of twenty years to give to her children the title, which she never had or could have, for she could under no circumstances have more than a life estate. This being the case, we can see no reason why her acts and declarations in regard to her possession are not competent. She was under no obligations to assert a possession beyond her actual title. She could, (140) and it was her duty to say to the owners of the outstanding interest that she claimed only to the extent of her true title. In the absence of any declaration to the contrary the law so regarded her. When she purchased the Rhoda Fuller interest she said in the most unmistakable manner that she recognized her as a tenant in common. When she sold it to T. H. Woodlief she said by her solemn deed that she was not claiming against Rhoda Fuller. T. H. Woodlief bought the Moore interest in 1864 and the Card interest in 1866. It is very doubtful whether after that time she could claim to hold adversely to him. He offered testimony tending to show that he was in possession with her, after making the purchase, and that they had some understanding as to the part of the land which he was to have by reason of his purchase. Of course no such understanding can bind the plaintiff or affect his title, but it is competent as showing the extent and character of her possession. If, at the time T. H. Woodlief purchased, his mother had been in the exclusive possession for twenty years it may be that she could not then by any act of hers affect the rights which had been acquired by such long possession, but when he purchased the two-eighths, she had been in possession for only three and five years. At that time her possession was consistent with the rights of the co-tenants, and any recognition by her of such title would inure to the benefit of T. H. Woodlief. The testimony should have been admitted. The instruction given the jury as a general

proposition is correct. As the entire charge is not sent up it is impossible for us to know how it was related to the instructions given and excepted to. As the case goes back for a new trial we do not deem it proper to pass upon any other exception than that directed to the exclusion of the evidence of the acts and declarations of Sallie Woodlief in regard to the extent (141) and character of her possession. As the parties do not claim under her we see no objection to the competency of T. H. Woodlief to testify as to such declarations. There must be a

New trial.

DEAN v. GUPTON.

(Filed 4 October, 1904.)

ADVERSE POSSESSION—*Evidence—Ejectment—The Code, secs. 143, 144.*

The evidence in this case, an action of ejectment, is sufficient to sustain a finding that the defendant held certain land in controversy adversely to the plaintiff.

ACTION by J. M. Dean and others against J. E. Gupton, heard by Judge *Frederick Moore* and a jury, at April Term, 1904, of FRANKLIN. From a judgment for the defendant the plaintiff appealed.

W. M. Person, for the plaintiffs.

W. H. Ruffin, W. H. Yarborough, Jr., and *F. S. Spruill,* for the defendant.

CLARK, C. J. By the will of Cooper Dean, who died in Franklin County in 1855, the *locus in quo* was devised to his widow for life, remainder to his son, Henry G. Dean, then living in Texas. This is an action of ejectment by the heirs at law of the latter. It was in evidence for the defendant that in 1855, soon after his father's death, Henry G. Dean came to Franklin County, saw the defendant, John E. Gupton, told him that his (Henry Dean's) mother was too old for him to carry away and he would give John E. Gupton and wife (the (142) latter being Henry's sister) the land if they would take care of his mother her lifetime; that this was agreed to and they lived with her, took care of and supported her and paid her doctor's bills, until she died, in February, 1862. She was deranged and an invalid for two years before she died. John E. Gupton has been in possession ever since and has listed the land in his own name and paid taxes on it since 1879.

There was some evidence to show that one Leonard had been in possession of part of the land, with no dividing line between him and the defendant, and counter evidence that he was a tenant of the defendant. The complaint alleges that the defendant is in possession of the land and this is admitted in the answer. There is no exception to the evidence or the charge.

The plaintiff prayed the Court to instruct the jury: (1) That upon all the evidence, if believed, the defendant has not had adverse possession of the land in question for thirty or twenty years, nor any proper title. (2) If the jury believe the evidence the plaintiffs are entitled to recover the land sued for. (3) That upon all the testimony the possession is not shown to be adverse in the defendant. To the refusal to so charge the plaintiffs excepted. These prayers were properly refused. There was evidence from which the jury would be justified in finding that the defendant has been in exclusive adverse possession of this tract of land since the death of the widow, in February, 1862 (The Code, sec. 144), and that "the plaintiffs and those under whom they claim have not been seized or possessed of the premises in question within twenty years before the commencement of this action" (The Code, sec. 143), and there has been nothing to prevent the running of the statute. While the oral contract could not convey title, it tended, if believed, to show that the defendant held adversely from the death of the widow, and there was evidence, if believed, that the defendant held the entire tract, and, of course, therefore up to its boundaries, and that the others named in the (143) plaintiff's evidence held under the defendant as his tenant either at will or paying rent.

No error.

JONES v. SUGG.

(Filed 4 October, 1904.)

1. EXECUTORS AND ADMINISTRATORS—*Pleas at Law—References—Accounts.*

   In an action by heirs against an administrator for an account and settlement, an answer by him that a final settlement had been filed is not a plea in bar, and a reference may be made.

2. REFERENCES—*Appeal—Executors and Administrators—Accounts.*

   The refusal of a motion to refer a proceeding to compel a personal representative to file a final account and settlement is appealable.

ACTION by Alice Jones and others against J. T. Sugg and others, heard by Judge *M. H. Justice*, at February Term, 1904,

of GREENE. From a judgment for the defendant the plaintiffs appealed.

G. M. Lindsay, for the plaintiffs.
Jarvis & Blow and *Shepherd & Shepherd,* for the defendants.

MONTGOMERY, J. This action was brought for an account and settlement of the estate of J. H. Freeman, deceased. A motion was made by the plaintiffs in the following words: "To refer the action for an accounting as against J. A. Albritton, executor of John Sugg, former administrator d. b. n. c. t. (144) a. of John H. Freeman, and the sureties on his official bond, as to his administration and dealings with the personal estate of John H. Freeman, upon the pleadings on the ground that the answers set out no valid plea in bar of an accounting."

It is clear from the record that the motion was denied for the reason that his Honor thought the answer filed by Albritton, administrator, was in law a plea in bar to the action; and the only question involved in this appeal is whether or not the answer was a plea in bar. The answer in substance was that John Sugg, the testator of Albritton, and the administrator d. b. n. c. t. a. of John H. Freeman, had filed his final account with the estate of Freeman with the clerk of the Superior Court. The filing of such an account was purely *ex-parte* and was not a plea in bar to the action. That fact might have been admitted by the plaintiffs or it might have been proved on the trial, and yet the plaintiffs would not have been estopped. They could still have had the account inquired into. The account as filed was only *prima facie* correct. The denial of the motion was appealable. It involved a substantial right of the plaintiffs, appellants. *Royster v. Wright,* 118 N. C., 152. Both matters are so fully discussed in the last cited case and in *Comrs. v. White,* 123 N. C., 534, that we need not pursue the subject. The motion should have been allowed.

Error.

(145)

POWELL v. BENTHALL.

(Filed 4 October, 1904.)

1. HUSBAND AND WIFE—*Evidence—Harboring Wife.*

In this action by the husband to recover damages for harboring his wife, after notice not to do so, the evidence is not sufficient to sustain a verdict against the defendants.

2. HUSBAND AND WIFE—*Evidence—Harboring Wife—Notice.*

In an action to recover damages for harboring plaintiff's wife, after notice not to do so, the relation of the defendants to plaintiff's wife is relevant and material on the question of motive.

3. HUSBAND AND WIFE—*Burden of Proof—Evidence—Notice.*

In an action to recover damages for harboring plaintiff's wife, after notice not to do so, the burden of showing the justification of the wife in leaving her husband is not on the defendant.

ACTION by D. C. Powell against W. T. Benthall and wife, heard by Judge *W. B. Councill* and a jury, at April Term, 1904, of HERTFORD.

The plaintiff sued the defendants jointly upon two causes of action: 1st. That they wrongfully and maliciously alienated the affections of his wife and enticed her away from him. 2d. That they harbored his wife after being forbidden to do so. The jury returned a verdict against the plaintiff on the first cause of action. On the second cause of action they found for the plaintiff and awarded him $1,500 damages. The defendants denying the material allegations of the complaint, say that the plaintiff's wife left home with his consent to seek work. That she refused to return to him. That their conduct was without malice to the plaintiff, and because of their relationship to his wife in good faith and to assist a neglected daughter and sister in her unhappy condition, etc.

The plaintiff testified that he married Eunice Parker (146) during the year 1891 and lived with her at Aulander about six years. He failed in business in 1892. That he kept boarders and hired horses. In 1897 he left Aulander and his wife went to live with her sister, the *feme* defendant, near the town of Aulander. She asked permission to go. Said that her sister wanted her to help trim hats, and he thought that it was better for her to do so. That he was traveling and away from home a great deal. That defendants and he were friendly and up to that time he had always supported his wife. After she went there all went on smoothly and he visited her. He went to Greensboro to live at the suggestion of the defendants, Ben-

thall and wife, who said it was a good place to live, and plaintiff could make money there. He corresponded with his wife, both writing frequently. Plaintiff introduced certain letters indicating affectionate regard on the part of his wife. He received a letter from her which he destroyed, which troubled him very much. He left Greensboro immediately for home; went direct to defendants' house, where he met his wife, who greeted him kindly but seemed to be in distress. He stayed there until night; his wife said she was in great trouble and wished to be moved away. Said that she wanted to go at once. He asked her to go to ride with him, she consented, but her sister, Mrs. Benthall, objected—said that she wanted his wife to help on some work. His wife said she would go some other time. He saw defendant Benthall later in the evening. Mrs. Benthall seemed mad at plaintiff; said things could not go on as they were, that he was not trying to provide for his wife. He took supper there; wife went on porch with him; Mrs. Benthall called his wife in, slammed the door, locking it. His hat was on the inside and Mr. Parker got his hat and he left. The next day he received a letter from his wife which was put in evidence. She wrote that she had decided not to have anything more to do with him unless he made a great change
(147) in himself; that she had tried him for six years and the prospect of his making a living had been gloomy for a long time; that she was not going to be supported any longer by some one else's money. She had rather work for her own living than live that way. That she had hoped for a change, etc. That her people were willing to take care of her but were not willing to take care of him, and that he must not come any more until she sent for him. That she was not mad with him but did not want him to bother her any more until he could do her some good. She had considered the matter well and that no one was putting her up to it, she was acting of her own free will; said that she would return the "things" which she has; that he had spent the lot which her father had given her.

Witness said that he went at once to defendant and saw his wife in the presence of Mrs. Benthall, and asked his wife why she wrote the letter. She replied that it was to protect herself. He said that he had come to move her away with the furniture. She said that she would not go; he said that he would get a divorce—she objected. He said this to see what effect it would have on her. He testified to his affection for his wife. His furniture, horse and buggy were at Benthall's. While he was insisting on his wife's going with him Benthall came up and said if they could not agree they had better divide up. She

agreed to give up half the property and witness took some of it away and took out process for the balance; when the officer went witness did not go in. Saw his wife and took hold of her, telling her that she must go with him. She pulled back, crying a little. Witness told her she had to go; said she would go if he would let her dress. Witness agreed to this, but would not let her go in the house; told her that she could go in the office near by. Clothes were brought and she dressed and got in a cart with witness. Before she went in the office Benthall interfered—started towards witness rolling up his sleeves; said he did not want anything like that going on there (148) Officer stopped him and Mr. Benthall took hold of his wife's arm and tried to take her from the witness. His wife went to his father's and stayed there two days and nights. Warrant was taken out against the witness for assault. He and his wife lived as man and wife for two days. Went to the trial and witness was convicted and fined. After the trial his wife went with her brother to the defendants'. The arrangement with Benthall was that witness's wife was to help her sister trim hats and not pay board. Witness was to pay board when there. He identified a letter which he had given to a school-teacher, and said that he got the letter back by mail at once. It was addressed to Mr. Benthall at his postoffice, which was kept in his store by Mrs. Benthall. It forbade the defendants from harboring, employing or giving shelter or food to plaintiff's wife. That he was ready, willing and able to take care of her. The letter was lost—was dated December, some five months after the trouble with his wife. There was other testimony tending to corroborate plaintiff.

Mrs. Powell testified for defendants that she went to defendants' October, 1895, and lived there twenty-two months before she separated from her husband. She went there because her husband thought it best to do so. She denied several of the statements of her husband. No one counseled her to leave her husband or prevented her from living with him. Neither of the defendants did so. When they divided property he asked her for the engagement ring—said it would help him in getting another girl. She described the treatment of her when she dressed in the office. He pulled her down—she had on morning wrapper, and during the scuffle the buttons were torn off. Told him that she would rather die than go with him. He said she had to go; would take her dead or alive. Mr. Newsome said: "Don't let the woman dress in the road." He agreed to let her go in the office. He went with her in the office, (149) holding her arm. Went with him because she could not

help it. She had lost confidence in him. When she first mentioned to the Benthalls her intention of separating from her husband, they told her to use her own pleasure; they would not advise her about it.

Defendant W. T. Benthall testified that he married Mrs. Powell's sister. Powell came to see him and made arrangements to move his wife to witness's house and to keep his furniture. Told him that he would charge nothing as she was his wife's sister, that she could help his wife about the house. Did not ask plaintiff to come or let his wife come. He asked witness to take her. When he went to Greensboro Powell borrowed $10 from witness. When he came back said he had twenty-six cents. Witness gave Mrs. Powell no advice about leaving her husband; knew nothing of any trouble between them. On the night he stayed at witness's house he said: "What is the matter with Eunice?" Witness asked him what he meant—said she did not talk to suit him. Powell never seemed out of humor with witness until Mary Parker carried a message; he then talked as if some one was trying to take his wife away. Witness told him he had nothing to do with it; that he would take his wife to the station any time she wanted to go. Powell wrote a note about harboring his wife; read it to Mrs. Powell. When he read it he said: "Eunice, you will have to move." She said: "If you and my sister will not let me stay I will have to go somewhere. I will live in a hollow tree before I will live with Mr. Powell again." Witness testified that she was his wife's sister and he could not drive her from his house. Mrs. Benthall said nothing. Heard about Powell's publishing notices forbidding any one to let his wife stay in their house. Told his wife. Mrs. Benthall testified that when plaintiff was pulling his wife in the road she heard her screaming and
(150) went to her; she was down in the road in the mud, her clothes torn almost off, her body was exposed. Went to her but was repulsed by plaintiff. Gave no advice or suggestion at any time to sister about leaving her husband, or prevented her from returning to him. Had let her live in the house because she was her sister and wanted to stay. There was other corroborative testimony. At the close of the evidence defendants renewed their motion for nonsuit, which was refused. Defendants excepted. The defendants asked the court to charge the jury: "The defendants had the right to permit their sister to live in their house, and to give her such countenance, comfort and support as her condition seemed to require, although she had separated from her husband without just cause, and although the plaintiff, after said separation,

forbade the defendants to give shelter, comfort and support and protection to his wife, and the jury should answer the second issue 'No,' unless they find that the defendants wrongfully induced the plaintiff's wife to leave her husband, alienate her affections from him, notwithstanding the defendants did give to the plaintiff's wife, after she left her husband, such shelter, comfort and support." The court refused the prayer, and defendants excepted.

The court in charging the jury upon the second issue explained the law regarding the right of the husband to the society, etc., of the wife, and of her duty to live with him and submit to his control, etc. Also, as to the duty of the husband to support his wife and by what treatment he would forfeit his right to her society, etc., after which his Honor said: "Now, gentlemen, applying these principles to the case at bar, the court charge you that if you find from the evidence that the defendants or either of them allowed and permitted the plaintiff's wife to life at the home of Mr. Benthall, after the plaintiff had objected to her doing so, such objection having been made known to the defendants, or either of them, then (151) you should answer the second issue 'Yes,' unless you find that the wife of the plaintiff left him on account of cruel treatment to her, or from one of the causes to which I have before referred as grounds upon which the wife may leave and separate from her husband."

The court further charged the jury that the burden was on the defendants to show justification on the part of the wife for leaving the plaintiff against his will. That the fact that defendants were the brother-in-law and sister of plaintiff's wife could not justify them or either of them in allowing her to remain at the house of Mr. Benthall against the will and after objection by the husband, but they must show that the wife was justified in leaving.

To these several instructions the defendants duly excepted and from a judgment for the plaintiff appealed.

Winborne & Lawrence and *L. L. Smith* for the plaintiff.

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

CONNOR, J. His Honor's instructions are based upon certain legal propositions which are challenged by the defendants' exceptions. They are: that, if the wife separated herself from her husband without his consent, her sister and brother-in-law become liable to an action for damages on the part of the husband, if, after being forbidden to do so, they permit or allow

her to remain in their home, unless they can show affirmatively that the wife was justified in separating from her husband. The jury by their verdict on the first issue excluded any suggestion that defendants alienated her affections or enticed her away from her husband. His Honor eliminates from the consideration of the jury any question as to the relationship of the defendants to the wife, or motive with which they al-
(152) lowed her to remain in their home, or active interference with her movements by advice or counsel. In the view of his Honor the plaintiff's cause of action accrued when the defendants failed, after being notified by the husband, to compel his wife to leave their home. The testimony, considered with reference to the instruction in regard to the manner in which the wife originally became an inmate of the defendants' home, etc., could only be considered by the jury upon the second issue to ascertain whether they permitted her to remain after being forbidden to do so, and whether they were justified in doing so.

The testimony of the plaintiff is that he permitted his wife to live with defendants without paying board, compensating them by helping her sister with her work. It seems that the husband, having been unfortunate in his business, found it desirable to leave his home to seek employment. The wife begins a correspondence with him indicating affection and attachment. After some time she writes him a letter which he says troubled him and brought him home. The contents of this letter are not given, but it is said by him related to his indebtedness. When he gets home his wife meets him and something is said about going to ride. The testimony in regard to the meeting and the incidents of the first night is conflicting. It appears, however, he slept at defendants' house, but not in the same room with his wife. On the next day his wife writes him a letter saying that she has decided not to return to him unless he changes his mode of life, etc. He at once went to see her, and in the presence of Mrs. Benthall talked the matter over with her—she repeating her purpose to separate from him. Something was said about dividing their personal property. Plaintiff after this took out process for the possession of the property and went to defendants' house with the officer. His wife was in her morning wrapper, and the scene occurred as detailed in the evidence. He took her to his father's for two days and nights during which time they lived as man
(153) and wife. After attending a trial before the Justice, the wife, in a buggy with her brother, returned to defendants' house and remained until December, when plaintiff

wrote a letter to defendant Benthall forbidding him to "harbor, give employment or shelter his wife, stating that he was ready, willing and able to care for her." It was also in evidence that he had posted public notices forbidding other persons doing so. It was in evidence on the part of the defendants that upon receipt of the letter he said to plaintiff's wife that she must move —to which she responded that if they would not let her stay she must go somewhere else; that she would live in a hollow tree before she would live with her husband. The defendant testified: "Mrs. Powell was my wife's sister and after this I could not drive her from my house." Mrs. Benthall and Mrs. Powell testify to substantially the same facts—all of them testifying that defendants did not at any time advise or counsel her to separate, or to continue to remain away from her husband. It was in evidence that the plaintiff had no home to which he could carry his wife, nor any means with which to support her. Except on the occasion referred to there was no evidence of cruelty on the part of the husband. We should be reluctant to excuse or justify the conduct of either husband or wife, or of third persons, encouraging separation or withdrawal of marital rights or refusal to recognize or discharge marital duties. We should adhere strictly to the wise and salutary principles announced and enforced by the great judges who have preceded us, as essential to the sanctity of this relation which forms the basis of our social and domestic life. On the other hand we should be equally reluctant to adhere to the conceptions of a past age regarding the status of the wife and the power of the husband over her person and conduct. We fully sympathize with the statement made in *"A Century of Law Reform,"* that there is no branch or department of (154) the law in which the change has been greater or the contrast more violent. It is not necessary to cite decisions of this Court to show that our predecessors have recognized and given expression to the change of public conscience and policy in this respect. Thirty years ago, this Court, speaking by SETTLE, J., said: "We may assume that the old doctrine that a husband has a right to whip his wife provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, 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." *S. v. Oliver,* 70 N. C., 60. In 1891 Lord Chancellor *Halsbury, in Reg. v. Jackson,* 1 L. R. Q. B. D., 671, said: "The Court has satisfied itself that in refusing to go and continue in her husband's house (the petitioner) was acting of her own free-will and that she is not

compelled or induced by any one to refuse to continue to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. * * * In the same way such quaint and absurd dicta as are to be found in the books as to the right of the husband over his wife in respect of personal chastisement, are not, I think, capable of being cited as authorities in a court of justice in this or any civilized country." He says: "The return seems to me to be based on the broad proposition that it is the right of the husband when his wife has willfully absented herself from him to seize the person of his wife by force and detain her in his house until she shall be willing to restore him to his conjugal rights. I am not prepared to assent to such a proposition." In this case opinions were written by the Master of the Rolls, and *Fry,* L. J., concurring with the Chancellor. The case is regarded as (155) the latest and best judicial expression of the law conforming to the sentiment of the most enlightened statesmen and jurists of the age. So far back as 1791, Lord *Kenyon,* who certainly was not a radical judicial reformer, said in *Phillips v. Squire,* Peake, 82: "The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behavior he knows to be proper; or from selfish or criminal motives. But where she is received from principles of humanity the action can not be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that of harboring an apprentice, the ground of that action being the loss of apprentice's services." The plaintiff was nonsuited.

In *Turner v. Estes,* 3 Mass., 317, the Court said: "The defendant is charged with enticing the plaintiff's wife. No evidence was given at the trial of any enticing. As to the charge of harboring, the sum of the evidence is that the defendant permitted his wife's mother to remain in his house without using force to expel her. He was not obliged to use force." These authorities fully sustain the defendant's exception to the charge. We think that his Honor was also in error in placing upon the defendants the burden of showing justification. *Barnes v. Allen,* 40 N. Y., 390. The learned Justice says: "The *gist* of the action, as all the authorities agree, is the loss without justifiable cause of the comfort, society and services of the wife. In maintaining the action two questions principally

arise: Was the loss occasioned by the voluntary action of the wife upon justifiable cause, or was it occasioned by the acts or persuasion of the defendant without any real cause and in bad faith towards the plaintiff? On both these questions the plaintiff must give evidence tending to establish his case or his action must fail." The error in the instruction, in (156) this particular, is that it overlooks entirely the motives and casts the burden of proving the truth of the wife's statement upon the defendant. We are further of the opinion that his Honor erred in telling the jury that they could not consider the relation of the defendants to the plaintiff's wife. Upon the question of good faith the relationship was most material. It cannot be that a sister and her husband are to be treated as officious intermeddlers and wrongdoers for giving food and shelter to plaintiff's wife and permitting her to remain in their home. We do not intend to say that if it appeared that they actively procured the separation, or counseled and advised of its continuance, they would not be liable—but where the question of motive is essential to be shown, the relationship is not only relevant but most material. After a careful examination of the testimony, we fail to see any evidence fit to be submitted to the jury to sustain the affirmative of the issue. In view of all the evidence, we think his Honor should have given the instruction asked upon the second issue. He could not have dismissed the action pending the trial upon the first issue. The finding upon that issue practically put an end to the case. The plaintiff relied upon *Johnson v. Allen,* 100 N. C., 131. That was a case in which the plaintiff sued for "enticing, harboring and debauching" his wife. The testimony was ample to sustain the allegation. The language of the Court must be taken in the light of the testimony. There is a vast difference between the case of a man who entices another man's wife away from him and debauches her and the facts in this case. The conclusion to which we have arrived renders it unnecessary to pass upon the exceptions of the defendants' counsel in regard to the form of the issue and the verdict. It is not improper to say, however, that in the light of what is said in *Pearce v. Fisher,* 133 N. C., 333, the exception should be sustained. For the error pointed out there must be a

New trial.

(157)

INSURANCE CO. v. SCOTT.

(Filed 4 October, 1904.)

1. PROCESS—*Insurance—Laws 1899, ch. 54.*

The power of attorney executed to the State Insurance Commissioner appointing him attorney upon whom process can be served, the same to be "in force irrevocable so long as any liability of the company remains outstanding" in the State, is irrevocable so long as such liability remains.

2. JUDGMENTS—*Motions—Actions—Laws 1893, ch. 81—The Code, sec. 274.*

A judgment obtained by default can be set aside within one year for mistake, surprise or excusable neglect only by motion, and not by an independent action.

3. JUDGMENTS—*Waiver—Exceptions and Objections.*

That the evidence on which a default judgment was based was not sworn to was a mere error, waived by not being excepted to.

4. JUDGMENTS—*Waiver—Fraud.*

The defendant, in a default judgment, is not entitled to have the same set aside for fraud, consisting of false allegations and proof, which were known to it at the time the judgment was rendered.

ACTION by the Mutual Reserve Fund Life Association against S. H. Scott, heard by Judge *O. H. Allen,* at May Term, of CRAVEN. From a judgment for the defendant the plaintiff appealed.

J .W. Hinsdale & Son and *Shepherd & Shepherd,* for the plaintiff.

W. W. Clark, for the defendant.

CLARK, C. J. This is a civil action to set aside a judgment on the ground of fraud, and secondly, that service of
(158) summons was made only upon James R. Young, Insurance Commissioner, though the defendant in the judgment (the plaintiff in this action) had revoked its letters of attorney which had been filed with the Insurance Commissioner, as required by the act of Assembly "to regulate fire insurance and other companies," ratified 6 March, 1899. This service was held good in a case by this plaintiff presenting the same point (*Biggs v. Ins. Co.,* 128 N. C., 5), which was reviewed and re-affirmed in another case brought up by this appellant. *Moore v. Ins. Co.,* 129 N. C., 31. It does not appear even that the plaintiff herein did not appear in the action in which this judgment was taken, but inferentially that it did, for the sec-

ond ground of relief set out is that "the plaintiff herein, under advice of counsel, made default in said action and did not discover that the judgment was procured by the false complaint and the unsworn statement of the attorney of said Scott," based upon the statements made to him by said Scott, until about the last of January, 1904.

It appears from the complaint in said former action, filed as an exhibit to the complaint herein, that the judgment was obtained by default upon a duly verified complaint. If there was mistake, surprise or excusable neglect, it is not shown by the averments in this action. Besides, relief on such ground cannot be had now by an independent action, but only by a motion in the cause under The Code, sec. 274. *Morrison v. McDonald,* 113 N. C., 327. If the party fail to make such motion in a year, he cannot have relief by an independent action. *Walker v. Gurley,* 83 N. C., 429.

If the defendant had never been served with process, nor appeared in the action, the judgment could be treated as void without any direct proceeding to vacate it. *Condry v. Cheshire,* 88 N. C., 375. An irregular judgment can be set aside by motion in the cause by a party thereto at any (159) time—not by an independent action. *Everett v. Reynolds,* 114 N. C., 366, and other cases cited in Clark's Code (3 Ed.), p. 323. On the allegations, however, it appears that the judgment was regularly taken by default and inquiry, and at a subsequent term judgment was had upon a verdict upon the inquiry.

The complaint alleges, as grounds of fraud to set aside the judgment, that certain material allegations in the complaint, and in the testimony on which the verdict and judgment were obtained in the original action, were false and fraudulent, but these were matters which should have been defended in that action instead of permitting judgment to go by default, as the plaintiff herein avers that he advisedly and deliberately did. It appears upon the face of the complaint in the first action, appended as an exhibit to the complaint in this, that the facts in reference to each allegation in the original complaint were in possession of the defendant in that action (the plaintiff in this) at the time said judgment was rendered.

"Equitable relief will not be granted to a party against a judgment because of a good ground (even) of defense of which he was ignorant till after judgment rendered, unless he shows that by the exercise of reasonable diligence he could not have discovered such defense in time for the trial, or that he was prevented from the exercise of such diligence by fraud or

surprise on the part of the opposing party, or by accident or mistake unmixed with negligence on his part." MERRIMON, J., in *Grantham v. Kennedy,* 91 N. C., 153. The last ground named in that citation is inadvertently taken from the former procedure, for relief in that class of cases cannot now be had by independent action, but only by a motion in the cause to set aside the judgment for "mistake, surprise or excus-
(160) able neglect" under The Code, sec. 274, amended by Acts of 1893, ch. 81. *Morrison v. McDonald, supra.*

The allegation that the witness, upon whose evidence the verdict at the inquiry was obtained, was not sworn, does not *per se* show fraud, but merely error which was waived by not being excepted to. The plaintiff has had his day in court. He had full opportunity to defeat a recovery upon the very grounds he now urges to set aside the judgment, *i. e.,* the falsity of allegation in the complaint and proof in the original action. He says he purposely kept silent, made no defense and permitted the judgment by default to be taken. The courts can not thus be trifled with. "Having been silent when he should have been heard, he can not now be heard when he should be silent." *Bank v. Lee,* 38 U. S., 119.

In sustaining the demurrer to the complaint there was

No error.

Cited: *Fisher v. Ins. Co., post,* 225; *Scott v. Life Asso.,* 137 N. C., 517, 519.

MORRISETT v. STEVENS.

(Filed 4 October, 1904.)

WILLS—*Estates.*

Where realty is devised to a person during his natural life, and after his death to his heirs in fee simple, with the condition that if he should die without heirs the property should go to another, the first devisee takes a fee simple estate.

ACTION by Ellen Morrisett and others against N. W. Stevens, heard by Judge *W. A. Hoke,* at Spring Term, 1904, of CRAVEN. From a judgment for the defendant the plaintiffs appealed.

Ward & Thompson and *W. M. Bond,* for the plaintiffs.
Pruden & Pruden and *E. F. Aydlett,* for the defendant.

MONTGOMERY, J. The last will and testament of J. D. Morrisett contained the following clause: "I leave all my real estate that I heired from my father, I. W. Morri- (161) sett, after paying my just debts, to my brother, G. L. Morrisett, during his natural life, and after his death I give and devise the said land to his heirs in fee simple forever, but should my said brother die without heirs of his body, then I give and devise the said property to Bettie Stevens in fee simple forever." The defendant has been in possession of the land claiming title thereto under a deed made to him by G. L. Morrisett, who died leaving the plaintiffs, his children, and only heirs at law. They have brought this action to recover possession of the land, claiming the same under the will of J. D. Morrisett and alleging that their father had only a life estate in the same. The only question in the case then is, does the rule in Shelley's case apply? We are of opinion that it does, and that the father of the plaintiff by his deed to the defendant conveyed to him a good and indefeasible title in fee. The property was devised to the father of plaintiff during his natural life and after his death to his heirs in fee simple. If we stop there, no contention could be made that the rule did not apply. A freehold estate is given to the ancestor, and in the same conveyance an estate is limited immediately to his heirs in fee simple forever, which meets the requirements of the rule absolutely and without qualification. The ulterior devise by way of remainder in the event that the ancestor should die "without heirs of his body" need not be considered, for the first taker died leaving heirs, his children, who are plaintiffs in this action.

Affirmed.

Cited: *Sessoms v. Sessoms,* 144 N. C., 125.

---

(162)

WOODLIEF v. WESTER.

(Filed 4 October, 1904.)

FORECLOSURE OF MORTGAGES—*Limitations of Actions—Remainders—The Code, secs. 146, 158, 152, subsec. 3.*

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman.

CLARK, C. J., dissenting.

WOODLIEF *v.* WESTER.

ACTION by R. R. Woodlief against A. B. Wester and others, heard by Judge *Frederick Moore* and a jury, at January Term, 1904, of FRANKLIN.

This case was a special proceeding for partition of land, which was transferred from the Clerk to the Superior Court and placed on the civil issue docket for the trial of issues joined, and A. B. Wester, mortgagee of the interest of one of the co-tenants, was made a party. The mortgagor relied upon the statute of limitations. The facts are as follows: Henry Merritt died in 1861, leaving a will, by which he devised a tract of land to Sallie Woodlief for life, and at her death to her children. There were six of these children. One of these, R. R. Woodlief, bought the share of one of his brothers, and being thus entitled to two-sixths of the remainder in said land, he, on 9 April, 1885, conveyed the same to A. B. Wester by mortgage deed to secure a note for $375.00 with interest, due 1 January, 1886. The only payment ever made was in 1890, and the jury find that there is still unpaid on said debt $168.40 and interest. The life tenant, Sallie Woodlief, died in June, 1902, and this proceeding was begun 29 September, 1902. His Honor charged the jury that if they believed the evidence they should find that the right of the mortgagee, A. B. Wester, to foreclose his mortgage is barred by the statute of limitations, and
(163) the defendant excepted. The jury found as directed.

Defendant A. B. Wester moved for a new trial. Motion denied. Judgment in favor of the mortgagor and appeal by defendant Wester.

N. Y. Gulley, for appellant Wester.
F. S. Spruill and *W. H. Ruffin,* for the appellees.

WALKER, J. The statute of limitation relied on in this case to bar the defendant's right to foreclose his mortgage and to extinguish his lien on the land is as follows:

"An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, shall be brought within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the asme." The Code, sec. 152 (3).

At the time the mortgage was executed by Woodlief to Wester, and ever since said time, Sallie Woodlief has been in the actual possession of the land described in the mortgage as the owner of the life estate therein, and neither the plaintiff Wood-

lief nor the defendant Wester has ever had any actual possession of the land or any part thereof. The contention of the plaintiff was, and the court below sustained it, that the actual possession of the life tenant, Sallie Woodlief, inured to him and was in law, if not in fact, his possession, the remainder being a continuation or elongation of the life estate and the possession of the life tenant and the remainderman being necessarily one and the same. It is true that for some purposes the possession of the life tenant is to be considered as not adverse to the remainderman, because the latter has no right of entry until the determination of the life estate, but this does not prove, nor do we know of any principle of the law which sustains the proposition that the actual possession of the (164) life tenant inures to the remainderman, so that during the continuance of the life estate the latter can avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. The law has been adjudged to be the other way. *Malloy v. Bruden,* 86 N. C., 257. It is true that the particular estate for life and the remainder are nothing but parts or portions of an entire inheritance, and this would be so if there were many remainders, upon the principle that all the parts are equal and no more than equal to the whole (2 Blk., 164), and it is also true that livery of seizin, when made to the tenant of the particular estate, related and inured to him in remainder, as both estates were but one in law; but the very reason and necessity for this rule fully answer the plaintiff's contention in this case that the possession of the owner of the particular estate, Sarah Woodlief, inures to him so as to bar the right of Wester who holds the mortgage upon his interest.

The reason of the rule just stated was that livery of the land was requisite to convey the freehold and could not be given to him in remainder (as his is an estate not in possession but in expectancy) without infringing the possession of the tenant for years or for life, and therefore livery to the latter was insufficient to support the remainder. It is the reason also why a remainder must have a particular estate to support it, as possession cannot be delivered to the owner, he having no immediate right to it. His estate commences *in presenti,* but can be occupied or possessed and enjoyed only *in futuro.* 2 Blk. Com., 166, 167. Livery was required to be made to the life tenant in order only to support the remainder, and for a reason which excludes the idea that the remainderman could have seizin during the continuance of the life estate. The remainderman could have no seizin of any kind, and therefore livery

(165) was made to the life tenant. But if the possession of the life tenant could inure to him in remainder for the purpose of barring rights, it could do so only for the benefit of him who holds the legal title (in this case the mortgagee), because the right to the possession is an incident of that title. In *Houston v. Smith,* 88 N. C., 313, it is said that seizin in deed is the actual possession and seizin in law, the right to the possession or enjoyment of a freehold estate, and seizin can only apply to such an estate. There is no such thing as a seizin of a remainder after a freehold estate, because the remainderman can have no actual seizin and no right to the possession or enjoyment of the land until the determination of the particular estate, and for this reason a widow is not dowable of such a remainder, though even a husband's seizin in law is sufficient to support the right of dower. If the statute refers to a constructive instead of an actual possession, the plaintiff must fail in his contention because that title which draws to it the possession, in the absence of actual possession, so that the law adjudges the possession to be constructively with the title, is the legal title which is held by the mortgagee, and it has been expressly adjudged that the constructive possession is in the mortgagee under such circumstances and where there is no outstanding life estate, and as between him and the mortgagor. *Parker v. Banks,* 79 N. C., 485. A valuable part of the remedy of the defendant as mortgagee is the right to enter upon and take possession of the premises. *Credle v. Ayers,* 126 N. C., 11; 48 L. R. A., 751; *Wittkowski v. Watkins,* 84 N. C., 456. As this right could not be exercised till the life estate fell in, the law will not bar his right, for the law bars the right of entry and of action of him only who can, but does not, either enter or sue. 2 Jones Mort. (6 Ed.), sec. 1210; *Bruner v. Threadgill,* 88 N. C., 366; *Lee v. McKoy,* 118 N. C., 525. But we think the plaintiff must fail on his plea of the statute by reason (166) of the very words of the act itself. It is impossible to suppose that the Legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter, we have already seen, has the right of possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. *Dobbs v. Gullidge,* 20 N. C., 68; *London v. Bear,* 84 N. C., 266; *Deming v. Gainey,* 95 N. C., 528; The Code, sec. 146; *Williams v. Wallace,* 78 N. C., 354. We cannot resist the conclusion from the language of the act

itself, when read in the light of well-settled legal principles governing the relation of mortgagor and mortgagee, that an actual possession was intended. Besides, it had always been held, before the adoption of sec. 152 (3) of The Code, that nothing short of an actual possession for the required period of time would be a good bar to the mortgagee's right. Adams Eq. (5 Am. Ed.), 144, note 2, and cases; *Roberts v. Welch,* 43 N. C., 287; *Moore v. Cable,* 1 Johns., ch. 385; *Bollinger v. Chouteau,* 20 Mo., 89; *Locke v. Caldwell,* 91 Ill., 417; *Morgan v. Morgan,* 10 Ga., 297; *Cholmondely v. Clinton,* 2 Jac. & Walk., ch. 186. The principle was adopted in analogy to the statute of limitations tolling the right of entry after twenty years' adverse possession. *Hughes v. Edwards,* 9 Wheat., 489. Pingrey in his work on mortgages, sec. 2238, says: "When the mortgaged land is not in the actual possession of either the mortgagor or the mortgagee, the title remains undisturbed as fixed in the deed of mortgage, and the presumption does not arise of payment or of the running of the statute to the prejudice of either. The mere lapse of time, unaccompanied by any possession, neither disturbs the right to redeem nor the right to foreclose." See also, section 2242; 2 Jones Mort. (6 Ed.), sec. 1212. We cannot consider the word "possession" in the connection (167) in which it appears in the statute without associating our idea of its true meaning with the *pedis possessio,* nor can we help thinking how vain it would be to use the word in any other sense.

But the question, it seems to us, has been settled and closed by the decision in *Simmons v. Ballard,* 102 N. C., 105, in which it was held that the possession of the mortgagor in order to bar the right of the mortgagee to foreclose must be the same kind as that required to be held by the mortgagee in order to bar the mortgagor's right to redeem, which is an actual possession, or "the possession and the exercise of full ownership over the land," for the prescribed period of time after the default of the mortgagor. *Edwards v. Tipton,* 85 N. C., 479; *Ray v. Pearce,* 84 N. C., 485; *Woody v. Jones,* 113 N. C., 253. If the interpretation of the statute, which the dissenting Justice in *Simmons v. Ballard* thought was the correct one, had been adopted by the Court, namely, that constructive possession is sufficient to bar the mortgagee's right to foreclose, the plaintiff would still fail to make good his contention, as it was admitted by the learned Justice who wrote the dissenting opinion, that the constructive possession is in the mortgagee, in the absence of actual occupation by either party, and it is conceded that there was none in this case.

It is suggested that the case comes within the provision of section 158 of The Code by which an action for relief not provided for in chapter 3 is barred unless commenced within ten years after the cause of action accrued. The conclusive answer is that an action wherein the relief consists in foreclosing a mortgage is especially provided for in that chapter by section 152 (3), and, in order to bar an action for relief under that section two things must concur, namely, the lapse of ten years after the forfeiture or after the power of sale became
(168) absolute or after the last payment, and the possession of the mortgagor during that period. This is an express provision of law directly applicable to an action to foreclose, and we must disregard altogether section 152 (3) before we can hold that section 158 has any application. Such a construction of section 158 would be a complete reversal of the will of the Legislature as plainly expressed. We do not think that in any case to which section 158 has been applied, the relief prayed for was the same in fact or in principle as that sought in this case. Indeed, there are several cases decided under section 158, in which the principle of section 152 (3) has been adopted by analogy, and in which it was held that a party who remains in possession of land is not barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. *Thornburg v. Mastin,* 93 N. C., 258; *Mask v. Tiller,* 89 N. C., 423; *Stith v. McKee,* 87 N. C., 389; *Norton v. McDevit,* 122 N. C., 756. It is true that in *Menzel v. Hinton,* 132 N. C., 660, 95 Am. St., 660, the Court held that there might be a sale under the power contained in a mortgage without resorting to an action to foreclosure, and it is also true that the Court conceded that such an action would be barred by the lapse of ten years after the last payment; but with this proviso, that the mortgagor had been in possession during the prescribed period. This appears at page 666 in the following passage: "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 the 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 theory of the statute is that there has been an abandonment of the right, which will not be presumed
(169) unless the party resisting the enforcement of the right has had possession.

It is provided by section 152 (2) and (3), that the statute

shall not run at all in an action for the redemption of a mortgage unless the mortgagee has been in possession, nor in an action for foreclosure unless the mortgagor has been in possession. Where there is no possession by either party, there can be no running of the statute. If it was intended that section 158 should apply where there is no possession by either party, it was utterly useless to insert in section 152 (2) and (3) the provision in regard to possession, as the statute, under such a construction of section 158, would run whether there was any possession or not, and the period of limitation is the same in both sections. The decision of this question in favor of the defendant renders unnecessary any reference to the other points discussed.

There was error in the instruction of the Court.

New trial.

CLARK, C. J., dissenting. The case herein presented falls within the express words and the purpose of The Code, sec. 158—"An action for relief *not herein provided for* must be commenced within ten years after the cause of action shall have accrued." This section was intended to be a universal statute of repose, applying to all causes of action not included among those specifically enumerated in the preceding sections of the statute of limitations. It could have no other purpose. If it does not apply to this case, by what reasoning can it be made to apply to any? Many of the cases in which it has been applied are to be found in Clark's Code (3 Ed.), pp. 75-78, to not one of which it was more applicable than this. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." This mortgage could have been foreclosed (170) in an action at any time subsequent to the last payment in 1890. The defendant, Wester, having failed to do so for ten years, is debarred by section 158 from having recourse to such action now. In *Menzel v. Hinton,* 132 N. C., 660, emphasis was put on the fact that to sell under the power of sale required no *action* in court, for, it was conceded, such action would be barred. The Code, sec. 152 (3), applies only where the mortgagee or trustee is in possession. The opinion of the Court in this case rests upon the ground that it does not apply where the mortgagee or trustee has not been in possession, hence such case necessarily is one not therein "provided for" and falls under section 158. There is no provision in section 152 (3) forbidding the statute to run except when the mortgagee or trus-

tee is in possession, but merely that in such case the bar is ten years. There is no reason why the general bar of ten years should not apply to the case where the trustee or mortgagee is not in possession as well as to other omitted cases, for section 158 applies to all cases not otherwise "herein provided for."

Cited: *Joyner v. Futrell, post,* 303.

---

(171)

BRITT v. LUMBER CO.

(Filed 11 October, 1904.)

WILLS—*Legacies and Devises.*

Where a testator by his will provided, "I will and bequeath to my daughter N. and heirs my farm on Railey's branch, known as the 'Peter Anders place,' which said place I lend to my daughter N., but not subject to any debts she and her husband may contract, but to be *bona fide* the property of her lawful heirs," his daughter took a fee-simple estate.

ACTION by S. H. Britt and others against the Rowland Lumber Company, heard by Judge *G. S. Ferguson,* at May Term, 1904, of SAMPSON. From a judgment for the plaintiffs the defendant appealed.

George E. Butler, for the plaintiffs.
H. A. Grady, for the defendant.

CLARK, C. J. The plaintiff's right to recover depends upon the construction of clause 10 of the will of Bryant Daughtery, which is as follows: "I will and bequeath to my daughter, Nancy Turnage, and heirs, my farm on Railey's branch, known as the Peter Anders place, which said place I lend to my daughter, Nancy, but not subject to any debts she and her husband may contract, but to be *bona* fide the property of her lawful heirs."

This action is brought by the heirs of Nancy Turnage to recover damages from the defendant for cutting down and carrying away the timber, which was conveyed by her deed to those under whom the defendant claims. The plaintiffs claim that Nancy Turnage had only a life estate in the land and had no right to sell the growing timber thereon.

If the devise had stopped at the word "place," it is clear

that Nancy took a fee simple. The subsequent attempt to withdraw it from liability for her debts was inarti- (172) ficially done and of no effect. It might have been done by leaving the estate to a trustee to pay her the income with the remainder over, but this was not done, and the contrary intent was shown by the devise thereof already made to her in fee. The added words "to be *bona fide* the property of her lawful heirs" but expressed the result expected and intended by the testator from the provision that the property should not be subject to her debts.

But if it could be taken that the exemption of the property from liability for the debts of Nancy was properly conferred, still *quacunque via* she took a fee, for the rule in Shelley's case would apply and carried a fee simple to Nancy, as will be seen by comparing the rule with this devise to "her and heirs, not subject to her debts, but lent to her and then to be the *bona fide* property of her heirs." This is at most (discarding the first part of the clause which carries a fee simple) a devise to her for life with remainder to her heirs.

The origin of the rule is given in 2 Blk., 172, and the rule itself is thus stated by Coke, 1 Rep., 104a: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, mediately or immediately, to his heirs in fee or in tail, always in such cases the words 'the heirs' are words of limitation of the estate, and not words of purchase." And this is a strict rule of law which cannot be prevented by expression of intention to the contrary —say all the authorities. In holding therefore that Nancy Turnage did not take a fee simple, there was

Error.

Cited: Wool v. Fleetwood, post, 470; *Pitchford v. Limer,* 139 N. C., 15.

---

(173)

HARDISON v. LUMBER CO.

(Filed 11 October, 1904.)

1. LOGS AND LOGGING—*Contracts—Timber.*

A contract for the sale of timber above the size of twelve inches in diameter requires a measurement from outside to outside, bark included, in the absence of evidence of any local or general custom giving those words a different meaning.

2. LOGS AND LOGGING—*Contracts.*

Under a contract for the sale of standing timber, giving the purchaser fifteen years within which to cut and remove the same, the cutting need not be continuous.

3. LOGS AND LOGGING—*Contracts.*

Under a contract for the sale of all the pine timber on plaintiff's land, of and above the size of twelve inches in diameter "when cut," with the term of fifteen years in which to cut and remove the same, the purchaser is entitled to cut trees that attain that size within the term.

ACTION by W. A. Hardison against the Dennis Simmons Lumber Company, heard by Judge *Frederick Moore,* at March Term, 1904, of MARTIN. From a judgment for the defendant the plaintiff appealed.

Small & McLean, for the plaintiff.
H. W. Stubbs, for the defendant.

CLARK, C. J. On 5 September, 1891, plaintiff conveyed to the Greenleaf-Johnson Company, in consideration of $65, "all the pine timber of and above the size of twelve inches in diameter on the stump when cut, in and upon" a certain tract of land, with the term of fifteen years within which to cut and remove the same. Thereupon, said company entered and cut a part of the timber which measured twelve inches and over, but left some of that size standing. In June, 1902, the
(174) Greenleaf-Johnson Company conveyed its interest and estate under said deed to defendant company, which again entered upon the land and cut and removed such timber as had been left by the Greenleaf-Johnson Company, and also cut and removed all of the trees which had attained the size of twelve inches, constructing and operating a railroad upon plaintiff's land for that purpose. As is alleged in the complaint, and not denied, these several acts on the part of the defendant were committed after the same had been forbidden by plaintiff.

Three questions are presented for consideration, to-wit:

1. In determining the measurement, shall the twelve inches be computed from outside of bark to outside, or from inside to inside.

2. If, when the tract is once cut over, and there is left standing trees of the required size, can the grantee enter again at any time during the period of the lease for the purpose of cutting and removing them?

3. If, when the tract is cut over once, and all the trees of the

dimensions of twelve inches in diameter and over at the stump are cut and removed, can the grantee enter again at any time during the period of the lease for the purpose of cutting and removing such trees as may have attained the required size between the time of the first and the second cuttings?

As to the first proposition, the natural meaning of the words "twelve inches in diameter," applied to standing trees, would be measurement from outside to outside, bark included. Few things are "closer than the bark to the tree." The construction we place upon the words has the support of precedent. *Alcutt v. Lakin,* 33 N. H., 507, 66 Am. Dec., 739; *Pease v. Gibson,* 6 Me., 81; 28 A. & E. Ency. (2 Ed.), 542, and other cases there cited. There was no evidence of any local or general custom giving these words a different meaning. A contract for logs "squaring" so many inches is an entirely different measurement, for this presupposes the bark and outer timber except at the four edges, to be cut away. (175)

The second point is against the plaintiff also. There are no words to restrict the purchaser to a continuous cutting. Had the parties so intended, they should have so contracted. It may be inconvenient to the plaintiff to have the purchaser enter a second time and cut down young trees, incidentally, in making his roads, but the seller should have foreseen and provided for this in making his contract. The purchaser in stipulating for "fifteen years" in which to "cut and remove" was evidently providing for his ease and leisure in so doing.

The last point is the most important one. In *Whitted v. Smith,* 47 N. C., 36, Judge PEARSON says that a conveyance of timber of a stipulated size to be cut and carried away at the convenience of the purchaser "only embraces such timber as was of that size at the date of the conveyance and not such as attained to it afterwards," and quotes with approval DANIEL, J., in *Robinson v. Gee,* 26 N. C., 186, that "It could never have been intended by the vendor when he made the reservation, that the tract of land should be a perpetual plantation for the raising of pine timber for the benefit of the vendee." In *Warren v. Short,* 119 N. C., 39, this is affirmed, AVERY, J., saying that a conveyance of all timber measuring "twelve or more inches in diameter at the stump, to be cut and removed within ten years, includes only the timber of that dimension when the conveyance was made." He adds that "A deed might be so drafted as to pass all trees that would attain the size mentioned during the period of the lease." The addition of the words "when cut" in this contract, so that the agreement reads "all pine timber above the size of twelve inches in diameter, on the stump, when

cut," evidently was intended to embrace all timber reaching that size within the ten years and so cut. The legal effect of such stipulation is construed in *Lumber Co. v. Hines,* 126 N. C., 254, to be that "the title passes only to those trees of the required measurement at the date of the deed. The grantee has no estate in the timber under size, for a court of (176) equity to protect, but merely a contingent right." The vendee held a license to cut such timber when it should reach that size. *Robinson v. Gee, supra.* Here it is agreed that the timber did reach the stipulated diameter "when cut" and was cut within ten years. The plaintiff having contracted that this might be done cannot recover damages because it has been done.

No error.

Cited: *Banks v. Lumber Co.,* 142 N. C., 50, 51; *Isler v. Lumber Co.,* 146 N. C., 557; *Davis v. Frazier,* 150 N. C., 452.

BLADES v. DEWEY.

(Filed 11 October, 1904.)

BANKS AND BANKING—*Bonds—Suretyship—Principal and Surety.*

Where the cashier of a bank is elected "for one year," and the recitals in his fidelity bond refer to his term of office, the surety on his bond is not liable for defalcations committed after the expiration of the term of office to which the bond refers.

ACTION by W. B. Blades against T. W. Dewey, C. Dewey, J. F. Miller and W. H. Borden, heard by Judge *O. H. Allen,* at May Term, 1904, of CRAVEN. From a judgment for the plaintiff the defendants appealed.

Rountree & Carr, D. L. Ward and *O. H. Guion,* for the plaintiff.

F. A. Daniels and *W. C. Monroe,* for the defendants.

CONNOR, J. This action is prosecuted by the plaintiff, trustee of the Farmers and Merchants Bank, for the recovery of the penalty of a bond executed by the defendants as sureties (177) of Thomas W. Dewey, late cashier of said bank. A jury trial being waived, the Court by consent found the facts material and necessary to a decision of the controversy. The Farmers and Merchants Bank was duly incorporated by chap.

55, Private Laws, 1891. Sections 3 and 4 of said act being the only sections referring to the election and terms of the officers of the bank, are in the following words: Sec. 3. "That the office and place of business of said banking company shall be in the city of New Bern, State of North Carolina, and the officers shall consist of a president, vice-president, cashier and teller, and a board of not less than five nor more than nine directors, who shall be elected annually by the stockholders; the directors so elected to choose the officers aforesaid, and shall require the president, the cashier and the teller each to give bond, with approved security, for the faithful performance of their respective duties. Sec. 4. That it shall be the duty of the board of directors and they are hereby fully empowered to make rules, regulations and by-laws for the government of said corporation and for the conduct of its business; also to fix the salaries of its officers and to fill vacancies in board of directors. Said board of directors shall be chosen by a majority of the corporators named herein at the first meeting to be called by them, which said board of directors shall hold office for one year and until their successors are duly elected, a majority of said board to constitute a quorum for the transaction of business." That under said act the said Farmers and Merchants Bank was duly organized on 3 March, 1891, and a board of directors elected by the stockholders, and that at a meeting of the said board of directors, held on 3 March, 1891, the defendant was elected cashier for one year and his bond fixed at the sum of twenty thousand dollars. That on 29 April the bond was, at a meeting of said board, presented and accepted, and thereafter no other bond was required or given during the continuance in office of said cashier. The parts of said bond material to the decision of this appeal are: "Whereas, (178) the above bounden Thomas W. Dewey has been chosen and appointed cashier of the Farmers and Merchants Bank, by reason whereof he will receive or have control, or be charged with money, property or things of said bank and others: Now the condition of this obligation is such that if the said Thomas W. Dewey, his executors or administrators, shall well and truly serve the said bank as such officer during his continuance in office, and well and truly perform and discharge all his duties as such officer, and shall at the expiration of his said office, or whenever sooner thereto required upon request to him or them made, shall make or give unto said bank a just and true account of all moneys." * * * That thereafter at a meeting of the board of directors of said bank held on 26 April, 1892, the said Thomas W. Dewey was elected cashier for the ensuing year,

and it was ordered that the bonds of the officers elected at said meeting be fixed at the same amount. That regularly each year thereafter the said Thomas W. Dewey was elected by the said board of directors as cashier for the ensuing year until and including the year 1903. There was no defalcation or breach on the part of said Dewey as such cashier until the year 1903. That during said year there was a defalcation by said Dewey to an amount exceeding the penalty of said bond. There was no by-law or resolution fixing the term of office of said cashier. The said bank failed and the plaintiff was appointed trustee. His Honor rendered judgment that defendants were liable on said bond and they excepted and appealed.

The defendants insist that by section 3 of the charter the terms of the officers, including the cashier, are made annual. This contention is seriously controverted by the plaintiff, he insisting that the words "elected annually" are confined
(179) to the board of directors. The question is certainly not free from difficulty. Assuming, however, that, as contended by the plaintiff, the term for which the cashier was to be elected is left open by the charter, to be fixed by the directors, it would seem that the fact, as found by the Court, that at their first meeting and probably before any by-laws were adopted, they elected the defendant Dewey "for one year," confined his term to that period certainly, until changed by resolution or by-law. In respect to the liability of the sureties to the bond in suit, no action of the trustees thereafter changing the term, or failing to require a new bond, could enlarge or extend the time for which they could be held answerable. The board seem to have so regarded the matter, because just one year after the first election they re-elected the defendant "for the ensuing year," and ordered "that the bond be fixed at the same amount." This language excludes the idea that they regarded the defendant Dewey as continuing in office under the first election, or that the bond given covered the next term. They elected him annually thereafter, ordering that the "bond remain as heretofore." This language might possibly give rise to some doubt, but certainly that used at the time of the second election could not do so. We concur with the plaintiff's counsel that no question of usage or custom can arise in this case. The terms of the contract were fixed at the opening of the bank and nothing done thereafter by the directors could change or affect them in respect to the question before us. What then did the defendants contract to do? It may be well enough to say at the outset that we do not assent to the suggestion that it was not competent for or within the power of the directors to fix

the term for a longer time than their own term. We see no good reason why, if not restrained by the charter, they may not elect for a number of years, or to hold at their pleasure. It is frequently said that sureties are the favorites of the law and their obligation is *strictissimi juris*. This is true, (180) but we think the principle is correctly stated by *Martin*, J., in *Bank v. Young*, 161 N. Y., 23: "The liability of a surety is measured by his agreement, and is not to be extended by construction. His contract, however, is to be interpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined by the language employed, when read in the light of the circumstances surrounding the transaction. Hence, when the question is as to the interpretation and meaning of the language by which a party has bound himself, there is a difference between the contract of a surety and that of a principal or other party sustaining a different relation. It is when the intention of the parties has been thus ascertained that the principle of *strictissimi juris* applies and then it is that the Courts gained the rights of the surety and protect him against a liability which is not strictly within the terms of his contract." Was the term for which defendant Dewey was elected at the time, and with reference to which the bond was given, annual? In the absence of a provision in the charter, or any by-law or resolution fixing the term, there is but one possible source for us to go for light by which to answer the question—the terms of the appointment. This the Court finds to have been "for one year." We must assume, in the absence of any suggestion to the contrary, that this was ascertained by referring to the minutes or records of the corporation. This is the usual way in which the business of a corporation is conducted. We must assume that the term for which he was elected was known to the sureties, and that they contracted with reference to such appointment. It would be doing violence to common experience and observation to do otherwise. The bond recites: "That whereas, the above bounden Thomas W. Dewey has been chosen and appointed cashier of the Farmers and Merchants Bank," (181) etc. Every contract of suretyship has reference to and is based upon some contract made, or obligation assumed, by the principal obligor, and the liability of the surety is measured by the obligation of the principal. "The bond of all officers remains in force as a continuing obligation only during the period for which he legally holds under his election. His re-election at the end of this period and his entry upon a second term of office, though no actual gap intervene, do not operate

to revive or keep alive his bond." 1 Morse on Banks, sec. 27. This is all clear enough, and there would be no difficulty in this case but for the fact that the bond simply recites that Dewey has been "chosen and appointed" without any reference to the time or term for which he has been so chosen, while the condition of the bond is that he shall well and truly serve the said bank as such officer "during his continuance in office." The defendants say that this language is to be understood as referring to his continuance in office by virtue of said appointment. The plaintiff insists that the condition must be given a very much larger meaning and application. That in the absence of any provision in its charter, by-laws or resolution fixing the term, or any express recital referring to the term of appointment, the parties must be understood as contracting to make good any default by their principal at any time during his actual continuance in office. It is conceded by the plaintiff that if the recital had in express terms referred to or set out an election "for one year," such recital would have controlled and limited the language of the condition. This principle is well settled by a long current of decisions from the time of Lord Chief Justice *Hale*. In *Lord Arlington v. Merricke*, 3 Saunders, 403, it was said: "That the condition shall refer to the recital." One Jenkins had been appointed deputy post-

(182) master for six months by the plaintiff, who was Post-master-General, and entered into bond with the defendant as surety, reciting the appointment "for the term of six months following," with the condition that he would well and truly perform, etc., "for and during all of the time that he shall continue deputy postmaster." The principal obligor continued in office after the expiration of six months and breached the condition of the bond. The court held that the surety was liable. *Hale*, C. J., says: "And so here the words 'during all the time' shall be intended but only during said six months recited in the bond." This, Saunders says, has been considered a leading case on this subject ever since. *Waterworks v. Atkinson*, 6 East., 507; *Baker v. Parker*, 1 D. & East., 287. In these cases the recital set forth the term of appointment. They aid us, therefore, only as sustaining the principle that the recital will control the condition. There are a class of cases wherein the statute fixes the term, in which it is held that although the term is not recited and the condition is general the language will be construed to refer to the term as fixed by the statute. In *Peppin v. Cooper*, 2 B. & Ald. (4 Eng. Com. L., 577), the office of Collector of Rents was fixed by act of Parliament at one year. *Abbott*, C. J., said: "It is true that the

words at all times hereafter in the condition of the bond would, taken by themselves, extend the liability beyond that period. But these words must be construed with reference to the recital and the nature of the appointment there mentioned, and the recital is that Warren, together with Peppin, had been appointed collectors under said act of Parliament. Now the nature and duration of the office must be learned from the act of Parliament itself, for if the statute makes it an annual office it is unnecessary to state that fact, either in the bond or the pleadings." *Hassell v. Long,* 2 Maule and Sel., 363. The plaintiff says that this case comes within neither of these classes, and this is true. In *Bank v. Chickering,* 3 Pickering, 335, *Parker,* C. J., referring to the contention that the con- (183) dition is controlled by the recital, says: "We do not doubt the soundness of the principle. * * * In some cases, when the words would extend to an indefinite period, but when by the recital it appeared that the office was annual, it has been held that the obligation should be understood as referring to an office so limited. We should go even further, and say that when it appears by the records of a corporation that the office, by their regulations, is an annual one, the bond should be so restricted, and all this is founded on the intent of the parties." It was held in that case that there was nothing in the record to show that the office was annual and nothing to make the sureties suppose that it was limited to one year. The general principle is recognized, and the Chief Justice says that it will apply when it appears by the records of the corporation. The facts of the case did not come within the rule. The plaintiff relies also upon *Bank v. Root,* 2 Met., 532. The opinion is written by Chief Justice *Shaw,* and is certainly entitled to the most respectful consideration by reason of his great learning and eminent ability. He says: "It is manifest by the terms of this condition that the obligation is unlimited in time, and undertakes for the faithful conduct of the cashier as long as he continues in office. But it is a well-settled and now familiar rule of law that general words in the obligation may be limited and restricted by the recital, by the subject, or by facts which when applied to the language show that it must have been so understood by the parties." After laying down this general proposition he continues, as if by way of illustration: "As when it is recited that one has been appointed to an office for a limited time, and there is a stipulation for a general performance, the law will look to the recital and limit the stipulation for a general performance to the time for which it is recited he is chosen." We cannot suppose that the Chief Justice (184)

intended by the illustration to narrow or limit the general principle so that it should only apply to cases coming strictly within the illustration. To so interpret him would be to limit the general principle in which he expressly says that the restriction of the condition may be brought about by the recital, by the subject, or by facts which when applied to the language show it must have been so understood by the parties. The fact that the principal was appointed "for one year," it seems to us, is as potent in controlling the condition as would be the recital of the fact, because it is the fact which the parties had in view when they contracted. *Bank v. Rott,* 2 Met., 532, was decided upon the general statute in force in Massachusetts, regulating banks and prescribing the terms of cashiers. The real point decided is that the language of the general statute will control the election by the board "for the ensuing year." The case of *Westervelt v. Mohsenstecher,* 76 Fed., 118, 34 L. R. A., 477, was decided upon the same ground—the National Banking Act prescribing the terms for which cashiers are elected. The Massachusetts Court expressly recognizes this in *Trustees v. Dean,* 130 Mass., 242. In that case the plaintiffs elected Richardson treasurer "for the ensuing term of three years." He gave bond with general recital. At the end of the term he was re-elected, and gave no new bond, the plaintiffs ordering that "the bond of the treasurer be the same as before." In an action brought for a breach committed after the expiration of three years, it was held that the sureties were not liable, the Court saying: "There is no statute which makes the office a continuing one, and the reasoning which led to the decision in *Bank v. Root* is not applicable to this case. * * * When the defendants signed the bond in suit, the subject matter of the contract was an office of a fixed and limited term. Their
(185) stipulations apply only to the limited office, and as there is no agreement to continue their liability in case of the re-election of the same officer, they are not responsible for any defalcations happening after their principal, by a re-election, entered upon a new office or term of office." *O'Brien v. Murphy,* 175 Mass., 253, 78 Am. St., 478; *Bank v. Ostrander,* 165 N. Y., 430. While none of these cases are on "all fours" with ours, we find nothing said in any of them which confines the application of the general principal to cases where the term is fixed by statute, charter, by-law or resolution, or which excludes its application to a case wherein the term of appointment at the time it is made is fixed to a definite period and the recital is general. In a note to Morse on Banking, sec. 27 (4 Ed.), the law is thus stated: "Though the bond does not recite

the term of the office or agency, if it be of limited duration by general statute, charter, by-law *or terms of appointment* (italics ours), the parties are still supposed to contract with reference to the limited term, and the sureties will not be held answerable for the misconduct of the principal beyond that term, upon a new appointment, even though the words of the bond are that they shall be responsible for the principal "at all times, or for any time hereafter." Among the cases cited to sustain this proposition are *Kitson v. Julian,* 82 Eng. Com. L., 853. In that case the bond recited that Julian had been appointed clerk to the Torquay Gas Company and had agreed to give bond. No term was named in the recital. The condition was that the said Julian should well and truly, etc., "so long as he should continue to hold said office." The bond was put in suit upon an alleged breach. The defendant sureties, by way of plea, averred that the appointment was for one year from and after Lady Day, 1850, and no longer. That Julian performed, etc., during said time. Plaintiff, by way of replication, said that by and with the consent of the defendants and the said company, the said Julian remained in the employment of said (186) company after the said time, and that during such last mentioned period there was a breach. Defendants demurred to the replication. The cause was argued upon the pleadings. Lord *Campbell,* C. J., said: "The liability continues after the expiration of the year if that was the intention of the parties. In *Lord Arlington v. Merricke,* the Court seemed to have considered that the parties intended otherwise. Many decisions show that when the principal is made liable for a given time only the liability of the surety is confined to that time. We have here a positive averment that the appointment was for one year and no more. The condition recites the appointment, the extent of which is shown by the plea, and we must assume that it was known to both parties what that extent was." The judgment was concurred in by all of the Judges. In *Hassell v. Long, supra, Ellenborough,* C. J., said: "All the cases since *Lord Arlington v. Merricke* and *St. Saviour v. Bostick,* 2 N. Rep., 175, have narrowed the construction of conditions of this sort to the actual term of the officer." *Bank v. Odd Fellows,* 48 Penn., 446; *Thomas v. Summey,* 46 N. C., 554; *Welch v. Seymour,* 28 Conn., 387; 5 Cyc., 773-4; *Munford v. Rice,* 6 Mun., 87. We do not think that the case of *Bank v. Seidensticker,* 92 N. W. (Iowa), 362, conflicts with this view. As sustaining the construction which we have adopted, it may be noted that in a number of cases the condition of the bond has been so drawn as to include breaches committed during other

terms for which the officer may be elected. *Oswald v. Mayor,* 5 House of Lords Cases, 856; *Bank v. Young,* 161 N. Y., 23. We do not deem it necessary to concur in all that is said in *Bank v. Briggs,* 60 Vt., 12; 37 L. R. A., 845; 60 Am. St., 922. Because of the importance of the principle involved and the very able arguments and briefs by counsel we have endeavored to set out at more length than is usual our views and
(187) the result of our examination of the authorities. Holding as we do that the condition in the bond is controlled and restricted by the recital, and that this refers to the terms of the appointment "for one year," we are of the opinion that the sureties are not liable for defalcations committed after the expiration of the first term, April 29, 1892. Judgment should have been so rendered. To the end that such judgment may be entered below, let it be certified that there is

Error.

Cited: Jackson v. Martin, post, 199.

BOWEN v. HACKNEY.

(Filed 11 October, 1904.)

WILLS—*Legacies and Devises.*

Under a devise providing that at the expiration of the estate of a life tenant the property given to the life tenant shall be equally divided between the children of the testator, the representatives of such children as may have died to stand in the place of their ancestors, the husband of one of the children who died without issue and before the life tenant does not take under the will, though he be the sole devisee of the wife.

ACTION by W. D. Bowen against George Hackney and others, heard by Judge *W. B. Councill,* at May Term, 1904, of WILSON.

This is a special proceeding for the partition of land, which was brought before the Clerk and by him transferred under the statute to the Superior Court for the trial of issues joined between the parties, a jury trial having been waived. The Court held that the plaintiff is not a tenant in common with the defendants and a judgment was entered accordingly, to which the plaintiff excepted and appealed.

(188) *Small & McLean* and *S. C. Bragaw,* for the plaintiff.
F. A. Woodard, Connor & Connor and *J. F. Bruton,* for the defendants.

WALKER, J. It appears from the case that Willis N. Hackney, who died in 1887, left a will, in which he devised a lot containing about one-half acre in the town of Wilson and certain personal property to his wife for life. He then devised and bequeathed to his children land and personal property. These devises and bequests were made in the first six items of the will, and the seventh item is as follows: "I now declare that, with the advancements already made and specially given in this will, in my judgment, equality is made to all my children, so that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors." Plaintiff married Orpah, a daughter of the testator, who died in July, 1899, without issue, leaving a will in which she devised and bequeathed all her property to the plaintiff. The widow of Willis N. Hackney died in December, 1901. Plaintiff claims an interest in the one-half acre lot as tenant in common with the defendants by virtue of the seventh item of the will of Willis N. Hackney and the will of his wife. The Judge ruled that he was not so entitled, and this ruling we are called upon to review.

The decision of the case turns upon the proper construction of the seventh item of the will. If the remainder after the life estate of Mrs. Hackney was vested absolutely by the seventh clause in Orpah (plaintiff's wife) at the death of the testator, and the direction as to the division of the property at her death or, to use the words of the will, "at the expiration of her life estate," referred not to the time of the vesting of the estate in interest, or of the vesting of a right to a future estate of freehold, but merely to the time of enjoyment or the vesting of the estate in possession, it will follow that the plain- (189) tiff's contention is right and that he acquired that vested interest of his wife under her will; but if the provision of the seventh item does refer to the time of the vesting of the estate in interest or, in other words, to the accrual of the right of property as distinguished from the right of enjoyment, his wife acquired an estate contingent upon her surviving the life tenant and, as she died before the latter, her interest never vested, plaintiff took nothing under her will and his suit must fail. We are of the opinion that the latter view is the correct one.

In the construction of a will the main purpose is to ascertain and effectuate the intention of the testator, so that his property may be received and enjoyed by those who were the objects of his bounty, and his intent will always be carried out when to

do so will not contravene some well-settled rule of law, for example, a rule by which a certain fixed and definite meaning is given to the language employed by him.

The case before us does not present any serious difficulty in the way of ascertaining what the testator meant, when we read the will as a whole and interpret it accordingly, or even when we isolate the seventh item and construe it by itself. The testator had in former parts of his will devised the lot in question and certain personal property to his wife for life, and devised and bequeathed other property to his children in a manner which in his opinion gave each of them an equal share of his estate. Having thus produced equality in this distribution among them, as he declared, he then directs in the seventh item of his will that, at the expiration of the life estate of his wife, that which was given to her for life should be equally divided among all his children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors.

(190) There are no words of devise in this item, except by inference or implication from the direction that the property, at the death of his wife, should be equally divided and, as to the period of division, and consequently of devise, the will uses terms of strict condition, namely, "at the expiration of the life estate." The general rule undoubtedly is that, if there is in terms a devise, and the time of enjoyment merely is postponed, the interest is a vested one, but if the time be annexed to the substance of the gift or devise, as a condition precedent, it is contingent and transmissible. 3 Wooddeson, 512. This rule was applied in the case of *Anderson v. Felton,* 36 N. C., 55, to a gift which was to take effect at the time the testator's daughter "arrived to the age of fifteen years," but there was no preceding life estate as there is in this case, and, in *Rives v. Frizzle,* 43 N. C., 237, this was said to take the case out of the rule as stated in *Anderson v. Felton.* But there are words in the seventh item of the will which distinguish this case from either of those last mentioned and bring our case within either one or the other of the principles stated in *Starnes v. Hill,* 112 N. C., at p. 10, 22 L. R. A., 598, and *Whitesides v. Cooper,* 115 N. C., at p. 574, in the passage quoted from Gray on Perpetuities, 108, which is as follows: "The true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainderman (as it is in the case under consideration), then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested.

Thus, on a devise to A for life, remainder to his children, but if any child die in the lifetime of A his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise (as in the present case) to A for life, remainder to such of his children as survive him, the remainder is contingent." *Clark v. Cox,* 115 N. C., 93; 2 Underhill on Wills, sec. 867, and also (191) pages 1309 and 1310. It can make no difference in this case whether the remainder to each child was contingent, or vested but subject to be divested by its death before that of the life tenant. In either view the plaintiff must fail, and it is immaterial therefore which alternative of the proposition we adopt as applicable to this case. If the remainder to the children of the testator at the death of their mother is not contingent, it can only be vested, subject to be divested as to any child who predeceased themother, for it surely was intended that the representatives of any deceased child should take not by descent but by purchase, that is, nothing from the parent, but all directly from the devisor. This appears plainly we think from the language of the item. 2 Underhill on Wills, sec. 867. In the first place, the division is not to be made until the death of the life tenant, and that is the time fixed by the terms of the will when it shall be definitely and finally determined who shall take. *Fleetwood v. Fleetwood,* 17 N. C., 223; *Simms v. Garrot,* 21 N. C., 397; *Irvin v. Clark,* 98 N. C., 437. The testator evidently had in mind the possibility that one or more of his children might die during the life of his wife, and provided for that contingency by giving the share which a deceased child would have taken if it had outlived the mother, to his or her representatives. It is manifest that the testator intended that the gift in the seventh item should take effect finally and absolutely according to the state of his family as it existed at the death of his wife, and the item should be construed as if it read: "So that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, then living, and the representatives of such as may have died, the latter to stand in the place of their ancestors." By this construction of the will a condition precedent would be annexed to the gift which would prevent its vesting in any child unless he or she should survive the life tenant. The case in this aspect would fall within (192) the principle stated in *Watson v. Watson,* 56 N. C., 400; *Williams v. Hassel,* 74 N. C., 434; *Miller Ex parte,* 90 N. C., 625; *Young v. Young,* 97 N. C., 132; *Starnes v. Hill,* 112 N. C., 1; 22 L. R. A., 598; *Clark v. Cox,* 115 N. C., 93, and *Whitesides v. Cooper,* 115 N. C., 570.

The children took contingent remainders, the contingency being that they should survive their mother, and failing in this as to any one or more of them the remainder vested in his or their representatives by purchase, as said by SHEPHERD, C. J., in *Whitesides v. Cooper, supra.* This would be the limitation of concurrent fees to take effect alternatively or as substitutes one for the other, which Fearne (3 Am. Ed.), 373, explains as follows: "However, we are to remember that although a fee cannot, in conveyances at common law, be limited on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere, but so that one only takes effect, and every subsequent limitation be a disposition constituted in the room of the former if the former should fail in effect." *Loddington v. Kyme,* 1 Ld. Raym., 203. Cruise (Vol. I, title 16, ch. 1, sec. 50) describes the ulterior devise to the "representatives" as a contingent fee, not contrary to but concurrent with the former limitations to the parent, according to the notion in *Plunkett v. Holmes* (Raym., 28), and the limitation as one upon a contingency, with a double aspect, the language of Fearne (p. 373) being, "this sort of alternative limitation was termed a contingency with a double aspect." SHEPHERD, C. J., explains this principle with his usual clearness in *Watson v. Smith,* 110 N. C., 6, 28 Am. St., 665, and in *Whitesides v. Cooper, supra.* If a child survived the mother the remainder was to vest, but if a child died before the mother the remainder then vested in the representatives of that child. "But at this day," says
(193) Fearne, p. 373, "such limitations may be good in a will or by way of use upon a contingency that may happen within a reasonable period; though this not by way of direct remainder, but by way of executory devise, or springing or shifting executory use." The nature of the limitation is immaterial in this case.

That there is a condition precedent annexed to the gift to the children, we find decided in *Hunt v. Hall,* 37 Me., 363, a case substantially like ours. The limitation there was "after the decease of my dear wife my will is that my executor, hereinafter named, cause an equal division to be made among all my children and the heirs of such as may then be deceased." With reference to this devise the Court said: "The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator an heir might convey by deed his share of the estate, and if he should de-

cease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided 'among his children and the heirs of such as may then be deceased.' By the terms of the will the estate is not to vest till after the death of the widow and then a division is to ensue. Till then there is a contingency as to the persons who may take the estate." The only distinction between the two cases, though they are not anywise different, is the substitution of the words "legal representatives" for the word "heirs," and it must be conceded that, with reference to the lot in controversy, the words "legal representatives" clearly refer to the heirs or the persons who would have represented their ancestor had she outlived the life tenant and the remainder had vested in interest and then by her death the descent (194) had been cast. The words were used to designate the persons who would thus have taken in the other event, but in the event as it actually occurred shall take, not by descent but by purchase, the intention being to create a new stock of inheritance.

If we assume though that the remainder vested in each child upon a condition subsequent, namely, that he or she should survive their mother, which would divest the interest as to any child if it died before its mother, then Mrs. Bowen's will passed nothing to her husband (the plaintiff), as the very instant it took effect under the statute she lost her interest in the property, her mother being alive at that time. *Wilson v. Bryan,* 90 Ky., 482.

The fact that Orpah (Hackney) Bowen died without issue cannot change the construction of the will, which must be determined from its language as of the time when it took effect and not from subsequent events, for the evident meaning of the testator was that his property should go to his "children equally, share and share alike," the representatives of any one who had died before the mother to stand in the place of such dead ancestor, and if there were no such representatives, then the leading and paramount intention of the testator should prevail and the division should still be made equally among his children, that is, the survivors, who would also be the heirs or representatives of the deceased daughter.

It was argued that the word "representatives" includes not only heirs but a devisee, or one who takes from another by purchase. We do not think that such a comprehensive meaning can be given to the word representatives under the terms of this will. It means the persons who are appointed not by the

visor in her will, but by the law, to represent her, and
(195) upon whom the law would have cast the inheritance, it having been used in this sense as *designatio personarum.* Besides, they must be the representatives of their "ancestor," which is defined as follows: "One who has preceded another in a direct line of descent; a lineal ascendant; a former possessor; the person last seized; a deceased person from whom another had inherited land." Black Dict., p. 69; 2 Bl. Comm., 201. 4 Kent Comm., 404, says: "Ancestral estates are such as are transmitted by descent, and not by purchase." The plaintiff, as devisee of his wife, does not come within any of these definitions.

We have examined the cases cited by the appellants' counsel in their brief and argument, and find that the language of the several wills which was construed in them as giving vested remainders was entirely different from that of the will in this case. We must observe well-settled rules of construction in interpreting a will, but such rules must be applied with strict reference to the peculiar wording of the will so as not to defeat the expressed intention of the testator. We are speaking of rules of construction and not rules of property.

The Court correctly adjudged that the plaintiff is not a tenant in common with defendants, and there was no error therefore in dismissing the action.

Affirmed.

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

Cited: S. c., post, 200; *Latham v. Lumber Co.,* 139 N. C., 10, 11.

---

(196)

JACKSON v. MARTIN.

(Filed 11 October, 1904.)

1. BONDS—*Officers—States—The Code, sec. 3723—Laws 1891, ch. 505.*

A bond by a clerk executed to the State Treasurer individually is not an official bond and does not extend beyond the term during which the clerk was appointed.

2. LIMITATIONS OF ACTIONS—*Suretyship—Bonds—The Code, sec. 155, subsec. 1.*

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years.

JACKSON *v.* MARTIN.

ACTION by H. W. Jackson, trustee, against W. H. Martin and others, heard by Judge *George H. Brown,* at April Term, 1904, of WAKE. From a judgment for the defendants the plaintiff appealed.

Pou & Fuller and *F. H. Busbee & Son,* for the plaintiff.
Argo & Shaffer and *S. G. Ryan,* for the defendants.

CONNOR, J. This case was submitted to the Court upon an agreed statement of facts. W. H. Worth was elected Treasurer of the State to fill the unexpired term of Donald Bain, deceased, who was elected November, 1892. He qualified 1 January, 1895. The term expired 1 January, 1897. On 28 May, 1895, the said W. H. Worth, Treasurer, appointed William H. Martin, one of his clerks, to assist him in the performance of his duty as Treasurer of the State Hospital for the Insane, the School for the Deaf, Dumb and the Blind, the Penitentiary and the Department of Agriculture. The said Martin, to secure the said Treasurer in the discharge of the duties of said clerkship, executed a bond with the other defendants as his sureties. The portions of said bond material to the decision of this cause are as follows: "Know all men by these presents, that the undersigned are held and firmly bound unto W. H. Worth, State Treasurer of North (197) Carolina, in the sum of five thousand dollars, etc. The condition of the above obligation is such that, whereas the above bounden W. H. Martin has been duly appointed by W. H. Worth, State Treasurer, clerk for the penal and charitable institutions of the State of North Carolina: Now, therefore, if the said W. H. Martin shall well and truly perform all the duties of said clerkship, or office, account for all moneys or other property that come into his hands during the time that he holds such position, then and in that case the above obligation to be void," etc. At the election held in November, 1896, the said W. H. Worth was again elected Treasurer for a term of four years, beginning 1 January, 1897, and duly qualified 21 January, 1897.

That no change was made in relation to the duties of the said Martin, he continuing in the said position. He was required by said Worth to execute a bond in a surety company for the faithful performance of his duties, etc. That said bond was renewed annually until the expiration of the term of office of said Treasurer. Said Martin did not take any oath of office, but performed the duties assigned to him by said Treasurer as clerk to the institutions aforesaid.

That the statute authorizing the employment of said clerk is contained in section 3723 of The Code as amended by chapter 505, Laws 1891. The said section declares that the Treasurer of the State shall be treasurer of the said institutions, and shall be responsible on his official bond for the faithful discharge of his duties as treasurer of each of the said institutions. "The Treasurer shall also be allowed the sum of one thousand dollars per annum to enable him to perform the duties devolving upon him as treasurer of said institutions." That during 1895-1896, and in that portion of 1897 prior to W. H. Worth qualifying under the election of 1896, the (198) said Martin embezzled and converted to his own use money which came into his hands as clerk to said institutions the sum of $688.67. That during the said Worth's second term of office, beginning 21 January, 1897, and ending in January, 1901, the said Martin embezzled and converted to his own use, in addition to the aforesaid amount, the sum of $15,371.37 of the money coming into his hands as clerk of said institutions. That more than ten thousand dollars of said sum was embezzled by said Martin during the three years preceding the institution of this suit.

That suit was brought on the said bond executed by the surety company and compromised. That the entire loss caused by the embezzlement of said Martin has been made good to the State by plaintiff, and that no part thereof has been recovered from W. H. Martin or any of his sureties, except the amount paid by the surety company. This action was instituted on 10 October, 1901. The defendants pleaded the statute of limitations.

We concur with his Honor that the defendant Martin was not an officer, and that the bond in suit is not an official bond. The statute making the State Treasurer also treasurer of the penal and charitable institutions, expressly provides that his official bond shall be liable for the discharge of his duties, etc. There is no suggestion that he is to have a deputy treasurer. He is allowed one thousand dollars to enable him to perform the duties imposed upon him. This sum he may expend in any way he prefers, so that it be expended for the purpose indicated. The statute is similar to that construed in *Beam v. Jennings*, 96 N. C., 82, providing for clerical assistance in the office of the Secretary of State. "Any bond which by statute is required to be executed by an officer is an official bond." Murfree on Official Bonds, sec. 166. We do not find in the instrument sued upon any of the incidents or character- (199) istics of an official bond. It is undoubtedly valid as a

common law bond, and the sureties are bound according to its terms. We have at this term examined the question and authorities raised and cited in the very excellent brief filed by plaintiff's counsel. *Blades v. Dewey.* It is conceded that if we adhere to the decisions of this Court in *Banner v. McMurray,* 12 N. C., 218, and *Thomas v. Summey,* 46 N. C., 554, the terms of the bond cannot be construed to extend to the defalcations occurring during the second term of Mr. Worth. Treating Martin's employment as a deputation, and this is the most favorable view to the plaintiff, we concur in what is said by NASH, C. J., in *Thomas v. Summey, supra.* "It matters nothing by what words the obligation is created, the principle is that the deputation is necessarily confined to the official term of the officer appointing, for the reason that the officer could confer no power he himself did not possess." There is a distinction between the election of an officer of a corporation by a board of directors for a term extending beyond that for which they are elected and the employment or deputation by a public officer. The first is the act of the corporation by its managing agency, and unless the corporation has restricted its power in its charter there is no reason why it may not by its directors make an appointment of any duration, or at its will and pleasure. The public officer has no such power. Any attempt to farm out or make a contract to employ a deputy or assistant beyond or before the beginning of his term would be contrary to public policy and void. The words in the bond will not be so construed as to suggest that Martin was to be employed by the Treasurer for a longer time than his then current term. The Treasurer seems to have so construed the bond, as he required a new one at the beginning of the second term. This did not affect the liability of the defendants, but is noted only as showing the understanding and intention of the parties to this contract. (200)

We also concur with his Honor that as to the defalcation occurring during the first term, the action is barred by the statute of limitations. The Code, sec. 155 (1). The judgment must be

Affirmed.

BOWEN v. HACKNEY.

(Filed 11 October, 1904.)

For head-note to this case, see *Bowen v. Hackney, ante,* 187.

ACTION by W. D. Bowen, executor of Orpah Bowen, against George Hackney and others, heard by Judge *W. B. Councill,* at February Term, 1904, of WILSON. From a judgment for the defendants the plaintiff appealed.

Small & McLean and *S. G. Bragaw,* for the plaintiff.
F. A. Woodard and *Connor & Connor,* for the defendants.

WALKER, J. This action to recover a legacy alleged to have been given to the plaintiff's wife by the will of her father must be governed by the decision in *Bowen v. Hackney, ante,* 187. In the latter case we held that, upon a fair construction of the will in accordance with the intention of the testator as manifested by his words, and in the light of such rules of law as were applicable, the plaintiff did not acquire title to the lot in question by virtue of his wife's will, the "representatives" mentioned in her father's will being those only who could claim under Orpah (Hackney) Bowen as their ancestor, and, in default of such persons, the property went to the other
(201) surviving children and the representatives of any who may have died during the continuance of the life estate; the division as respects such representatives of a deceased child to be *per stirpes,* that is, they should receive only the share of their said ancestor. This was based upon a consideration of the leading idea and paramount intent of the testator, that his property should go to his children living at the death of Mrs. Bowen or their descendants who would be of his blood. This construction defeats the plaintiff's recovery of the legacy for which he sues, as he is not able to bring himself within the description of the persons who were evidently intended to be the objects of the testator's bounty. We infer from certain expressions in the will that the testator was not *inops consillii* when it was written, and, while he did not use the best legal phrases to convey his meaning, his words are sufficiently apt for us to gather his intent.

The Court properly decided that the plaintiff is not entitled to any of the personal effects of Willis N. Hackney in the hands of the defendant, George Hackney, his executor.

Affirmed.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

(202)

GATLIN v. SERPELL.

(Filed 11 October, 1904.)

LOGS AND LOGGING—*Contracts.*

Where a person contracts to sell timber at $1.50 a thousand feet, to be paid for as cut, except a stipulated amount was to be paid before the cutting should begin, it did not constitute an absolute sale of the timber, and a subsequent contract that certain burnt timber might be cut at a lower price so altered the original price as to make the purchaser liable for the lesser price for the burnt timber cut under the second contract.

ACTION by R. H. Gatlin and wife against G. Serpell, heard by Judge *Frederick Moore* and a jury, at April Term, 1904, of EDGECOMBE. From a judgment for the plaintiff for less than the relief demanded, he appealed.

W. A. Dunn & Son and *G. M. T. Fountain,* for the plaintiffs.

George Cowper, for the defendant.

MONTGOMERY, J. This action was brought to recover of the defendant the amount of $3,709.70, alleged to be due as a balance under a contract concerning the sale of timber upon the land of the plaintiff, entered into between the plaintiff and the defendant on 28 January, 1898. It is admitted on all sides that the amount claimed by the plaintiff is due, unless the contract of 28 January, 1898, is modified as to the price the defendant was to pay for the timber per thousand feet by a contract subsequently made between the parties under their seals in November, 1900. If the contract of 1898 was modified in the respect mentioned above by the one of 1900, then it is admitted that the defendant owes the plaintiff only $209.70. The contention of the plaintiff is that while the latter contract recites a consideration moving the plaintiff in its execution, yet the recited consideration is, neither in law nor in fact, a valuable consideration, and that the seals are only a (203) presumption of a consideration, and that that presumption is overcome by proof contained on the face of the contract itself. The original contract (of 1898) seems to have been drawn with care. It does not amount to an absolute sale of the timber on the land, the title to the timber did not at once pass to the defendant. No one can read it and arrive at the conclusion that the defendant had the right to take possession of the timber and dispose of it to others as he might see fit to

do. In the first clause of the original contract the consideration of one dollar is recited, and the plaintiffs declare that they "have contracted to sell and convey and to make any and all transfers and assignments, releases and conveyances which may be necessary to convey and transfer unto the said party of the second part or his assigns all the sound merchantable timber now standing and growing upon the several tracts of land particularly described in the schedule hereto attached." In consideration therefor the defendant agrees "for the purpose of paying the purchase money for the said timber hereby covenants and agrees to and with the said parties of the first part that he will pay to the said P. E. Gatlin, or her assigns, as hereinafter set forth, the sum of $1.50 for each and every one thousand feet of said timber to be cut as hereinafter set forth." The defendant further agreed that he would begin to cut the timber within three years from the date of the contract unless he should be prevented from reasonable causes, in which event two years more were to be allowed him to begin the cutting, and that he would cut not less than 3,500,000 feet during each year until the entire timber should be cut from the land. There was a further provision in the contract which gave to the defendant, in case he did not begin to cut the timber as provided, an option that he might purchase and take title to the land set forth in the schedule, the purchase price being $45,000. There was a further agreement between (204) the parties that the defendant was to pay to Mrs. Gatlin, or her assigns, $5,000 upon the execution of her contract, and $5,000 on 28 January, 1899, and the like amount on 28 January, 1900, making in all the sum of $15,000, which said amounts so paid "shall be held by the said P. E. Gatlin, or her assigns, without interest, to be applied to the price of the timber as the same shall be cut. It is understood and agreed between the parties that if the party of the second part shall begin to cut the timber before the second and third payment of $5,000, as each shall become due as aforesaid, then the said payment or payments succeeding such beginning shall not be paid, but the monthly payments as hereinafter provided for shall be made in lieu thereof; settlements to be made, in respect to the quantity cut, on the 15th day of each month unless prevented by some unavoidable accident, in which case a reasonable time is to be given for said settlement. Said amounts due for timber cut as aforesaid shall be deducted from the several sums of $5,000 paid and to be paid as aforesaid; after the said sum of $15,000 shall have been exhausted in timber cut from the land, the timber thereafter cut shall be

accounted and paid for at the said rate of $1.50 per one thousand feet on the 15th of each month as aforesaid." Another provision in the contract, important in its bearing upon this litigation, and throwing light upon the intent of the parties, is in the following words: "It is further agreed, understood and stipulated by and between the said parties that if the said party of the second part or his assigns shall not have elected to take title to the said land at the end of the said term of three years, then he or they may at the end of the said term of two years, provided that he or they may not have been able to begin cutting said timber, take title to the said land with the exceptions aforesaid upon the same terms as (205) hereinbefore set out."

The defendant did not avail himself of the privilege of purchasing the land, but in good time began to cut the timber, and the purchase clause of the contract is mentioned by us only to show that there was no absolute sale of the timber. The contract, reduced to its simplest terms, was that the defendant should have the right to cut, and was compelled to cut at the rate of 3,500,000 feet a year, all the timber upon the land, the timber to be paid for as it was cut and half monthly. The payments amounting to $15,000 to Mrs. Gatlin before the defendant began to cut the timber, were simply a guaranty of ability and good faith on the part of the defendant to carry out his part of the contract. It was not to be applied, nor any part of it, as a present cash payment as the purchase money for the present title to the timber, but to be applied as the timber was cut and measured in payment of the same. The last provision in the contract which we have quoted shows that the plaintiff did not intend that the defendant, after his deposit of $15,000 had been exhausted, should be allowed to continue to cut and market the timber as if he owned the title to it. That clause required of him that he should make semi-monthly reports of the cutting of the timber and settlements for the same at those times; and when the $15,000 should have been exhausted in such settlements and payments he should still be compelled to continue the manner of making returns and settlements, and, in case he did not, his right to cut another stick of timber on the premises would cease and be determined. So, we conclude that under the original contract there was no out-and-out sale of the timber to the defendant. He had only the right to cut it and pay for it as he cut it, at a stipulated price per thousand feet. The option to purchase he did not avail himself of. It makes no difference that the agreement to sell the timber described the timber as

(206) "that now standing and growing on the land." It was not to be paid for until it was cut and measured. Suppose the whole of the timber had been burned or destroyed before the defendant began to cut it, could it be contended with any show of reason that he would have owed the plaintiff the value of the timber?

The second contract (of 1900) it is agreed, as we have said, modified the original one in respect to the price to be paid for the timber per thousand feet if there was a consideration moving the plaintiff in its execution. The second contract had its existence because of the injury to the timber on one thousand five hundred or two thousand acres of the land described in the contract by forest fires. In August, 1900, before the defendant began to cut timber in January or February, 1901, the fire occurred, and in November following the fire the second contract was made. In the preamble the injury by fire to the timber is set out, followed by the declaration that unless it (the timber) should soon be cut and removed it will be a total loss to the plaintiffs, and that they desire to make their loss which had resulted from said fire as small as possible. It is then provided: "That the said Gatlin and wife, in consideration of the premises, and the agreement upon the part of the said Serpell to cut and remove all the said sound merchantable timber trees from the above-described territory of land—no timber to be considered unmerchantable on account of the recent fire—have contracted and agreed, and by these presents do contract and agree, that said Serpell may cut and remove therefrom seven millions of feet of timber at the price of one dollar per thousand feet, instead of one dollar and fifty cents as agreed upon in the original contract, paying the last-named sum or price for all cut therefrom in excess of the amount named, seven million feet."

It seems scarcely debatable that the facts set forth in the second contract did not provide a valuable consideration to the plaintiffs and were not greatly beneficial to them. Under the first contract the defendant might have left the
(207) burned timber to be cut last, and that being so, both by the evidence and the recital in the contract, the burned timber would have become worthless before the defendant would have been compelled to cut it under the original contract. And the plaintiffs seeing that, and acknowledging it in the second contract, entered into the second agreement by which they got a fair price for the burned timber, the value of which they would have lost if the defendant had exercised the privilege he had to cut the unburned timber first.

But, besides, the plaintiffs knew that the defendant was cutting timber from the burned territory, amounting to seven million feet, and was making reports of the same according to the terms of the contract. He did not specify the price, that was agreed upon in the contract and could be determined by a mathematical calculation; and the plaintiffs, making no inquiry about the price and knowing that the defendant was cutting burned timber and regularly reporting the quantities, cut, for a long time, will be deemed to have acquiesced.

Judgment was rendered in the Court below for $208.09, and the same is

Affirmed.

CONNOR, J., did not sit.

---

(208)

ALLEN v. TOMPKINS.

(Filed 18 October, 1904.)

1. SALES—*Contracts—Guaranty.*

Where, in a sale of machinery, the contract is that the seller shall replace any defective machinery, the purchaser is not entitled to recover for a breach of the contract on account of defective machinery, in the absence of any request for new machinery.

2. SALES—*Contracts.*

In an action for damages because of defective machinery, the purchaser is not entitled to recover the value of the excessive use of raw material caused by the defects, where the contract provided that any defective machinery would be replaced by new machinery.

ACTION by Allen Bros. & Ford against the D. A. Tompkins Company, heard by Judge *G. S. Ferguson* and a jury, at October Term, 1903, of FRANKLIN.

The defendant, a corporation doing business at Charlotte, N. C., sold to the plaintiffs certain machinery to be used in the manufacture of oil from cotton seed and had the same carried to the premises of the plaintiffs in the town of Louisburg, N. C. The contract of sale was entirely in writing, and it contained a guaranty on the part of the vender that the machinery and its equipment should be first-class in its material and workmanship, and could work well for the purposes intended if properly used. The plaintiffs made the cash payment and executed their notes for the deferred payments to the defendant. The plaintiffs have brought this action to re-

cover damages of the defendant, the cause of action being as set out in the complaint substantially as follows: The machinery when first put in motion by servants of the defendant was found to be defective in two particulars; the crusher rolls and the separator refused to do their work; the cash payment was made, and the notes of the plaintiffs to defendant
(209) for the installments were given upon an agreement between the agent of defendant and plaintiffs that the machinery should be put in good condition and do its work effectively before he left it, and that as an inducement to the plaintiffs to accept and operate the machinery the defendant agreed that it would make the machinery satisfactory before it quit working on it, and that the defects complained of would disappear when the machinery became smooth from use. The defendant failed to make the machinery conform to the warranty before it quit working on it as it agreed to do, and the defects did not disappear when the machinery became smooth from use. The plaintiffs continued to operate the machinery after they discovered its defects and that it was not doing good work, because of the assurance of the defendant that it would make the machinery satisfactory before it would quit work on it and that the defects would disappear when the machinery would become smooth from use. While the defendant was at work upon the machinery under its contract, and while the plaintiff was operating it, great losses occurred to the plaintiffs in the output of oil and meal by reason of waste in the kernel of the cotton seed which went off with the hulls; in idle labor, extra fuel and money expended for repairs.

The defendant in its answer averred that the contract was complied with in all respects, and that the loss, if any accrued to the plaintiffs, was by reason of their failure to skillfully handle the machinery, and that the cash payment was made and the notes for the deferred payments given by the plaintiffs unconditionally and in full acceptance of the machinery after it had been properly tested. From the judgment both parties appealed.

PLAINTIFFS' APPEAL.

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

T. W. Bickett and *Burwell & Cansler,* for the defendants.

MONTGOMERY, J., after stating the case. In the ordinary case of a sale of machinery with a warranty as to ma-
(210) terial and quality, if the purchaser discovers, when de-

livery is offered, defects in the same, he may reject it and have his action against the vender for such damages as he may have sustained by reason of the vender's non-performance of his contract; or he may keep the machinery and set up, by way of counter claim against the vender's demand for contract price, the breach of warranty in reduction. *Cox v. Long,* 69 N. C., 7; *Lewis v. Rountree,* 78 N. C., 323; *Kester v. Miller,* 119 N. C., 475; *Mfg. Co. v, Gray,* 129 N. C., 438, 57 L. R. A., 193. And the true measure of damage would be the difference between the contract price and the actual value. *Spiers v. Halstead,* 74 N. C., 620; *Kester v. Miller, supra.* In the present case, however, those rules for the assessment of damages for breach of such contracts are not applicable, for the reason that in section thirteen of the specification sheet which forms a part of the contract between the parties, a specific and particular method of remedying original defects in the machinery is agreed upon. The language of that section of the contract is as follows: "We guarantee all machinery and equipment to be first-class in material and workmanship, and to work well for the purposes intended if properly used. In case of original defects in any machine or part of machine, we agree to make good the defect by supplying a new machine or new part."

When the defendant then offered to deliver the machinery to the plaintiffs and demanded of them the cash payment and the notes for the other installments, the plaintiffs, before using the machinery and making the payment, could have demanded a refitting of the machinery by the furnishing (211) of new crusher rollers and a new separator to be in good order and capable of doing the work required of them, and if those pieces had been furnished of such character the defendant's liability would have been at an end. That was the contract between the parties. No breach of the contract by which damage in money was in contemplation of the parties. Such an idea was excluded by the terms of the agreement. The plaintiffs' remedy was for new pieces of machinery. If the defendant had, upon demand for new pieces of machinery, refused to furnish them, then of course the ordinary rule would apply, and the plaintiff would have been entitled to collect such damages as reasonably flowed from a breach of the contract.

This action then is not for a breach of the original contract, but is for damages growing out of an alleged loss of profits through waste of material in the process of extracting oil and making meal, idle labor, extra fuel and money paid for re-

pairs on the machinery, while the plaintiffs were operating the machinery when they knew it was defective and not doing good work, and before the defendant had properly cured the defects. The plaintiffs' counsel rely upon the case of *Kester v. Miller, supra,* to support their demand. In that case there was an agreement between the venders and vendees that the vendees should keep the machinery and operate it while the venders were undertaking to put it in good order so that it would do its work well. The agreement seemed to be like the agreement in this case. That case was tried below by Judge *Brown,* a lawyer of great ability and a Judge of long experience, and he held that the vendees, the plaintiffs, could not as a matter of law recover against the venders damages which they alleged they had sustained for unnecessary and extra fuel they were compelled to use while the venders were engaged in repairing the machinery, nor for idle labor which the (212) vendees were compelled to keep in their business. His Honor's view no doubt was that when the vendees, knowing what their remedy was when the machinery not coming up to the guaranty was delivered, chose to make another agreement, they should have protected themselves by saying, as it were, to the venders, "if we agree to let you put this machinery in good condition, in the condition you have warranted it to be in the contract of sale, then you must make compensation for any losses that we may sustain by reason of having to use more fuel while you are at work than would be necessary to supply a perfect machine, and to reimburse us for the value of labor that we cannot discharge, but must keep around this machinery and which must be idle at times, in the very nature of things, while you are at your repairs." This Court thought differently and reversed the ruling of his Honor below. We thought there was an implied contract on the part of the venders to make repayment to the vendees for such expenses as had to be incurred by the vendees in the operation of the machinery over and above what would have been necessary if the machinery had been in good condition, for the machinery had to be operated in order that the venders might see its defects and then remedy them. In other words, this Court was of opinion that the conduct of the venders amounted to a request of the vendees that they would furnish extra fuel, and to keep his labor on the premises while the repairs were being made. In that case there was no demand for any damages for injury to material used in operating the machinery or for loss of profits in the diminished output. We went as far in *Kester v. Miller* as the Court ought to go, and

we are of the opinion in the present case that his Honor was correct in holding, as a matter of law, that the plaintiffs could not recover damages for the loss sustained in oil and in cotton seed meal, resulting from the incomplete separation of the hull from the kernel of the cotton seed, as found by the jury in issues one and two as to damages. No such damages (213) could have been in contemplation between the parties, and the law will not, upon the facts of this case, declare such damages to arise naturally from a breach of contract between the parties.

No error.

WALKER, J., did not sit on the hearing of this appeal.
DOUGLAS, J., concurs in result only.

Cited: *Mfg. Co. v. Machine Works,* 144 N. C., 69; *Woodridge v. Brown,* 149 N. C., 304.

McKEITHAN v. TELEGRAPH CO.

(Filed 18 October, 1904.)

1. CONTRACTS—*Evidence—Master and Servant.*

The evidence in this case shows a special contract between the employer and employee, whereby the former agreed to employ the latter for four months.

2. CONTRACTS—*Burden of Proof—Master and Servant.*

An employer relying on an employee's incompetency as a justification for his discharge has the burden of proving the incompetency.

3. CONTRACTS—*Master and Servant.*

In an action for wages by a discharged employee for breach of the contract of employment, the employee being shown to be incompetent, it is immaterial whether this was the reason for his discharge.

ACTION by A. A. McKeithan against the American Telephone and Telegraph Company, heard by Judge *R. B. Peebles* and a jury, at February Term, 1904, of CUMBERLAND. From a judgment for the plaintiff the defendant appealed.

I. A. Murchison and *Robinson & Shaw,* for the plaintiff.
N. A. Sinclair and *R. H. Dye,* for the defendant.

MONTGOMERY, J. The plaintiff brought this action to recover of the defendant corporation $195, which he claimed

(214) was due to him for a breach of contract of employment. The plaintiff alleged that his employment was for five months at $50 per month and his board, and that at the end of two months he was discharged without cause. The defendant denied the material allegations of the complaint. The only issue submitted to the jury was, "Is the defendant indebted to the plaintiff, and if so, in what sum?" The defendant excepted to one of the instructions of his Honor, which was in these words: "If you believe the evidence of either plaintiff or defendant, you will find a special contract between the parties; that contract was to last five months and plaintiff was to be paid $50 per month and traveling expenses according to both parties." We think the instruction was a proper one.

The plaintiff testified as follows: "I was to commence work for defendant company as soon as called for after January 1, 1902, and I was to continue for five or six months at least, and was to receive $50 per month and all expenses, including board and traveling expenses."

T. E. Grafton, a witness for the defendant, who was the building inspector for the company and authorized to employ labor, upon the matter of the contract said: "I told plaintiff I did not care anything about testimonial; that if he would do my work it was all right; that it would not take me long to find out whether he could hold the job; that if he proved satisfactory we would need him until the line of that division was completed, which would take at least five months, but that if he could not do the work to my satisfaction then he would have to go, and that was all there was to it. He was to get $50 per month and all expenses, of which he had to keep an account." In that connection his Honor gave such an instruction to the jury as enabled them to fully understand the reservation on the part of the defendant to discharge the plaintiff, should he turn out to be incompetent for his work. Not
(215) that it was necessary for the defendant to have explicitly reserved that right when he made the contract, for the law did that for him, but that the jury might understand the right of the defendant.

His Honor said: "Another feature about this contract about which there is a dispute is: 'Grafton said he was to have the privilege of discharging McKeithan if he did not suit him.' If you are satisfied by the greater weight of the evidence that was the bargain, then he had a right to discharge him whenever his services displeased him." The defendant made exception to that instruction, but why is not clear to us, because it presented that aspect of the case in the very strongest

light for the defendant, that is, in view of the contract as found by the jury under the instructions of the Court.

There is an error, however, in one of the instructions of his Honor which necessitates a new trial in this case. The defendant requested the Court to instruct the jury "that an employee hired to do certain work for a specified time upon condition that he is competent and fit for the work, if upon trial he proves incompetent and careless and unfit for the duties of the position, the master can discharge him before the expiration of the time of hiring, and no legal obligation rests on the employer to pay for the unexpired time of hiring." His Honor gave the instruction, but modified it by adding "that the burden of showing what the employment was rests upon the party that employs him, that is, upon the defendant in this case, and unless he satisfies you by the greater weight of evidence that McKeithan was incompetent, and further that that is why he discharged him; for if you find that the plaintiff was incompetent for this work by preponderance of evidence, and that the plaintiff was discharged on this account, the plaintiff is not entitled to recover." His Honor was right so far as he instructed the jury that the burden of showing incompetency of the plaintiff rested on the defend- (216) ant. The language of his Honor was explicit in that matter, and that is what he clearly meant when he said "the burden of showing what the employment was rests upon the party who employs him."

In *Deitrick v. R. R.*, 127 N. C., 25, this Court said: "From such authority as we have, and upon common reasoning, we are of opinion that the burden of showing cause for the discharge was upon the defendant. If the plaintiff was able to show his alleged contract and that he was discharged during the term, he showed *prima facie* a breach of the contract and was entitled to damages unless the defendant could justify the breach by showing legal cause for the discharge." But the latter part of the instruction, that is, that the defendant had to show that the plaintiff's incompetency was the cause or reason for the plaintiff's discharge, was erroneous. In a case like this one, the motive which prompted the defendant to discharge the plaintiff is wholly immaterial. The only question about it is whether there was a sufficient ground for the discharge. 20 Am. & Eng. Ency., 32; *Spotswood v. Barrow*, 5 Exch., 110; *Kane v. Moore*, 167 Pa., 275; *Horse Shoe Co. v. Eynon*, 95 Va., 151. In the same volume of the Encyclopedia, and at the same page, the author writes: "It is not necessary that the reasons for discharging the servant be

stated at the time of the discharge; any adequate cause for dismissal, existing and known to the employer at the time, excuses and justifies the discharge, whether assigned or not, and although a different cause was assigned. It is also equally well settled at the present time that if a good cause of dismissal really existed, it is immaterial that at the time of the dismissal the master did not know of its existence, and acted upon some other causes which may have been insufficient."
(217) And numerous authorities are there cited in support of each proposition.

The defendant was entitled to the instruction without modification. For that error there must be a

New trial.

Cited: *Eubanks v. Alspaugh*, 139 N. C., 522.

FISHER v. INSURANCE CO.

(Filed 18 October, 1904.)

1. CORPORATIONS—*Process—Summons.*

The summons in an action against a corporation need not state facts showing the defendant to be a corporation.

2. PARTIES—*Pleading—Process—The Code, secs. 239 (subsec. 2), 241, 242—Dismissal.*

The failure of a summons to show legal capacity of one of the parties is not cause for dismissal of the action.

3. CORPORATIONS—*Insurance.*

An insurance company is not entitled to raise the question of its want of corporate capacity as against a person with whom it has dealt as a corporation.

4. PROCESS—*Service of—Corporations—Insurance.*

Corporations not having any property in the State and having no agent upon whom to serve process, it may be served upon the clerk of the Corporation Commission.

5. CORPORATIONS—*Process—Service of—Constitutional Law—Commerce—Interstate—Laws 1901, ch. 5.*

Laws 1901, ch. 5, relative to the service of process on foreign corporations, is constitutional.

6. CORPORATIONS—*Insurance—Process—Service of—Laws 1899, ch. 54.*

Laws 1901, ch. 5, relative to service of process on foreign corporations, is cumulative to Laws 1899, ch. 54; so that service on a foreign insurance company is valid under either statute.

FISHER *v.* INSURANCE CO.

7. CORPORATIONS—*Process—Service of—Presumptions.*

Where a summons is served on the clerk of the Corporation Commission, it will be presumed that the facts necessary to authorize such service existed.

8. CORPORATIONS—*Process—Service of.*

The act authorizing the service of process on the clerk of the Corporation Commission applies so long as the foreign corporation is indebted to any citizen of the State.

ACTION by Miriam Fisher against the Traders Mutual Life Insurance Company, heard by Judge *R. B. Peebles,* (218) at Spring Term, 1904, of BRUNSWICK.

This action was brought to recover the amount of an insurance policy. The summons was served on the Secretary of the Corporation Commission, under the provisions of Laws 1901, chap. 5. Defendant's counsel entered a special appearance and moved to dismiss the action for defective service of the summons, assigning the following reasons: 1. It does not appear on the face of the summons whether the defendant is a corporation or a joint stock company. 2. Defendant introduced a certificate from the "Insurance Department," showing that it had never been licensed to do business in this State. 3. That it did not appear that the defendant "had property and was doing business in this State," so as to bring the case within Laws 1901, chap. 5. 4. That Laws 1901, chap. 5, is invalid.

At Fall Term, 1903, Judge *Bryan* heard and overruled the motion and allowed plaintiff to file her complaint, which she did. The record of the proceedings before him were lost, and it was agreed before Judge *Peebles* that the foregoing should be taken as the record in lieu thereof. At Spring Term, 1904, the defendant moved again to dismiss the action and Judge *Peebles,* who heard the motion, found only one fact, namely, that the summons had been served by reading it to the Secretary of the Corporation Commission and leaving (219) a copy with him. Upon that finding and the record, which the parties agreed should be considered in place of the lost one, Judge *Peebles* overruled the motion, and allowed defendants to plead over, to which they excepted, as they had done before Judge *Bryan.* Defendants refused to answer the complaint or to demur thereto, and to the judgment by default final which was entered, excepted and appealed.

E. K. Bryan and *Cranmer & Davis,* for the plaintiff.
Russell & Gore, for the defendant.

WALKER, J., after stating the case. The first objection is met fully by *Stanly v. R. R.*, 89 N. C., 331, in which it is held that a corporation may be designated by its corporate name in all suits brought by or against it. In *Insurance Co. v. Osgood*, 1 Duer (N. Y.), 707, cited with approval by this Court in *Stanly v. R. R., supra*, it was said, in answer to the objection that the plaintiff's corporate character was not alleged: "It does not appear on the face of the complaint that the plaintiff is not a corporation. It does not, therefore, appear that the plaintiff has not legal capacity to sue. Unless that appears a demurrer cannot be sustained based on that objection." This accords with the express provision of our law. Clark's Code (3 Ed.), sec. 239 (2), and secs. 241 and 242. See also, *Ramsay v. R. R.*, 91 N. C., 418; *R. R. v. Lumber Co.*, 114 N. C., 690; *S. v. Grant*, 104 N. C., 908. *Justice Maule*, in *Wolfe v. Steamship Co.*, 62 E. C. L., 103, referring to an objection that the defendant had been described only by its corporate name, said: "There is no positive rule that I am aware of which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form. It impliedly amounts to (220) an allegation that the defendant is a *corporate body.*"

A motion to dismiss is like a demurrer and, in either case, all facts alleged, as well as those to be reasonably inferred, are to be taken as admitted. It may be added that a motion to dismiss for the reason stated will not be sustained, when based upon the summons merely, before the complaint is filed. The objection to the want of capacity to sue should be taken by demurrer to the complaint, or if the defect does not appear therein, then by answer, as it is one of the offices of the complaint to allege the facts showing the capacity of a party to sue or be sued.

Besides all this, the defendant has dealt with the plaintiff in its character as a corporation, and has shown that as an insurance company it did not take out license as required by law to do, and it does not lie in its mouth at this time to question its corporate capacity, as said by Justice *Merrimon* for the Court in *Ryan v. Martin*, 91 N. C., 468: "It is not to be presumed that a party will contract and deal with a nonentity. It will be presumed to the contrary, as to him, that he did not." *Jones v. Foundry Co.*, 14 Ind., 90.

The second objection cannot be sustained. It can make no difference in this case whether the defendant was licensed to do business in this State or not, as the plaintiff did not have the summons served on the "Insurance Commissioner," but on

the Secretary of the Corporation Commission. The failure therefore to comply with the law in that respect did not exempt it from service of process under Laws 1901, chap. 5, if that act is applicable to this case.

The defendant challenges the validity of the act, and we will consider that question before determining whether it is one of the corporations described therein and therefore subject to the service of process in accordance with its provisions.

It is thoroughly well settled that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such (221) other State, and this right may be granted or withheld by the State at its discretion, or it may be granted on any condition the State may see fit to impose, unless there is an interference with interstate commerce, or some other federal principle is violated; but the business of insurance is not commerce, in any proper sense, within the meaning of the Constitution of the United States. *Hooper v. California,* 155 U. S., 648. Acts of State Legislature similar to the one under consideration have frequently been called in question and as often decided to be a valid exercise of a power residing in the States to exclude foreign corporations altogether from their borders, or to admit them upon such terms and conditions as the States may deem proper for the protection of their own interests and those of their citizens. The subject has recently been so exhaustively and ably treated in the Court of last resort, having jurisdiction to finally settle such questions, that we can best dispose of this point by a bare reference to them without further comment or discussion. *Ins. Co. v. Spratley,* 172 U. S., 602; *Ins. Co. v. Phelps,* 190 U. S., 147. The statutes of Tennessee and Kentucky, which were considered in those cases and held to be valid, are substantially identical in their main features with the Act of 1901. The cases of *Pennoyer v. Neff,* 95 U. S., 714, and *Wilson v. Seligman,* 144 U. S., 41, are not at all in point. They depended for their decision upon a principle wholly different from that which governed in the cases we have cited. In *Ins. Co. v. Spratley, supra,* the Court said: "It was held in *Pennoyer v. Neff,* 95 U. S., 714, that a service by publication in an action *in personam* against an individual, where the defendant was a non-resident and had no property within the State, and the suit was brought simply to determine his personal rights and obligations, was ineffectual for that purpose. The case has no bearing upon the question here presented." And in *Pennoyer v.* (222) *Neff* it was expressly held that a State could require not

only a foreign corporation, that is, one chartered by another State, but a non-resident individual, making contracts within its limits, to appoint a resident agent to receive service of process. The Court in that case merely decided that a statute of a State and judicial process issuing from its courts cannot operate beyond the limits of the State, and that a non-resident cannot be brought within the jurisdiction of a State Court by process not personally served upon him in the State, nor by publication nor substituted service, so as to establish his personal liability, but that the Court can only proceed against him by seizing any property he may have in the State and subjecting it to the payment of his debt in an action brought to recover the debt, and the judgment of the Court in such a case is valid only to the extent necessary to control the disposition of the property. When the entire object of the action is to determine the personal rights and obligations of the defendant, that is, when the suit is merely *in personam,* constructive service upon the non-resident, in the form of publication of the original process, is unavailing and ineffectual for any purpose. But this is far from holding that a State may not provide for service according to the method provided in the Act of 1901, for the Court in the case just cited fully recognizes the power of the State so to do, and Mr. Justice *Field,* who delivered the opinion, in referring to that question, says: "Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforcible there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment (223) or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgment rendered upon such service may not be binding upon the non-residents, both within and without the State." The two cases then stand upon a very different footing, and the principle which separates and distinguishes them has long been recognized and enforced. *Ins. Co. v. French,* 18 How., 404; *Ins. Co. v. New York,* 119 U. S., 110; *Paul v. Virginia,* 18 Wall., 168; *Ducat v. Chicago,* 10 Wall., 410. A foreign corporation, as will be seen from the authorities, can exercise the right to do business in a State only by comity or as an act of grace on the part of that State, and the condition upon which the favor is extended

goes with it, and cannot be separated from it, so that if the privilege is enjoyed the condition must be performed. "The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the Legislature of that State," and the law is the same as to all corporations whose business does not belong to the regulating power of Congress. *Crutcher v. Kentucky,* 141 U. S., 47.

Having concluded that the Act of 1901 is valid, the only remaining question is whether the defendant is one of the class of corporations upon whom process can be served as therein provided. The original bill introduced in the House of Representatives, and which was afterwards enacted into law as chap. 5, Laws 1901, did not require that the corporation should have property in the State, as is now required by the first section of this act—the words "having property and" having been inserted by way of amendment to the bill in the Senate. Senate Journal 1901, p. 941. Why these words were inserted we do not know, as the liabilities of non-resident corporations having property in the State could be enforced by attachment. But we do not think the operation of the act (224) is or should be restricted to corporations having property in the State, as the words of sections 2 and 3 are broad enough to include any and all corporations doing business in the State, and it was the evident purpose of the Legislature that the act should be so construed. Section 1 and sections 2 and 3 provide for totally different cases, and this being a remedial statute should be construed liberally so as at least not to defeat the intention of the lawmakers. We are also of the opinion that chap. 5, Laws 1901, is cumulative to chap. 54, sec. 62, Laws 1899, so far as insurance companies are concerned, and that a plaintiff may have process served upon a defendant, who is an insurance company, in either of the ways allowed by those statutes.

In discussing the questions involved we have not found it necessary, in support of the ruling of the Court below, to refer to the absence of the findings of fact upon which that ruling was based. It was incumbent on the defendant to have the facts stated in the record, if it wished to avail itself of any defect in the evidence or of the non-existence of any fact, and we are required to presume, when there is no such statement, that the Court found from evidence such facts as warranted its ruling. An appellate court never presumes error, and cannot adjudge that there was error unless it is plainly shown by the appellant. *Carter v. Rountree,* 109 N. C., 29; *Smith v.*

Whitten, 117 N. C., 387. Section 1 of the Act of 1901 requires every corporation having property and doing business in this State to have an officer or agent in the State upon whom process can be served, and section 2 refers to those corporations not mentioned in the first section, and provides that when there is no officer or agent in the State the corporation shall appoint a person to receive service of the process, and, upon its failure so to do, service may be made on the
(225) Secretary of the Corporation Commission. This section applies to foreign corporations doing business in this State, or who have done business herein and incurred liabilities which remain unsatisfied. Under the rule we have just stated, we must presume that the defendant had no property and no agent in the State and had designated no person to receive service of process, and that the other facts existed which were necessary to make the service valid, for this Court will presume that a ruling is correct until the contrary is shown by the party who alleges error.

The fact that the defendant had ceased to do business in this State, if such is a fact, cannot affect our conclusion. If it had taken out a license to do business in the State, it could neither revoke it, nor could it withdraw from the State to the plaintiff's prejudice. The statute will not cease to operate as to it until its debts due to citizens of this State are paid. *Biggs v. Ins. Co.,* 128 N. C., 5; *Moore v. Ins. Co.,* 129 N. C., 31; *Ins. Co. v. Scott, ante,* 157; *Ins. Co. v. Spratley, supra; Ins. Co. v. Phelps, supra.* There is no error that we can discover in the refusal to dismiss the action, or in the rulings of the Court.

No error.

Cited: Goodwin v. Claytor, 137 N. C., 230; *Falkner v. Pilcher, Ib.,* 452; *Scott v. Life Asso., Ib.,* 519; *Parker v. Ins. Co.,* 143 N. C., 342.

WAYNESVILLE v. SATTERTHWAIT.

(Filed 18 October, 1904.)

1. STATUTES—*Counties—Municipal Corporations—Highways—Streets Laws 1903, ch. 375—Laws (Private) 1885, ch. 127.*

   Laws 1903, ch. 375, does not repeal Laws (Private)) 1885, ch. 127, sec. 16, or confer any power on the county commissioners to change or control the streets of the town of Waynesville.

2. STATUTES—*Words and Phrases—Definitions.*

   The word "at," when used to designate a place, may and often must mean "near to."

CLARK, C. J., and MONTGOMERY, J., dissenting.

ACTION by the town of Waynesville and others against S. C. Satterthwait and others, heard by Judge *G. S. Ferguson,* at chambers, in Waynesville, N. C., 2 August, 1904.

Appeal by plaintiffs from an order of *Ferguson,* J., dissolving a restraining order and refusing an injunction to the hearing. The plaintiff, the town of Waynesville, is situated in Waynesville township, Haywood County. The courthouse is located in said town. By the provisions of sec. 16, chap. 127, Private Laws 1885, being the amended charter of said town, the board of aldermen are empowered to lay off, widen and straighten new streets in the town when in their opinion the same shall be required for the best interest of the town, to make sidewalks, etc. The general powers conferred upon town officers by chap. 62 of The Code are given to said aldermen. The plaintiffs, other than the town of Waynesville, are taxpayers, freeholders and residents of the town. By the provisions of chap. 375, Laws 1903, the commissioners of Haywood County are authorized, when the proposition so to do has been approved by the qualified voters of Waynesville township, to issue and sell bonds of said township to the amount of $50,000 "for the purpose of macadamizing, grading and improving the public roads of said township." By sec. 10 of (227) said act the defendants are appointed a board to be known as "Road Commissioners of Waynesville township," who, by sec. 12, are given "absolute control and management of the public roads of said township and of such as shall be macadamized, graded and improved under the provisions of this act." The defendants are empowered to expend the funds arising from the sale of the bonds so issued for the purpose of "macadamizing, grading and improving the public roads of said township, and to that end they may make contracts." * * *

Section 15 provides that "It shall be the duty of said road commissioners to begin improvements at the courthouse on the four main roads in said township, to-wit: Pigeon river, Jonathan creek road, Clyde road and Balsam Gap road." The defendants are authorized to enter upon lands near to or adjoining roads improved * * * for the purpose of getting gravel, timber. * * * They are also authorized to condemn land as provided by the general road law of Haywood County.

An election was held pursuant to the provisions of the act and the proposition to issue bonds approved. The bonds were issued and sold, and the defendants have in hand a large sum of money for the purpose of executing the provisions of the statute. They made a contract with the defendant, D. L. Boyd, and employed a civil engineer to lay off and fix the grade of the roads.

The plaintiffs allege that the defendants have surveyed and located a road or street in the town of Waynesville about one-half mile in length, beginning at a point near the residence of Howell, on Main street, running thence across certain lots, * * * to the great damage of the owners of such lots; that the contemplated road is intended to change and does change the location of a portion of Main street in the town, (228) which change is about to be made by the defendants without the consent and over the protest of the board of aldermen of the town, as well as over the protest of the other plaintiffs and other citizens and taxpayers, and without authority of law. They ask that the defendants be enjoined from constructing said road as now located, and from making any substantial change of any portion of Main street in the town.

The defendants admit that they have changed the location of the road leading from the courthouse to the town of Clyde, within the corporate limits of the town of Waynesville, and that the change of location commences at the intersection of the two streets at the Presbyterian church. The defendants refer to a map prepared by the civil engineer employed by them. They say that the proposed road is to be twenty-two feet wide, of which ten feet is to be macadamized, and if a greater width is desired the same will be left to the aldermen of the town to be made. They say that the proposed change is to be made with as little damage as possible to property holders, at the same time having due regard to the interest of the public. They say further that the location of the new road will not change the present location, unless the board of aldermen shall see fit to discontinue the use of said street on account

of the location of the new road. They admit that they have decided to grade, improve and macadamize the new road and not the old one. They deny that the work is being done against the protest of the board of aldermen, "and while the defendants do not recognize the authority of the board of aldermen to dictate to them the location of said road, they have sought the board of aldermen and endeavored to secure their co-operation in the location of said road." The board of aldermen declined to come to any agreement, and finally, through their attorney, notified the attorney of the defendants "that they had no authority over the matter and would assume no responsibility in the location or change of location (229) of said road." The defendants say that they are vested with the power to make the change in the location of the road, or at least to establish a new road for the purpose of improving and macadamizing the same, as road commissioners aforesaid, under the provisions of the Act of 1903. They admit that the property of the plaintiff taxpayers will not be so valuable as it would be if the defendants should grade, improve and macadamize the old road, and they express regret that the grade of the old road is such as to make the change necessary. They proceed to set forth the conditions, grade, etc., which in their opinion make it necessary to change the location. They set forth many other facts in justification of the proposed change. Judge *Moore* granted a restraining order, and upon the hearing before Judge *Ferguson* the order was vacated and an injunction to the hearing refused. The plaintiffs excepted and appealed.

W. B. & H. R. Ferguson and *W. L. Norwood,* for the plaintiffs.

George H. Smathers, for the defendants.

CONNOR, J. His Honor, Judge *Ferguson,* in the judgment rendered by him finds that by the charter of the town of Waynesville the board of aldermen are "entrusted with the right and power of altering and improving the streets of said town and of laying out and establishing new streets. * * * And the exercise of this power is solely in the board of aldermen, and the town solely liable for damages resulting from its exercise, except as the same shall be modified by the act of the Legislature, Laws 1903, ch. 375." He says: "I am of the opinion that the Legislature had the power to grant to the defendants, the road commissioners of Waynesville township, the right and power to enter the corporate limits of the

(230) town and make the improvements specified in said act."

In the view which we take of the case, it is not necessary to express an opinion upon the power of the Legislature to confer upon a board of commissioners, or other agency, composed of persons not required to be residents of the town, the power to enter its corporate limits and re-locate streets or open public roads therein. This is a delicate question, and we should be slow to find, unless clearly expressed, an intention on the part of the Legislature to confer such power. While this Court has recognized and enforced the power of town commissioners to control, widen and straighten streets as in their judgment the public good and convenience may require, it has also recognized the limitations upon such power when the vested rights of the citizen and property owner were affected. *Hughes v. Clark,* 134 N. C., 457. Next to the public health there are few, if any, matters of municipal control which affect more seriously the welfare of cities and towns, or when interfered with, create more friction than the streets and sidewalks. Any divided control or authority in regard to them must necessarily result in conflict and confusion. The courts will always endeavor to ascertain the intention of the Legislature by a careful examination of the statute and its several parts, taking into consideration the purpose and scope of the legislation, the present status of the subject matter, and the rights and interests affected. They will also endeavor to so construe the act that no conflict with existing statutes occur further than is expressly or by necessary implication made necessary. The courts will never bring into question the power of the Legislature until they find no other reasonable way of deciding the question presented. *Mardre v. Felton,* 61 N. C., 279.

The question presented by this record to be first considered is whether the Legislature has by the Act of 1903 con-

(231) ferred upon the defendant commissioners the "absolute control" of any of the streets in the town of Waynesville. If such is the effect of the statute, it must, in respect to such streets, repeal by implication section 16 of the charter. Certainly the board of aldermen and the defendant commissioners cannot at the same time have and exercise "absolute control" of the same street. It is manifest that there is no express repeal of the charter or any of its provisions. The Act of 1903 makes no reference to the charter or to the town or its officers. If repealed, it must be by implication. While it is well settled that the Court will construe later acts to repeal former ones by implication in well-defined cases, it is equally true that the law does not favor the implied repeal of statutes.

Nash, J., in *S. v. Woodside,* 31 N. C., 497, says: "The law does not favor these implied revocations, nor is it to be allowed unless the repugnancy be plain, and where in the latter act there is no clause of *non obstante* it shall, if possible, have such construction that it shall not operate a repeal." Endlich on Int. Stats., sec. 280; Sutherland on Const. Stats., secs. 126, 127. There is a further rule stated by Judge Dillon: "It is a principle of extensive operation that affirmative statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities." Dillon Mun. Corp., 143. In *Comrs. v. R. R.,* 81 Va., 355, it is said: "The principles applicable to the repeal of statutes by implication are few and simple. The general rule laid down in Gregory's case, 6 Coke, 19b, and so far as known universally accepted as correct, is that a 'later statute in the affirmative shall not take away a former act and *eo potius* if the former be particular and the latter general.'" And it is said that rule is enforced more rigidly when the attempt is made by a later general law to repeal the provisions of a prior special charter than in any other cases. *Brown v. Comrs.,* 21 (232) Pa., 43.

Guided by these well-settled principles, we proceed to inquire whether an act which by its title and terms prescribes a scheme for improving the *public roads* of a township, should be construed to apply to the public *streets* of an incorporated town, and by implication take the power from the constituted authorities of one and confer it upon the former. It is also a well-settled rule of statutory construction that "the courts approach the interpretation of a statute with the presumption that words and phrases therein are used in their familiar and popular sense and without any forced, subtle or technical construction to limit or extend their meaning." 26 Am. & Eng., Ency., 635.

There is a marked distinction, both in common use and in statutory enactment, between a public road and a public street. We have at every session of the General Assembly acts providing for the improvement of the public roads, while invariably the charters of towns and cities confer the power upon commissioners or aldermen to open and control streets. Judge Elliott says that "Rural highways may, we think, be appropriately and conveniently denominated roads, and the public ways of a town or city may be properly and conveniently called streets." Elliott on Streets, sec. 7. "A street is a road or public way in a city, town or village." He says that while all streets are highways, all highways are not streets; that the

rights of the public are much greater in streets than in roads in the rural districts, and the methods of regulating their use, improvement and repair are materially different. This Court, in *Osborn v. Comrs.,* 82 N. C., 400, has clearly recognized the distinction between public roads and streets. The General Assembly passed an act providing a system for working the public roads of Mecklenburg and other counties. The commissioners were empowered to divide the county into road
(233) districts. The commissioners of Mecklenburg under this power laid off as one district the city of Charlotte, and undertook to take control of the streets, declaring them to be public roads. Upon an application to enjoin them this Court said: "In our opinion incorporated cities and towns whose charters make provision for the repair of streets are not included, nor intended to be included, in an act to regulate roads and highways, and they are still left in possession of their chartered rights and privileges in this regard." The learned Chief Justice notes the language of the city charter and proceeds to say: "The conflict between them is avoided by a construction of the act which confines its operation to parts of the county in which roads, as distinguished from streets, are to be found." The defendant commissioners were enjoined from interfering with the streets. The same construction was given a similar statute by the Court in Illinois. In *Ottawa v. Walker,* 21 Ill., 605, 71 Am. Dec., 121, speaking of the power to control the streets vested in the town authorities, it is said: "The power in its very nature would seem to be inconsistent with its joint or concurrent exercise by the two bodies, and even if the city charter was not subsequent in date, unless it plainly appeared from the language employed that it was intended to be joint or concurrent, it would be held that the power was exclusive in the commissioners beyond the city limits, and exclusive in the common council within their jurisdictional limits, and neither have any power to perform any acts in reference to this subject beyond their respective limits. * * * The exercise of such a power by each of these bodies would necessarily lead to endless strife and confusion which the Legislature never could have intended to produce by those provisions." *People v. R. R.,* 118 Ill., 520. In *S. v. Jones,* 18 Texas, 874, it is said: "Both cannot exercise it at the same time without producing a conflict which would be irre-
(234) concilable, and which might be extremely detrimental to the interests of the town." *S. v. Frazier,* 98 Mo., 426. In *Cross v. Mayor,* 18 N. J. Eq., 305, the Chancellor says: "But it has never seemed to me a matter susceptible of doubt

that in case a city charter contains a special provision putting the streets in charge of the officers of the corporation, such provision excludes the common scheme for constructing and keeping up highways in the townships and all its concomitant regulations. In conformity with the well-known rule of law, the general legislation on the subject gives way to the special legislation on the same subject." The question has been expressly passed upon in *S. v. Mayor*, 33 N. J. Law, 57. Referring to the argument made by the prosecution the Court says: "The argument is entitled to much force as applicable to incorporated places, when the charter is silent on the subject of the power of municipal authorities to regulate the streets. But when the charter of a city or town expressly vests the regulation and control of the streets and highways in the corporation the argument is entitled to no weight. The question is not whether the Legislature may legislate within the limits of a municipal corporation, but whether general laws shall have controlling effect when the Legislature has expressly delegated to the corporation special authority to legislate on the subject by the adoption of municipal ordinances."

In the light of these authorities and the reason of the thing, we conclude that the Act of 1903 should not be so construed as to repeal section 16 of the charter or to confer any power on the defendant commissioners to change, alter or otherwise control any of the streets in the town of Waynesville.

It is urged that section 18, chapter 375, Laws 1903, expressly provides that the defendant board shall "begin improvements at the courthouse on the four main roads in said township," and that the language confers express (235) power to take absolute control of the roads. It is said that this language is incapable of any other meaning or construction than that contended for by the defendants. The map which has been filed as a part of the record shows that the courthouse is located on Main street, and that the highways within the corporate limits are streets, laid off and designated by name; that no such roads as those named in the act converge at the courthouse. It is true that the roads named come into the streets at the boundary of the town, and, by following the streets they make into Main street, reach the courthouse. It would be impossible to begin the work on the four roads named, "at the courthouse." The language of the statute may be sustained and given effect by beginning work on the roads at the boundary of the corporation leading to the courthouse, and in this way repugnancy and conflict avoided. The argument that the language is to be given a literal construction

proves too much, because if they cannot begin at the court-house it would show a want of power to work the roads named at all, which would destroy the evident purpose of the Act of 1903. The word "at," when used to designate a place, may, and often must mean, "near to." It is less definite than "in" or "on"; *at* the house may be *in* or *near* the house. Web. Inter. Dic., 95; Cent. Dic., Vol. I.

Read in the light of the existing conditions and the context and giving effect to the act without conflicting with the charter, a reasonable construction of the language would empower the defendants to begin work on the roads named at the point where they reached the town boundary and where they merge into the street. In this way the apparent repugnancy of the charter and the act of 1903 is reconciled. It is by no means clear from the language of the act of 1903 that the de-
(236) fendants are empowered to change the location of the road, and certainly not to change the location of a street; but we do not wish to decide any more than is fairly presented by the record.

The injunction prayed for and granted by Judge *Moore* is that the defendants be "restrained from constructing the said road as now surveyed and from making any substantial change in Main street in said town of Waynesville." We decide nothing more than that the plaintiff, the town of Waynesville, by its aldermen having control of its streets is entitled to this relief.

We do not undertake to say or suggest that the proposed change is not advisable or that it is an abuse of power. We simply decide that under the statute no such power is given to the defendants.

It is said that the bonds issued were voted by the people of the township, including the citizens of the town, who pay a large part of the tax, and that the town should receive some of the benefits therefrom. We appreciate the force of this view. Whether this can be secured by cooperation by the board of aldermen and the defendant commissioners is not before us, nor do we intimate any opinion thereon.

We are of the opinion that the restraining order granted by Judge *Moore* should have been continued and the injunction granted as prayed for.

To the suggestion that the town of Waynesville is not one of the real plaintiffs, and that the question discussed and cited is not presented, it is sufficient to say that we are compelled to decide this, as we do all other cases which come before us, upon the record. The case was argued before us by counsel repre-

sening the *plaintiffs,* and many of the authorities cited in this opinion were cited and relied upon in his brief. His contention was, as we have decided, that the Act of 1903 did not by implication repeal the town charter and that the aldermen had absolute control of the streets of Waynesville. The map of the town shows that the highways therein are *streets,* (237) laid off and named. It may be that all parties will find it conducive to the best interest of the township and the town to co-operate in carrying out the purpose of the Act of 1903. This is not for us to determine or direct.

Let this be certified.

Error.

DOUGLAS, J., concurring. I cancur in the opinion of the Court as written by Justice CONNOR, on the ground that it does not appear to me that the Legislature intended to create a divided sovereignty, or *imperium in imperio,* within the town of Waynesville. My opinion is based entirely upon the intention of the Legislature, and not upon its power. A different interpretation might raise serious constitutional questions. The power of the Legislature to grant charters to cities and towns, and to modify or repeal them at its pleasure, within constitutional limitations, is not questioned; but to what extent it can direcly interfere in their management and control, is another and more doubtful question. While concurring in the opinion of the Court, not only in what it says but also in its wisely refraining from discussing questions whose determination is not necessary to the decision of this cae, I am nevertheless impressed with the suggestive nature of the opinion of the Chief Justice. Speaking solely for myself in a concurring opinion, I may go further and express my personal views. It seems to me that the town of Waynesville is a proper party to this case, and is actually and in good faith asserting its right to the location and improvement of its streets. But if it were a mere nominal party, what difference would it make? If the road commissioners of Waynesville township have *no power* to open new streets within the limits of the town, I see no reason why they cannot be enjoined by any one who would be in- (238) jured thereby. Here the private right of the citizen would apparently end. I see no ground on which either he or the town itself would be entitled to a *mandamus* to compel the township commissioners to macadamize any of the existing streets; certainly not under the facts shown in this case. The Legislature evidently intended a part of the fund to be spent within the corporate limits, and probably expected that it could

and would be done by the concurrent and harmonious action of both boards. The unexpected dispute destroyed only in part the effective operation of the act, which otherwise remains in full force and effect. There is no reason why the township board should not proceed to improve the roads outside the town limits, reserving perhaps sufficient funds for the improvement of the road within the town when its location is finally determined. While they cannot control the town authorities, they are equally independent in the exercise of their own duties, privileges and powers. There is no apparent reason why the two boards could not, acting concurrently, open and improve the new street as proposed. It is not proposed to close up any part of the old street, or to deprive its abutting owners of any of the rights or conveniences they now enjoy. This is all they can demand. They have a right to have the old street kept open as far as it is necessary to the reasonable enjoyment of their property, and to have it kept in proper repair as a public highway. This would be a continuing duty of the town commissioners, and for failure in its performance they would be indictable under *S. v. Dickson,* 124 N. C., 871. As was said in that case: "What is proper repair would depend largely upon circumstances, such as the size of the town and its available funds, the character and location of the streets, and the amount of travel thereon." I am not aware of either statute or de-

(239) cision entitling an abutting owner to have his street paved or macadamized to the conclusion of others. If the public interest, on account either of convenience or economy, requires the opening of a new street, then it should be opened, but by the proper authority.

It is true that the opening of new streets often disturbs the *relative* values of property, but this cannot be avoided, and it is never a legal injury if done in good faith and for a public purpose. Of course, if the town authorities were to use the public moneys merely under a colorable pretense of public necessity, but in fact to subserve some private interest, they could be enjoined, if indeed they did not become criminally as well as civilly liable. There is no intimation of any such purpose in the case at bar. On the contrary, the undisputed testimony tends to show that the new street was located in good faith and in furtherance of the public interest and convenience. A city can no more be confined to its village streets than a man to the clothing of his infancy. As it grows it expands, and needs new and more convenient lines of communication. The country road, originally its principal and perhaps its only street, becomes inadequate to the needs of its growing popula-

tion; and is rarely susceptible of substantial improvement. It cannot be abandoned, but neither can it be justly given a fictitious value at the expense of the general public.

CLARK, C. J., dissenting. I concur with Judge *Ferguson* that "the Legislature had the power to grant to the defendants, the road commissioners of Waynesville township, the right and power to enter the corporate limits of the town and make the improvements specified in said act." No town has any powers except those conferred by the charter and other statutes, and these are subject to modification and even entire repeal at the will of the Legislature. This last was done notably by the acts abolishing the cities of Memphis, Tenn., and (240) Fayetteville, N. C., which were held constitutional. Even counties may be abolished at the will of the Legislature. *Mills v. Williams,* 33 N. C., 558. This act (Laws 1903, chap. 375) provides in section 15 that "it shall be the duty of said road commissioners to begin improvements at the court-house on the four main roads in said township, to wit: Pigeon river road, Jonathan creek road, Clyde road and Balsam Gap road." This statute says the work must begin at the court-house on the four main roads named, and necessarily it must be where the four roads come together, as they must do, at the court-house, if, as the act says, they all begin there.

There is no complaint in this record by any one that the road commissioners are macadamizing and working that part of these roads, which, so far as they lie within the town, are called streets. This is not in the scope of this action nor contemplated by the plaintiffs. The tenor of this action is that at a certain point on the street which the plaintiffs, Howell, Martin and Thomas (who are the sole real plaintiffs), claim should be a part of the Clyde road, the defendant road commissioners have changed the road and are not macadamizing the street in front of their property as part of such road, and their sole equity to the injunction is that the failure to adopt and macadamize the street in front of their property as part of said road will impair its value. The parties on whose property the new road is laid out are not complaining. The town is a nominal co-plaintiff and is not complaining that four of its streets, nor this one, are being macadamized at the expense of the township, and notified the defendants, when asked to join them, that the town authorities "had no authority over the matter and would assume no responsibility in the location or change of location of said road." The position of the road commissioners is that while they are required to work

(241) the four roads named "beginning at the court-house," they are expressly given authority to change the location of the road (not of the street) at any point between the court-house and Clyde, and that they find that to adopt the street as a part of the road at the point where the complainant's property lies would require the public for all time to come to climb a 9 per cent grade and an expenditure by them of $6,000, while selecting the new route which they have chosen (to which the owners of the property over which it will run are not objecting), the grade will be reduced to 5 per cent, and a cost of $3,000, both of which are plainly left in their discretion by the terms of the act, and show a wise exercise of their discretion. The defendants in their answer disclaim any intention to change the street in front of the plaintiff's property or close it up or to exercise any control over it. They simply decline to adopt that part of the street as a part of the road. The contention of the plaintiffs is not that the defendants are exercising authority over the street in front of them, but that they are not, and have chosen another location for their road. They prefer that $6,000 should be spent where it will improve the value of their property, ignoring the fact that there will be a saving to the public of an expenditure of $3,000 and of 4 per cent in the grade by locating the road where the commissioners, in the exercise of the discretion vested in them by the statute, have wisely seen fit to locate it instead of upon the steeper and more expensive street in front of the plaintiffs' property. The sole object of the injunction asked is to prevent the road commissioners locating the road elsewhere, and thus to force them in spite of the discretion vested in them by the statute to macadamize and grade that part of the street in front of the plaintiffs' property as a part of the public road to Clyde. It would seem that the Judge below properly refused them an injunction to aid them in such purpose.

(242) The defendants in their answer having intimated that they might use their discretion by not macadamizing steep parts of streets in the town, if compelled to adopt them as parts of the public roads, the plaintiffs in an affidavit filed by them in reply, assert an intention and the right to procure a *mandamus* in such event to compel the working of such parts of the streets by the defendants. Such is the purport and object of this litigation as set out in the record. There is no contention therein by any one that the defendants have no power to macadamize the streets in the town, so far as they are parts of the four roads named, up to the court-house.

Waynesville is not only an incorporated town but it is a

county seat, and the four roads leading to the court-house are perhaps more used by citizens from the different parts of the county than by those of the town. In placing the cost of macadamizing those four roads "beginning at the court-house" upon the larger public, the act has only required what is done in Washington, London, Paris and other cities in which the cost of certain improvements are defrayed by the larger public under officials appointed by it, though the local public have the same use of them. In the same way, in Raleigh, the sidewalks and parts of the streets around the Capitol Square and Executive Mansion, and indeed in front of the very building in which this Court sits, are graded and paved at the expense of the State and by its officials. Requiring the same as to the four public roads of Waynesville has not been and could not be complained of by that town, nor even by these plaintiffs. The point presented by them is, as above stated, an entirely different question.

MONTGOMERY, J. I concur in the dissenting opinion.

---

(243)

JOHNSON v. CAMERON.

(Filed 18 October, 1904.)

1. WITNESSES—*Evidence—The Code, sec. 590.*

A witness interested in the result of an action may testify as to a transaction between the deceased under whom she claims her interest and the adverse party.

2. DEEDS—*Delivery—Questions for Jury.*

The mere handing of an unprobated and unregistered deed to the grantee by the grantor is not necessarily a delivery, and the question should be submitted to the jury.

3. EVIDENCE—*Wills—Deeds—Delivery.*

The devising of land by a grantor in a deed is competent evidence on the question of the delivery of the deed, where the grantor at his death was in possession of the lands and the deed.

ACTION by J. H. Johnson against L. A. Cameron and others, heard by Judge *R. B. Peebles* and a jury, at May Term, 1904, of CUMBERLAND. From a judgment for the plaintiff the defendants appealed.

Thomas H. Sutton, for the plaintiff.
Isaac A. Murchison and *M. L. John,* for the defendants.

CLARK, C. J. This was an action for partition. The plaintiffs, children and grandchildren of George W. Cameron, deceased, claim title under two deeds to him, dated 2 January, 1869, but which have never been probated or recorded, and which were found in possession of W. M. Cameron, who was sole grantor in one deed and joint grantor in the other, and under whom the defendant, Cleopatra Cameron, claims. Said W. M. Cameron died in 1901. George W. Cameron died more than twenty years ago. The widow of W. M. Cameron, having interpleaded and claimed an interest in the land, was
(244) made a party defendant. The sole issues submitted were as to the delivery of these two deeds. The widow of George W. Cameron was allowed to testify that she saw W. M. Cameron hand said deeds to her husband.

The Code, sec. 590, disqualifies a party to an action, or one interested in the event thereof, from testifying in his (or her) interest against the person claiming adversely as to "a personal transaction or communication *between the witness and the deceased person or lunatic,*" except when the executor of such opposing party or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. But here the witness testified as to no transaction or communication between herself and W. M. Cameron. It was a transaction between W. M. Cameron and her husband, and as to that she is a competent witness notwithstanding her interest. *Dobbins v. Osborne,* 67 N. C., 259; *McCall v. Wilson,* 101 N. C., 600; *Loftin v. Loftin,* 96 N. C., 99, are in point; as also *Ballard v. Ballard,* 75 N. C., 191, where BYNUM, J., says that it is not by being a party to the action or interested in the event that one becomes disqualified, for notwithstanding that fact he is competent "except as to a transaction or communication *between such witness* and the person deceased." In *Peoples v. Maxwell,* 64 N. C., 313, it was held that while an adverse party to the action was competent to prove the handwriting of the deceased, he could not prove that the deceased actually signed the paper, but that was where the paper was executed to the witness, and hence the signing was a transaction between the witness and the deceased. To the same purport is *Bright v. Marcom,* 121 N. C., 86. Here the deed was not delivered to the witness; the delivery was not a transaction *"between the witness* and the deceased," and her interest, under the above decisions and by the very language of the section, does not disqualify. There must be added the further fact that the
(245) delivery, the transaction, was between the witness and the deceased. Her interest was contingent and subse-

quently acquired by her husband's death. She was not a party to the transaction. It may be that if the statute disqualified in cases like the present, it would be, as is said in *Isenhour v. Isenhour,* 64 N. C., 642, "a desirable rule, but it is not the one adopted by the Legislature."

This case does not turn upon the witness being a party or interested in the event—she is both. Nor does it make any difference that she is in form a party defendant. *Redman v. Redman,* 70 N. C., 261, and other cases cited in Clark's Code (3 Ed.), p. 851. Nor does it come within those cases which turn upon the question whether the evidence tends to show a transaction or communication with the deceased, for a delivery of the deeds (if made) comes under that head. *McRae v. Malloy,* 90 N. C., 524. But the transaction with the deceased here testified to by a party to the action was not "between the witness and the deceased," and hence by the terms of the statute and by the decisions above cited the witness was properly admitted to testify in regard thereto. *Lane v. Rogers,* 113 N. C., 171; *McCall v. Wilson, supra; Bunn v. Todd,* 107 N. C., 266.

But the Court erred in instructing the jury that if they believed the evidence of L. A. Cameron (widow of George W.), to answer the issue (of delivery) "Yes." The evidence of Mrs. Cameron was that she saw the deceased grantor "hand the deeds" to her deceased husband. But that fact, taken alone, does not constitute a delivery. It must be delivered as the grantor's act and deed. Then, too, there was the countervailing testimony to be considered by the jury that the deeds, unprobated and unregistered, were found at the death of the grantor in his possession, and that none of the plaintiffs, nor George W. Cameron, have ever been in possession of one of the lots, and the widow of George W. Cameron testified that her husband and herself lived, up to his death, with W. M. (246) Cameron on the other lot. The Court erred, also, in rejecting evidence that the grantor by his will disposed of this land, it being competent as tending to throw light upon the nature of his possession of the deeds and of the land. It may be that the deeds were merely handed to George W. Cameron for inspection. Certainly, the mere evidence that they were "handed" to him without any declaration of the purpose, taken in connection with the failure to take possession of the land and the failure to probate and record the deeds and their being found years later in possession of the party named therein as grantor, did not empower the Judge as a matter of law to instruct the jury that upon the evidence of the widow, if believed, they should respond "Yes" to the issue.

Error.

WALKER, J., concurs in result.

DOUGLAS, J., concurring only in result. I cannot but think that the testimony of the widow comes within the intent and spirit of the prohibition contained in section 590 of The Code. She testified to the delivery to her deceased husband by the deceased grandfather of a deed conveying land in which the witness would be entitled to dower by virtue of said deed and of it alone. Section 590 expressly provides that: "A party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor * * * concerning a personal transaction or communication between the witness and the deceased person," etc. The prohibition extends only to parties and privies, and not to mere strangers (247) who would have no motive to testify falsely and whose testimony would not be tinctured by self interest. The object of the statute seems plain, and yet under this decision we will have the following anomalous status of the law: Suppose that A buys a tract of land from the deceased, and immediately conveys by quit claim deed to B, who sues for its recovery. A cannot testify to the execution of the deed, although he is not a party to the suit and has no pecuniary interest whatever in its result; while B, the person suing for the recovery of the land, can testify as to the execution of the deed by the deceased to A from whom alone he derives his title. If B's testimony is believed, he gets the land; while A gets nothing in any event, no matter how the suit may go. And yet the evidence of A is excluded while that of B is admitted. Which would be more likely to conceal or pervert the truth? In the words of Chief Justice PEARSON, in *Walton v. Gatlin*, 60 N. C., 310: "When the stream becomes too muddy to see the bottom, the surest way to find truth is to go up to the fountain head, that is, 'to the reason and sense of the thing.'"

(248)

MOORE v. GUANO CO.

(Filed 18 October, 1904.)

COSTS—*Witnesses.*

Where, pending a retrial, an action was compromised under an agreement that the defendant should pay the costs, the defendant was not liable for the costs and expenses of witnesses subpœnaed by the plaintiff, but not sworn, examined or tendered to the defendant.

ACTION by F. M. Moore against the Navassa Guano Company, heard by Judge *R. B. Peebles,* at Spring Term, 1904, of BRUNSWICK. From a judgment for the plaintiff the defendant appealed.

T. E. Brown and *J. D. Bellamy,* for the plaintiff.
Rountree & Carr, for the defendant.

MONTGOMERY, J. The plaintiff instituted three several actions against the defendant company in the Superior Court of Brunswick County, for injury caused to the crops and premises of the plaintiff on account of a faulty method of the defendant in the manufacture of its guano. No witnesses were subpœnaed in the last two actions, but a large number were subpœnaed in the first action. The first action was regularly tried at Fall Term, 1901, and there followed a verdict and judgment for the plaintiff. Upon appeal to the Supreme Court by the defendant a new trial was granted to the defendant. Before the new trial was had, or any further proceedings were taken in the other actions, the parties compromised and settled the three actions. The amount of $6,300 was paid by the defendant to the plaintff in full settlement of any and all suits then pending in the Superior Court of Brunswick County, brought by the plaintiff against the defendant, and of any and all other causes of action arising from the operation of the factories of the defendant at Navassa, whether included in said suits (249) or not. The receipt of the plaintiff for the $6,300 contained a clause bearing upon the question raised in this appeal in the following words: "It is further agreed that I shall suffer a nonsuit or enter a retraxit in said action, the said Navassa Guano Company to pay the costs, to be taxed by the Clerk." Then followed this agreement: "A judgment in the cause that it be dismissed at the defendant's cost, to be taxed by the Clerk." There was no judgment entered in the other cases.

The defendant paid the costs in the action that was tried, except the tickets of a large number of witnesses, who, on the trial

had not been sworn, examined or tendered to the defendant. The defendant also paid the costs as taxed by the Clerk in the two actions that were not tried. Afterwards the defendant moved that the costs be retaxed in the first action, and the matter was referred to E. S. Martin to hear the evidence and to render his findings as to the amounts in each item excepted to. The referee heard the matter and reported his findings to the Court, and it will not be out of place to say that it is a model both in the clearness of the findings of fact and the conclusions of law. We have recited in this opinion the findings of fact. The plaintiff excepted to all the conclusions of law except the first. The second, third, fourth and fifth conclusions of law are as follows:

2. "That the facts found show that all the witnesses were subpœnaed in the first action instituted by the plaintiff on 5 October, 1899, and tried at Fall Term, 1901, and that no witnesses were subpœnaed in the other two actions, which have never been tried. Therefore all witness fees, including mileage allowed by law to be taxed as cost, should be taxed by the Clerk as costs in the first action; and the defendant's exceptions relate therefore to the first action."

3. "That the cost to be taxed by the Court or Clerk
(250) can mean only such costs and expenses as are allowed by law to be taxed as cost. Therefore, according to law, the defendant company is not liable for nor compellable to pay, as costs, the witness fees and mileage of any witness subpœnaed by the plaintiff who was not sworn, examined or tendered by him to the defendant on the trial of said action, as the law does not permit the fees and mileage of any witness for the plaintiff not sworn, examined or tendered as aforesaid, to be taxed as costs against the defendant in said action."

4. "That it appears that in the other two actions no judgments have been rendered, but according to the agreement the costs of each of said actions are to be taxed by the Court or Clerk and paid by the defendant, that is to say, only such costs as are allowed by law to be taxed as costs."

5. "That the costs taxed by the Clerk in both of said actions (see Exhibit 25, report of evidence) are the only legal and proper costs in said actions for which the defendant is liable according to law; and as the defendant has paid the same, it has fully performed on its part the agreement made with the plaintiff as to the costs of said two actions."

The exceptions of the plaintiff were sustained by the Court at the hearing—his Honor holding that the agreement of settlement imposed upon the defendant was a guarantee that the

plaintiff should have no cost to pay, and that it covered all the costs the plaintiff was liable for in law to his own witnesses. We are of the opinion that in that ruling there was error. On the trial below these witnesses of the plaintiff were not sworn, examined or tendered by him to the defendant, and the law does not permit that fees and mileage of any witness, not sworn and tendered to the other party or examined, shall be taxed against that other party.

In *Cureton v. Garrison,* 111 N. C., 271, this Court said: "Where a witness, though duly subpœnaed, is neither examined nor tendered to the opposite party on the trial, his attendance can be taxed only against the party who sum- (251) moned him." To the same effect are the cases of *Loftis v. Baxter,* 66 N. C., 340, and *Sitton v. Lumber Co.,* 135 N. C., 540.

The report of the referee ought to have been confirmed. The judgment of the Court below is

Reversed.

Cited: Herring v. R. R., 144 N. C., 209; *Hobbs v. R. R.,* 151 N. C., 136.

RAMSEY v. BROWDER.

(Filed 18 October, 1904.)

1. COMPROMISE AND SETTLEMENT—*Payments—The Code, sec. 574—Tender.*

   Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise.

2. REFERENCES—*Findings of Court.*

   Where the rulings of a trial judge affect only the conclusions of law of a referee, and he finds no facts, the findings of fact of the referee remain in force.

ACTION by J. L. Ramsey against D. H. Browder, heard by Judge *George H. Brown* at April Term, 1904, of WAKE. From a judgment for the plaintiff the defendant appealed.

Armistead Jones & Son and *J. C. L. Harris,* for the plaintiff.

W. N. Jones, Battle & Mordecai and *J. N. Holding,* for the defendant.

CLARK, C. J. The findings of fact by the referee are
(252) in substance that on 1 January, 1901, there was a balance of $1,548.04 due the plaintiff by the defendant's intestate; that soon thereafter the said intestate "agreed to pay the plaintiff, and the plaintiff agreed to accept, one-fourth of the amount then due in compromise and settlement of the claim, the plaintiff agreeing to accept a portion of the amount in advertising. There was no valuable consideration for this agreement. Subsequently, as a part performance of this agreement of compromise, the plaintiff gave orders upon the defendant's intestate for advertising to be credited on the amount due under the compromise, and all such orders were promptly filled. Such advertising amounted to $112.40. On 12 June, 1901, the defendant's intestate died and the defendant shortly thereafter qualified as her administrator." Also, that the defendant "made demands on the plaintiff to designate the amount the plaintiff would take in advertising and the amount of cash which would be required to settle the compromised debt, and he failed to designate the amounts. The plaintiff did not, at any time after the compromise, make demand on any one for compliance beyond the advertising above mentioned." Upon the above findings of fact the referee's conclusion of law was that "the compromise in the spring of 1901, constitutes a valid, subsisting and enforcible agreement," and that the plaintiff was entitled to judgment for the amount of the compromise, $387.01, less advertising paid, $112.40, *i. e.*, $274.61, with interest thereon from June 25, 1902, the date this action was begun.

Upon exceptions to this report, duly filed, both as to the findings of fact and of law, the Court held:

"1. The entire evidence does not show a 'payment of such less amount' as required by section 574 of The Code."

"2. There has been no performance by the defendant's intestate by paying the said compromise sum," and thereupon rendered judgment for the full amount of the original
(253) debt, $1,548.04, with interest from 1 January, 1901, subject to a credit of $112.40, advertising paid.

The ruling of the Judge leaves all the findings of the referee in force except as modified thereby. *Smith v. Smith,* 123 N. C., 234, there being no specific finding of fact by the Judge, those of the referee stand; *McEwen v. Loucheim,* 115 N. C., 348; *Battle v. Mayo,* 102 N. C., 434. Here the modification is entirely as to the referee's conclusions of law. Prior to The Code, sec. 574 (enacted in 1874-'5, chap. 178), payment by compromise of a lesser sum would not discharge an indebtedness for a larger sum. By that act an agreement to accept a part of a

debt in discharge of the whole was no longer, as before, void, because without consideration and *nudum pactum,* but became a valid, enforcible contract. *Boykin v. Buie,* 109 N. C., 501; *Petit v. Woodlief,* 115 N. C., 120. In both those cases, there was an agreement, as here, to accept the lesser sum, but when payment was offered it was declined. The agreement to accept the lesser sum was held valid and enforcible under section 574. And where new bonds were issued for a smaller amount in compromise of a larger, they were held valid. *Bank v. Comrs.,* 116 N. C., 362.

It is true that while the agreement is valid and enforcible, yet if the debtor, as in *Hunt v. Wheeler,* 116 N. C., 425, repudiate it or unreasonably delay to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. But here a part of the agreed sum was to be paid in advertising. Something (nearly a third) was so paid, but when the plaintiff was called on to designate how much in all should be so paid, he failed to do so. He cannot take advantage of his own wrong. Until he designated the amount to be taken in advertising the defendant could not know how much to pay or tender in money. (254) A case in point is *Tucker v. Edwards,* 7 Colo., 211.

Upon the findings of fact by the referee, which were not disturbed by the Judge and must be taken as true by us, the Court below should have sustained the referee's conclusions of law, or, if the paintiff prefers, he can state the sum he would elect to receive (if any more) in advertising, and the defendant will be allowed a time thereafter, to be specified in the judgment, in which to furnish said advertising and to pay the balance of the compromise in cash. If the defendant does not comply by the date named, then at the next succeeding term the plaintiff shall be entitled to judgment for the original debt, credited with the advertising paid.

Error.

(255)

MILLS v. GUARANTY CO.

(Filed 18 October, 1904.)

1. APPEALS—*Case on Appeal—Transcript.*

Where both parties appeal from a judgment, each appeal constitutes a separate case, and a separate transcript must be sent to the Supreme Court, and where this is not done the case will be remanded.

2. APPEALS—*Case on Appeal—Waiver.*

Where both parties appeal, counsel can not waive a rule of the Supreme Court requiring a separate transcript in each appeal.

3. APPEALS—*Rules of Court—Supreme Court—Arguments of Counsel —Rule 10—Briefs.*

A case can not be submitted in Supreme Court without oral argument unless a printed argument or brief for each party is filed.

ACTION by the Orion Knitting Mills against the United States Fidelity and Guaranty Company, heard by Judge *G. S. Ferguson* at June Term, 1904, of LENOIR. From a judgment for the plaintiff both parties appealed.

N. J. Rouse, for the plaintiff.
Loftin & Varser, for the defendant.

WALKER, J. It is to be regretted that we cannot consider and decide this appeal upon its merits, but we are forbidden to do so by a positive rule of this Court which was adopted as long ago as 1850, in *Devereux v. Burgwin,* 33 N. C., 490, and has been consistently enforced ever since. Both the plaintiff and the defendant appealed, and the appeal of each constituted in this Court a separate and distinct case, and the rule requires that there shall be a transcript in each appeal and that the cases shall be docketed separately. *Morrison v. Cornelius,* 63 N. C., 346; *Perry v. Adams,* 96 N. C., 347; *Jones v.*
(256) *Hoggard,* 107 N. C., 349. An appeal is no less a new and distinct proceeding, instituted by the party who thinks himself aggrieved by the judgment of the Court below, than was a writ of error sued out under the former procedure to correct or reverse the judgment of a court of record of inferior jurisdiction. There has been a decided change in the formalities by which the two proceedings are prosecuted, but no substantial change in their nature.

The requirement of the rule cannot be waived by the consent of counsel. *Perry v. Adams,* and *Jones v. Hoggard, supra; Bank v. Bobbitt,* 108 N. C., 525. Both appeals are entered in the record, and there is a transcript which may be sufficient to present the questions intended to be raised in each appeal, but how can we choose, as between the parties, to which of the two we will give the "benefit of the transcript." It is evident that we cannot do so. It is best, therefore, to enforce the rule. "In this case, says MERRIMON, J., for the Court, in *Perry v. Adams,* 96 N. C., at p. 48: "There is but one transcript. Whose is it? Is it that of the plaintiff, or defendant? We decline to attempt to decide the questions intended to be presented for our decision, until the appeals shall be separated and each assigned its proper place on the docket, and to this end there must be a transcript for each."

There is another objection to the present consideration of these cases. They were submitted by consent of counsel without oral argument under Rule 10, and that rule requires that before the case will be argued a printed argument or brief of counsel for each of the parties must be filed with the Clerk for the use of the Court. Only one printed brief has been filed in these appeals, and that one was filed by the plaintiff's counsel for their client in his appeal. The defendants have filed no brief in that appeal, nor have any of the counsel filed briefs in the defendant's appeal. The two appeals involve different questions, and each must therefore be decided upon principles not controlling in the other. (257)

It follows from what we have said that the appeals are not properly before us. We will not dismiss them, as we are not disposed in any case or under any circumstances to enforce the rules too rigidly when the same end can be attained by less drastic procedure, but we wish to call the attention of the members of the bar to this important rule, to the end that their cases may be heard and decided speedily and at the same time intelligently.

This appeal will remain open on the docket for the present, so that counsel may have a proper transcript sent up and also may have reasonable opportunity for conforming the submission of the case to the requirement of the rule. The case, though, will be remanded for a transcript, which may be sent to this Court in time for the case to be disposed of at this term, if counsel so desire. If not so sent, the case will be continued. It is so ordered.

Remanded.

DEFENDANT'S APPEAL IN SAME CASE.

WALKER, J. This case is, of course, in the same condition as the plaintiff's appeal and must be governed by what is said in the opinion filed in that case. The appeal will remain open on the docket a reasonable time so that a proper transcript may be sent up and briefs filed as required by Rule 10. The case, though, will be remanded for a transcript, which may be sent to this Court in time for the case to be disposed of at this term, if counsel so desire. If not so sent, the case will be continued. It is so ordered.

Remanded.

---

(258)

GODWIN v. TELEPHONE CO.

(Filed 18 October, 1904.)

1. PLEADINGS—*Verification—Officers—The Code, sec. 258—Laws 1901, sec. 610.*

   A managing or local agent of a corporation may verify its pleadings.

2. TELEPHONES—*Mandamus.*

   A prostitute and keeper of a bawdy house can not by *mandamus* compel the installation of a telephone in such house.

ACTION by Jane Godwin against the Carolina Telephone and Telegraph Company, heard by Judge *G. S. Ferguson,* at March Term, 1904, of LENOIR. From a judgment for the defendant the plaintiff appealed.

Dortch & Barham and *Loftin, Mitchell & Varser,* for the plaintiff.

Wooten & Wooten, for the defendant.

CLARK, C. J. The exception to the verification of the amendment to the answer is without merit. Since *Phifer v. Ins. Co.,* 123 N. C., 410, the General Assembly has amended section 258 of The Code by providing (Laws 1901, ch. 610) that when a corporation is a party the verification of any pleading may be made by a "managing or local agent thereof," as well as by an officer who alone, formerly, was authorized to make verification in such cases.

This is an application for a *mandamus* to compel the defendant to put a telephone with necessary fixtures and appli-

ances in the dwelling-house of the plaintiff in the town of Kinston, and admit her to all the privileges accorded to other subscribers to the telephone exchange operated by the defendant in said town. It was admitted by the plaintiff that "she is a prostitute and keeps a bawdy house within the (259) corporate limits of the town of Kinston and desires to have said telephone put in said bawdy house." The Court being of opinion that the plaintiff was not entitled to a *madamus* for such purpose, the plaintiff took a nonsuit and appealed.

There was no error. A *mandamus* lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide the reasonable regulations of the company. This is well settled. *S. v. Telephone Co.*, 52 Am. Rep., 404; 27 Am. & Eng. Ency. (2 Ed.), 1022; 19 *Ibid.*, 877; Joyce on Electric Law, sec. 1036, and numerous cases cited by all these. In *Telegraph Co. v. Telephone Co.*, 61 Vt., 241, 5 L. R. A., 15 Am. St., 893, S. C., 3 Am. Elec. Cases, at p. 435, it is said: "A telephonic system is simply for the transmission of intelligence and news. It is perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealing with all." That case cited many authorities, which are indeed uniform, that the telephone business, like all other services fixed with public use, must be operated without discrimination, affording "equal rights to all, special privileges to none." "Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public," is said in *Telephone Co. v. Telegraph Co.*, 66 Md., 399, at p. 414, 59 Am. Rep., 167, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our Corporation Act on the same footing, as to public uses, as railroads and telegraphs, and the Corporation Commission is authorized to regulate their charges and assess their property for taxation.

But while it is true there can be no discrimination where the business is lawful, no one can be compelled, (260) or is justified, to aid in unlawful undertakings. A telegraph company should refuse to send libellous or obscene messages, or those which clearly indicate the furtherance of an illegal act, or the perpetration of some crime. But recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which were used for the purpose of selling bets on horse races. "Keeping a bawdy house" was an

indictable offense at common law and is still so in this State. *S. v. Calley,* 104 N. C., 858, 17 Am. St., 704; *S. v. Webber,* 107 N. C., 962, 22 Am. St., 920. One who leases a house for the purpose of its being kept as a bawdy house or with the knowledge that it will be used for that purpose, is indictable. 9 A. & E. Ency. (2 Ed.), 527. A *mandamus* will never issue to compel a respondent to aid in acts which are unlawful. *Weidwald v. Dodson,* 95 Cal., 450; *Gruner v. Moore,* 6 Colo., 526; *Chicot v. Kruse,* 47 Ark., 80; *People v. Park,* 117 Ill., 462.

It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character but the character of the business at the house where it is sought to have the telephone placed which required the Court to refuse the *mandamus.* In like manner, if a common carrier knew that passage was sought by persons who are travel-
(261) ing for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing, and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed, the Court will not by its *mandamus* require that facilities of a public nature be furnished to a house used for that business. For like reason a *mandamus* will not lie to compel a water company to furnish water, or a light company to supply light to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance.

The further consideration of this matter is not required on this application for a *mandamus,* but should be upon an indictment and trial of the plaintiff for the violation of law so brazenly avowed by her.

No error.

GAINEY v. TELEGRAPH CO.

(Filed 18 October, 1904.)

TELEGRAPHS—*Negligence—Damages.*

Where a death message was sent to plaintiff, directed "G. (P. O. Idaho), Fayetteville, N. C.," and asked plaintiff to "write" if he could not come, the telegraph company was not guilty of negligence, on receiving the telegram at Fayetteville, in placing it in the post-office, addressed to plaintiff.

ACTION by Noel Gainey against the Western Union Telegraph Company, heard by Judge *R. B. Peebles* and a jury, at February Term, 1904, of CUMBERLAND.

This action was brought to recover damages for the negligent failure to deliver a telegram, which plaintiff alleges caused him great mental anguish. Dr. W. E. Gainey, brother of the plaintiff, died in Mayo, Fla., on 17 No- (262) vember, 1901. There being no telegraph office at Mayo, his widow sent to Live Oak, Fla., which is twenty-three miles from Mayo, the following telegram addressed to the plaintiff:

"MR. NOEL GAINEY,

(*P. O. Idaho*), *Fayetteville, N. C.*

The Doctor is dead. Write if you can come. Died at 7:45 today.

"MRS. W. E. GAINEY."

This telegram was handed by Mrs. Gainey to O. B. Clark at Mayo, with the request that he have it sent from Live Oak over defendant's lines to the plaintiff and it was delivered by Clark to the operator of defendant at Live Oak at about 4 P. M. the day Dr. Gainey died. Clark paid sixty-five cents, the amount charged for transmission, and nothing was said about any extra charge for a special delivery outside of the company's free delivery limits at Fayetteville, to which place the message was addressed and sent. Plaintiff lived near Idaho, which is his postoffice and about one mile and a half from Fayetteville. The message was transmitted from Live Oak on 17 November and received at Fayetteville about 5:30 P. M. on the same day, which was Sunday afternoon. It was then mailed by the operator to the plaintiff at Idaho and was delivered to him by the postmaster the next day about 7 o'clock P. M. These are the material facts. At the close of the tes-

timony the Court, on motion of the defendant's counsel, dismissed the action, under the statute, and plaintiff excepted and appealed.

N. A. Sinclair and *Q. K. Nimocks,* for the plaintiff.
Robert C. Strong, for the defendant.

WALKER, J., after stating the facts. This case is not like any one of the numerous cases we have decided upon
(263) the subject of the liability of a telegraph company in damages for its negligent failure to deliver a message, but we do not think the question involved, when considered with reference to the facts appearing in the record, is at all difficult of solution. It is undoubtedly true, as argued by the learned counsel for the plaintiff, that the company is not exempted from liability merely because the person addressed may chance to live outside its free delivery limits, because it undertakes expressly, and by the very terms of its contract, to make a delivery within those limits free of any charge, and, impliedly, at least, to deliver beyond the fixed limits, for which latter service an extra charge is made, not exceeding in amount the actual cost of such special delivery. The language of the contract in this respect is as follows: "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." We have held that when a message is received at a terminal office to which it has been transmitted for delivery to the person addressed, it is the duty of the company to make diligent search to find him and, if he cannot be found, to wire back to the office from which the message came for a better address, and likewise it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free delivery limits, either to deliver it by a special messenger or to wire back and demand payment, or a guarantee of payment, as it may choose to do, of the charge for the special delivery and, if it fails to deliver without demanding and being refused payment of the charge it will be liable for its default. It is not liable, though, if the sender of
(264) the message, when proper demand is made, refuses to pay the extra charge for a special delivery beyond the limits established for free delivery by the company, provided those limits are reasonable. *Hendricks v. Telegraph Co.,* 126 N. C., 310, 78 Am. St., 658; *Bryan v. Telegraph Co.,* 133 N. C., 603; *Telegraph Co. v. Moore,* 12 Ind. App., 136, 54 Am.

St., 515. To what extent this doctrine should be carried or how far beyond the free delivery limits the company should be required, in any given case, to make a special delivery, we need not now consider, as the question is not presented in this particular appeal. Our case must be decided upon its own peculiar facts, and we can derive little or no aid, except by analogy, from the decisions. The message which was sent to the plaintiff clearly indicated that Fayetteville was the terminal office on the line of defendant to which the message was to be sent, and that the message, when transmitted from Live Oak and received at that office, would have to be transferred to the mails for delivery to the plaintiff. If this is not true, why was there a double address, one to Fayetteville and one to Idaho? There is another significant fact in the case: The message was not only addressed to Fayetteville as the farthest reach of the telegraph service, but Idaho was indicated, not as a place merely of the plaintiff's residence in the vicinity of Fayetteville, but as his postoffice or the place where he received his mail. If the parties intended that the message should be sent to Fayetteville and then given to a special messenger and carried to the sendee at Idaho, why not use the simple word "Idaho," without the prefix "P. O."? But if it was their purpose that the message should go to Fayetteville by wire and then a written copy be mailed to the sendee at Idaho, it would be perfectly natural to use the prefix, and we can readily understand in such a case why it should have been done.

Again, it appears on the face of the telegram that celerity in the communication between the parties was not in this case the sole inducement for using the electric tele- (265) graph. The sender no doubt wished the message to reach the plaintiff sooner than would have a letter, if mailed on the same day at Mayo or Live Oak, but for some unexplained reason it was not expected that the sendee should reply by wire to the telegram. We at first thought that there may have been a mistake in the transmission of the message, but it was admitted in the argument to have been received just as it was sent. Why the sendee should have been requested to write if he could come when his letter could not reach Mayo for two days, and perhaps after the interment, we do not understand, unless he was not much expected to come or, at least, not until after the burial, because of the great distance between the two places. Besides, the plaintiff could have reached Mayo as soon as a letter could be transmitted by mail, and, if he went, there was no need of writing. But whatever the reason of this peculiar wording of the message, we think

if the plaintiff was requested to use the mails, the defendant may well be excused for doing likewise. It is so apparent from the language of the telegram that the company had the right to suppose that it was expected not to make a special delivery but simply to post the message at Fayetteville, that there is no conceivable ground upon which we could hold it to have been negligent to deliver by mail instead of by a special messenger. The message also conclusively showed that there was no telegraph office at Idaho, otherwise it would have been addressed directly to the sendee at that place. That being so, what is said by this Court through CLARK, C. J., in *Bryan v. Telegraph Co.*, 133 N. C., 603, fits the case: "The officer at the receiving point could not have given the sender any information which he did not already have. It was his own negligence not to have paid the special delivery charges, if a special delivery was required." *Telegraph Co. v.*
(266) *Henderson*, 89 Ala., 510, 18 Am. St., 148; *Telegraph Co. v. Matthews*, 107 Ky., 663; *Telegraph Co. v. Taylor*, 3 Tex. Civ. App., 310; *Telegraph Co. v. Swearingen*, 95 Tex., 420. But, as we have shown, a special delivery outside of Fayetteville was not in the minds of the parties. The insuperable objection to the plaintiff's recovery is that the contract of the company, as evidenced by the message and attendant circumstances, if given the most favorable construction for him, does not bring this case within any recognized principle imposing liability upon the defendant for a breach of its duty. If the plaintiff has lost, he has not been injured, as it is expressed in one of the maxims of the law, and the Court was right in dismissing his action.

No error.

ROGERSON v. LUMBER CO.

(Filed 18 October, 1904.)

APPEAL—*Judgments—Interlocutory Orders.*

Where an action to recover damages for cutting timber on land depended on the construction of a will of the previous owner, and the Court, after submission on the pleadings and agreed case, decided the construction issue in favor of plaintiffs and adjudged that they recover such damages as they had sustained by reason of defendant's acts, and retained the cause for the assessment of damages by a jury or by reference, an appeal by defendant from such decision before damages had been assessed and final judgment entered was premature.

ACTION by J. Rogerson and others against the Greenleaf-Johnson Lumber Company, heard by Judge *Frederick Moore,* March Term, 1904, of MARTIN.

This action was brought to recover damages for cut- (267) ting timber on land claimed by the plaintiffs under the will of Joseph Corey. He devised land to his daughter, Sarah F. Rogerson, for her life, and added that if she died leaving no heirs of her body the land should revert to his family. The plaintiffs, who are the children of Sarah, contend that at their mother's death they took a remainder in fee by implication of law. The defendant purchased the timber on the land from Sarah. The plaintiffs further contend that she, having only a life estate, could not convey a good title to the timber as against them. The defendant contends that the limitation over to the family, upon the contingency mentioned, is in the residuary clause of the will and does not apply to the land in controversy, known as the "pocosin land," which is given to Sarah in a separate item, and if it does apply, that Sarah took an estate in fee tail under the rule in Shelley's case, which was converted into a fee simple absolute by the Act of 1784 (The Code, sec. 1325). The matter was submitted to the Court for its decision upon the facts admitted in the pleadings and a case agreed. The Court, "being of opinion with the plaintiffs, adjudged that they recover such damages as they have sustained by reason of the acts of the defendant," and retained the cause for the assessment of damages by a jury or by reference. The defendant excepted and appealed.

Harry W. Stubbs, for the plaintiff.
Gilliam & Martin, for the defendant.

WALKER, J., after stating the case. We cannot decide the interesting question raised in this case, as it is not properly before us. The appeal is fragmentary, not having been taken from a judicial order or determination of the Court which affects a substantial right of the defendant. On the contrary, the appeal was taken from a mere opinion of the Court upon one of the questions of law involved in it, and (268) which did not put an end to the action. We are asked to decide, not the whole controversy but only a part of the case. If we should comply with the request, and the case should be further tried upon the question of damages, and either side should allege errors in the trial of that issue and appeal, we should have the anomalous case presented by two Judges trying different parts of the same controversy, which the law has always required to be tried by only one. It is true

that we can award a new trial upon any one issue, when there has been error only as to that one, and remand the case for the trial of that issue, and the matter may again come before us by appeal, but the appeals will have been taken from final judgments, and the case thus presented, it will be seen, depends altogether upon a principle different from the one which must govern in this appeal. In *Hines v. Hines,* 84 N. C., 122, an appeal was taken from just such a ruling as we have in this case upon a case agreed, in which the question was propounded: "Can the plaintiff maintain his action, and is he entitled to his account of rents and profits?" The appeal was held to be premature, and the language of ASHE, J., who wrote the opinion of the Court, is so apposite that we reproduce it: "The case by the appeal in the manner it is brought before this Court is fragmentary. The law involved is by *'pro forma'* judgment sent to this Court, while the facts and merits of the case are retained in the Court below to await the opinion of this Court upon the question of law. Such a proceeding is an innovation upon the practice of the Court, and to entertain the appeal would be establishing a bad precedent, to which this Court cannot give its sanction. The parties in this case should have gone on regularly to trial of the case upon all the issues raised by the pleadings, according to the regular practice of the Court, and if the Court should have erred in its judgment or any of its rulings, then to have brought the whole case before
(269) this Court by appeal, that its decision upon the questions of law involved and controverted might be finally adjudicated.

Moore v. Hinnant, 87 N. C., 505, is directly applicable: "The statement," says SMITH, C. J., "should embrace all the facts material to a final and complete determination, with nothing further to be done except to carry the judgment into effect. The present statement seems to be defective in not specifying any goods attached and to be restored in case of a decision favorable to the plaintiff." In *Little v. Thorne,* 93 N. C., 69, "the Court was asked to construe a will, and gave judgment expressing an opinion" upon the construction of it, whereupon the plaintiffs appealed. The appeal was dismissed as not taken from any judgment of the Court finally and completely determining the rights of the parties. To the authorities cited above may be added the following cases which are to the same effect: *Comrs. v. Satchwell,* 88 N. C., 1; *Lutz v. Cline,* 89 N. C., 186; *Jones v. Call,* 89 N. C., 188; *Taylor v. Bostic,* 93 N. C., 415; *Arrington v. Arrington,* 91 N. C., 301. The law does not confer upon parties who differ as to the law of their case the right

to propound interrogatories to the Court, on a case agreed, in respect thereto. The case must be so presented as to enable the Court to hear and determine it and to render judgment thereon as if an action were pending. *McKeithan v. Ray,* 71 N. C., 165; Clark's Code (3 Ed.), sec. 567. It was not intended, either by a case under that section or by a case agreed, to provide "a mode of propounding queries to the Court to settle abstract questions of law where no judgment can be rendered directing the defendant to do or not to do some particular act." CLARK, J., in *Farthing v. Carrington,* 116 N. C., 325. There must be a judgment of some kind, upon which an execution can issue or which can be enforced by the process of the Court. *Carter v. Elmore,* 119 N. C., 296.

The right to submit controversies for the decision of the Court, upon facts which the parties have agreed upon, does not exist "unless the question of difference might be (270) the subject of a civil action." *Milliken v. Fox,* 84 N. C., 109. The determination of the matter must therefore be as comprehensive and as conclusive of the rights of the parties, when it is made, as a judgment in a civil action would be. The Court can no more hear a case agreed by little and little or decide it in parts or fragments than it can with legal propriety pursue that course in the trial of a civil action, for which, as far as it goes, the case agreed is a substitute, dispensing with the findings of fact and presenting to the Court nothing but the law, the decision of which will finally determine all the rights of the parties involved in the controversy. The case of *Hicks v. Gooch,* 93 N. C., 112, is in all essential respects analagous to the case at bar. It was an action to recover the possession of land and damages for the unlawful entry and the mesne profits. The issue as to title and the right of possession was tried and an inquiry into the damages ordered to be made by a jury at the next term. The defendant excepted to the rulings upon the first issue and appealed. The Court dismissed the appeal upon the ground that it was fragmentary, and insisted on a strict observance of the rule that an appeal must be from a judgment embracing and settling all the matters in controversy, and having as its basis a verdict upon all the issues. See also *Rodman v. Calloway,* 117 N. C., 13. It may well be doubted if a case can be submitted and decided under sec. 567 of The Code or upon a case agreed, unless the submission extends to every issue necessary to determine the rights and liabilities of the parties, including of course the issue as to the amount of the liability when the case or action sounds in damages.

The appeal in this case was not only premature, having been taken before the case had in its development
(271) reached that stage where the action of the Court could be reviewed, but there was in fact no determination of the Court, which in a proper legal sense was a judgment from which an appeal could be taken. Clark's Code (3 Ed.), sec. 548, pp. 741, 753.

What was done was clearly contrary to the course and practice of the Court and was therefore irregular. If the judgment had been in favor of the defendant it would have been final, and the latter could have appealed, but not so where it was against the defendant, in which event an assessment of damages was required before the controversy could be completely determined and final judgment entered.

The point we have discussed was not made in this Court, but we must take notice of the defect in the record, as we are required by statute to do so, and, besides, it affects our jurisdiction of the case, and one of the first inquiries in every case should be has the Court jurisdiction of the cause and the parties?

In accordance with the rule laid down in the cases we have cited, the appeal must be dismissed and the case remanded, to the end that such other and further proceedings may be had as are agreeable to law.

Appeal dismissed.

Cited: *Billings v. Observer,* 150 N. C., 542.

---

(272)

REGISTER CO. v. HILL.

(Filed 18 October, 1904.)

1. SALES—*Pleadings—Contracts.*

In this action for the price of a machine, a request "to hold the order until the plaintiff heard from the defendants further," to which plaintiff replied that it would hold up the order for a period, does not constitute a countermand.

2. SALES—*Contracts—Actions.*

Where the defendants ordered from plaintiff a cash register, agreeing "in consideration" of shipment to pay in monthly installments, title remaining in plaintiff until all the installments should be paid, plaintiff was entitled, on refusal of defendants to accept the machine when tendered, to maintain an action for the price, and was not limited to damages for breach of the contract.

ACTION by the National Cash Register Company against K. P. Hill and others, heard by Judge *Frederick Moore* and a jury, at January Term, 1904, of FRANKLIN. From a judgment for the plaintiff the defendants appealed.

F. S. Spruill and *Hinsdale & Hinsdale,* for the plaintiffs.
W. H. Yarborough, Jr., and *T. W. Bickett,* for the defendants.

CONNOR, J. The plaintiff is a corporation engaged in manufacturing and selling, upon order, cash registers. On 19 September, 1901, the defendants signed and delivered to plaintiff's agent, J. E. O'Donnell, an order bearing date 1 October for a cash register to be "shipped as soon as possible." Defendants, in said order, promised to pay for said machine $420, of which $50 was to be paid on delivery and the balance in monthly installments of $30 each. Among other provisions in the order was the following: "It is agreed that the title to the said cash register shall not pass until the (273) purchase price or any judgment for the same is paid in full and shall remain your property until that time." The machine was shipped to defendants at Louisburg, 11 January, 1902, and defendants duly notified thereof by plaintiff. Defendants refused to take it from the depot, to make the cash payment or execute the notes according to the terms of the order. The order further provides: "On presentation should there be any failure to pay such draft or execute notes for deferred payments, it is agreed that the full amount of the purchase price shall at once become due and payable. Should there be any default in the payment of any notes it is agreed that all the remaining notes shall at once become due and payable, anything in the notes to the contrary notwithstanding." The plaintiff on 29 September, 1902, instituted this action for the recovery of the purchase price of the machine. The defendants in their answer deny that they purchased the machine, or promised to pay $420 therefor. They admit that they have never paid anything for the machine nor executed any notes therefor. They deny that the machine was delivered to them; they say, however, that at the time the order for the machine was given that it was distinctly agreed between O'Donnell, plaintiff's agent, and themselves that it was not to be sent in or become binding until confirmed by them after they had decided as to the business in which they would engage. That they never confirmed said order or instructed the agent to send it to the plaintiff. That this was acknowledged

by said agent after said order was given. That they never went in the business in which said machine would have been useful or serviceable to them. That when the machine was shipped they immediately declined to receive it and notified the plaintiff. The defendants tendered the following issues: 1. "Did J. E. O'Donnell agree with the defendants not to send in the order signed by the defendants until he should (274) be instructed by them to do so?" 2. "Did the defendants instruct O'Donnell to send in said order?" 3. "What damages, if any, is the plaintiff entitled to recover?" The Court declined to submit the issues tendered, and in lieu thereof submitted the following: 1. "Did the defendants contract and agree to buy from the plaintiff a national cash register?" 2. "What price did they agree to pay therefor?" 3. "How much is still due thereon?" To the refusal of the Court to submit the issues tendered by the defendants, and to the issues submitted by the Court, the defendants excepted. It was admitted that the machine was at the time of the trial in depot at Louisburg.

The plaintiff introduced the order and other testimony tending to show the circumstances under which it was given, and to contradict defendants' averment that there were any conditions attached thereto. The defendants introduced testimony tending to sustain their allegations. The only correspondence introduced was a letter to the plaintiff from its agent dated 20 September, enclosing the order, with the statement that the manufacture of the machine was not to be begun until 1 October, 1901. Letter, 8 October, from plaintiff to defendants acknowledging receipt of order. Letter, 10 October, from defendants to plaintiff asking it to hold the order, saying that they contemplated some change in their business. Letter from plaintiff to defendants acknowledging receipt and saying that they would hold order "for a period;" that the machine was near completion. His Honor, among other things, charged the jury: "If you shall find from the evidence that at the time the order was signed by K. P. Hill & Co., it was delivered to J. E. O'Donnell with the understanding and agreement that the same was not to be sent in to the plaintiff company until he, O'Donnell, had been instructed by K. P. Hill & Co. to send it in; and if you shall also find from the evidence that the defendants did not thereafter instruct said (275) O'Donnell to send in said order, then the Court charges you that there was no contract or agreement for the purchase of a national cash register by the defendants, and you will answer this issue 'No.'" The evidence bearing upon

this issue was then read over and reviewed by the Court, and the various contentions of the parties repeated to the jury. The Court set out in its charge all of the respective contentions of the plaintiff and of the defendants, and directed attention of the jury to the testimony offered by both sides in support of such contention. The defendants made no request for special instructions. To the defendants' exceptions to the refusal of his Honor to submit the first and second issues tendered, it is sufficient to say that the charge of the Court removed any possible objection if there was any. The real controversy was whether there was an unconditional order. The charge presents that question fairly and clearly and the jury found for the plaintiff. The exceptions cannot be sustained. The defendants, however, insist that the contract was executory—that, as found by the jury, they contracted and agreed to buy the machine; that they did not buy the machine; that at the time the order was given the plaintiff had no such machine to sell. They also insist that the order was countermanded before the machine was made; that this being so, the plaintiff should not have completed it but sued for damages for breach of contract, relying upon the decision of this Court in *Heiser v. Mears,* 120 N. C., 443. We do not deem it necessary to discuss the question because the defendants have not, either by their answer or by the issues tendered, presented it. The answer is based upon the contention that the order was conditional, and that the condition had never been performed. This is very different from the contention that although a binding order was given it was, without legal excuse, countermanded, thus admitting a right of action in the plaintiff but denying its right to recover the contract price. The issues ten- (276) dered by the defendants show clearly that such was not their contention. It is not improper to say that there is no evidence to sustain the suggestion of a countermand of the order. The letter of 10 October falls far short of a countermand; it was at most a request to hold the order until they heard further from them. The plaintiff's answer that it would "hold for a period" put the defendants upon notice that it was not construed as a countermand. The defendants, however, insist that, conceding they are wrong in this position, the contract being executory, the plaintiff cannot sue for the price. That it is entitled to recover damages for the breach of the contract, such damages being the difference between the contract price and the market value of the machine; that this is especially the measure of the plaintiff's recovery in this action, because the title to the machine was not to pass by delivery but

to remain in the plaintiff until paid for. The defendants insist that they were entitled to have the third issue tendered by them submitted, so that they could introduce testimony to reduce the plaintiff's recovery by showing the market value of the machine, which should be deducted from the contract price. That after the refusal to submit that issue they were cut off from introducing such testimony. The decision of the question thus raised depends upon whether the plaintiff's exclusive remedy is an action for damages, or whether it may elect to sue for the contract price, or retain the machine and sue for the difference between the contract price and its market value, or adopt another alternative by selling the machine and suing for the difference between the price thus obtained and the contract price. It must be conceded that the authorities are conflicting. In 24 Am. and Eng. Ency., 1118, 1119, both views are stated and the decided cases sustaining them given. An examination of many of the cases sustains the author,
(277) saying that "When title has not passed and the contract is still executory it is usually held that the remedy by an action for damages is exclusive and that an action for the agreed price cannot be maintained. There is authority, however, for the view that the vendor may elect either to sue for damages or to treat the goods as the property of the vendee, notwithstanding a distinct refusal to accept them, and sue upon a contract for the whole contract price; * * * but this rule is frequently confined to cases where the contract calls for goods to be manufactured especially for the vendee." He says that there is much confusion upon the subject, even among cases from the same jurisdiction. He cites no case, nor do we find any in our reports, directly deciding the question. We are therefore driven to the necessity of adopting that rule which seems most consonant with "the reason of the thing" and the upholding of contractual duties and rights. When one has, without valid excuse, broken his contract the courts will not incline to permit him to prescribe the rights of the innocent party. In either view, the law looks to making the plaintiff whole and securing to him his rights under the contract. The difference is rather in the method of working it out. Shall the manufacturer of the machine who, as the jury have found, has performed its part of the contract, be compelled to either send an agent to Louisburg and sell the machine manufactured for the special use and to meet the wants of the defendants, or to reship it to the place of manufacture before he can sue? Is it not more reasonable and just to require the party who is in default to make good his obligation and protect himself by

selling the machine if he does not want it? If the vendor is required to sell or otherwise show the market value he is put to trouble and expense, and subjected to the sometimes uncertain verdict of the jury as to whether he has made the best sale or secured the best price possible, or exercised good judgment in handling the property. The case which we find nearest analagous to ours is *White v. Solomon,* 164 (278) Mass., 516, 30 L. R. A., 537. The defendant gave an order for a manikin to be delivered and for which he was to pay a part cash and the balance in installments. Title was retained by the vendor until the whole amount was paid. . The terms of the contract were strikingly like the one made by the defendants. Mr. Justice *Holmes* says: "The main question is whether the Judge who tried the case ought to have ruled that the plaintiffs were not entitled to recover the price of the article in question, but must offer evidence to the Court upon the question of damages for the alleged breach of said contract. A majority of the Court are of the opinion that this ruling was properly refused. We assume in favor of the defendant, but without deciding that the title to the manikin did not pass by delivery at the express office, but that assumption does not dispose of the case. In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damage for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said, in terms, that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum in futuro*) of the whole value of the manikin, and that the passing of the title shall become as a future advantage to him when he has paid the whole. The words "in consideration of the delivery" are not accidental or insignificant. The contract is (279) carefully drawn so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the

whole value of a chattel before the title passes, there is nothing to prevent his doing so and thereby binding himself to pay the whole sum. * * * When, as here, all the conditions have been complied with, the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised."

It will be noted that in the order given in this case following the direction to ship the machine, are the words, "In consideration of the above," that is, the *shipment*. We can see nothing to distinguish our case from the principles announced by this very able Court. We have quoted the opinion at length because it meets and disposes of the question before us. The defendant does not in his answer raise any issue the finding of which would diminish the recovery. The jury having found that they gave an unconditional order, and the plaintiff having complied with it, we can see no good reason why it may not recover the contract price. The judgment must be affirmed.

Affirmed.

Cited: *Pratt v. Chaffin, post,* 353.

---

(280)

PARKER v. BROWN.

(Filed 18 October, 1904.)

1. EXECUTORS AND ADMINISTRATORS—*Widow—Trover and Conversion—Year's Support—Allotment—The Code, sec. 2121.*

An allotment of a year's support from growing crops at a specified value is sufficiently definite to admit the record thereof in evidence by the widow in an action for the conversion thereof.

2. CROPS—*Leases—Executors and Administrators—Contracts.*

Where a cropper dies before harvesting his crop, his personal representatives are entitled to recover his chare of the crop.

3. LANDLORD AND TENANT—*Crops—Widow—Trover and Conversion—The Code, secs. 1754-1756.*

The widow of a tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord.

4. LANDLORD AND TENANT—*Contracts—Crops—Widow.*

Where a landlord agrees with the widow of a tenant, to whom the crop has been allotted as a part of her year's support, that he will harvest the same, and after deducting the expenses pay her her part, he thereby recognizes the allotment.

5. LANDLORD AND TENANT—*Executors and Administrators—Trover and Conversion—Crops—Widow.*

Where a landlord harvests crops already allotted to the widow of the tenant as a part of her year's support, he holds the same in trust for her, and she may bring trover therefor.

6. LANDLORD AND TENANT—*Damages—Measure of—Trover and Conversion.*

In an action by a widow to recover an interest in crops raised by her husband on leased land, the instruction of the trial judge in this case is proper.

ACTION by Eula M. Parker against W. D. Brown, heard by Judge *W. B. Councill* and a jury, at February Term, 1904, of HERTFORD. From a judgment for the plain- (281) tiff the defendant appealed.

D. C. Barnes and *L. L. Smith,* for the plaintiff.
Winborne & Lawrence, for the defendant.

CONNOR, J. During 1902, W. E. Parker contracted with the defendant to cultivate his land—the defendant furnishing and feeding the team, farming implements, etc., and Parker furnishing and feeding the labor to cultivate and save the crop. The fertilizers were to be paid for by both parties in equal proportions. The crop, except the corn, was to be divided equally; of the corn Parker was to have only one-fourth. Parker cultivated the crop until the latter part of July when he was taken sick, and died on 6 September. A few days before his death the plaintiff, being *enciente,* left the defendant's premises and went to her father's home where she could have attention during her confinement. The plaintiff, after her husband's death, applied to a Justice of the Peace to lay off her year's support. Among other articles allotted to her were "cotton, $60; five barrels of corn, $15; peanuts, $125. The value of all the articles allotted was only $254.75, leaving a deficiency of $245.25," being his interest in the crops raised on the defendant's land.

The Court upon the complaint and answer submitted the following issues: 1. "Did the defendant wrongfully and unlawfully convert to his own use the property of the plaintiff as alleged in the complaint?" 2. "What damage has the

plaintiff sustained by reason of said conversion?" The defendant excepted to the issues and assigns the submission of them as error. The issues are the only possible ones which could have been submitted. The plaintiff offered in evidence
(282) the record of accounts showing the return of the jury allotting the year's support. The defendant objected, but the Court admitted the record and the defendant excepted. The objection cannot be sustained. Section 2121 of The Code directs that the commissioners shall make and sign three lists of the articles allotted, etc. One of them shall be delivered to the widow, one to the personal representatives and one returned to the Clerk of the Superior Court, who shall file and record the same. It is only the list of articles which is to be recorded. The defendant relies on *Kiff v. Kiff*, 95 N. C., 71, to sustain his exception. The allotment here is sufficiently definite. While, as was said by the Court in that case, there should be a reasonable certainty in the description of the property allotted, this beneficent provision for the year's support of the widow should not be defeated by requiring any more than a reasonably certain allotment. Although in the complaint she plainly alleges upon oath that her husband's interest in the crop was allotted to her as a part of her year's support, the defendant, under oath, says that it is "untrue and denied," and it is worthy of note that the justice who made the allotment swears that "two commissioners were with me when this allotment was made; Brown was along when we looked over the crops, was present and showed the crops cultivated by Parker." The defendant introduced no evidence. Certainly there was no room for misunderstanding what property was allotted to the plaintiff. The exception cannot be sustained. The plaintiff swore that she never got anything from the crop except one bushel of corn.

Benthall testified that he was the justice who helped allot the plaintiff's year's support. The record of the allotment being read to him, after objection, he said "the articles were allotted from the crops raised by the plaintiff's husband for 1902. At the time the allotment was made the crops were growing in the field, and we knew no other way to get at it
except to estimate it as we did. We estimated her hus-
(283) band's interest in the cotton crop at $60; his interest in the corn at $15, and in the peanuts at $125. After the allotment I took charge of the crops for her. I walked over the land with the defendant and asked him to take charge of the cotton crop for me and gather it, and he said he would. He was to be paid expenses for saving the crop and for his

trouble. I was to take charge of the peanuts, gather and house them, and help house the corn. We got up some of the corn and divided it under the contract; shocked the peanuts, 300 shocks; could not get laborers to pick them. It was the last of December before I could pick the peanuts. I went there just before or just after Christmas to pick the peanuts, and picked two and a half days. The defendant and I had some disagreement; sent the boy back and the defendant declined to let him have the key. The defendant forbade me interfering with the crops any more, or going in the field where the crops grew. The defendant did not agree to accept me as a tenant. I think the amount the defendant claimed as due for advancements was under $50. The defendant took charge of the crop after he forbade me and the hired hands to save it. The blackbirds damaged the peanuts very much. The cotton was mostly picked out early in the fall. On the day of the allotment the defendant said that the guano account was $40 or $50."

This witness went to the defendant's house just before Christmas to settle, for the plaintiff said that he had come to settle Mrs. Eula Parker's account; and the defendant said he would not receive or accept the money. When asked for the account the defendant refused to present it. He tendered him $57 for Mrs. Parker and he refused it.

The plaintiff testified that she was at the defendant's in October, 1902; he gave her weights of cotton he had gathered. T. T. Parker testified in regard to the cost in saving the crop, to the value of the crops, etc. All of the (284) testimony was objected to and the defendant excepted. The defendant introduced no testimony, but moved the Court to dismiss the action as upon nosuit. The motion was denied and the defendant excepted.

The Court instructed the jury that if they believed the evidence they would answer the first issue "Yes;" that one-half the cotton and peanuts and one-fourth the corn raised by W. E. Parker on the defendant's land for the year 1902 was the property of the plaintiff. To this charge the defendant excepted.

In his brief the defendant attacks the validity of the allotment for uncertainty. The objection, as we have said, cannot be sustained. The allotment being valid, the plaintiff became the owner of such interest as her husband had in the crops. *Kiff v. Kiff, supra.* The defendant insists that the husband was a mere servant and that he was only entitled to wages, and then only upon condition that he completed his term of

service and cultivated and harvested the crops—such wages to be measured by the amount of the crops raised; that he had no property in or right to the possession of any part of the crops upon which to base an action for a conversion. The form of the action or the prayer for relief is immaterial. The plaintiff has made a clear, plain statement of her rights and her wrongs. The defendant denies each allegation, and "for a further defense" sets out in detail his version of the transaction; when the plaintiff introduces testimony the defendant, by his demurrer admits it, and the jury find it to be true, sustaining her allegations. The defendant relies upon *Thigpen v. Leigh,* 93 N. C., 47. While this Court held in that case that a contract to make and save a crop was entire, and if the plaintiff of his own accord and without any legal excuse abandons the crop he loses his right or interest therein,

(285) the Court has not decided that where, as is admitted in this case, the lessee has made the crop and harvest time has come and he sickens and dies, the lessor may take the entire crop and refuse to render any account of it, or pay over the proceeds after deducting all amounts due for advancements and for saving the crops to the representatives of the lessor. It matters but little, if at all, in what form of action the widow, who has by the allotment of her year's support become entitled to her husband's interest, seeks to have a settlement with the lessor and payment of the amount due her for the support of herself and her infant children. The Court will hear her complaint and afford to her a remedy if upon "a plain and concise statement of the facts constituting a cause of action" she be entitled thereto. We will not, since the adoption of The Code of Civil Procedure, stop to inquire whether the cause of action be in trover or detinue, or whether, except for the purpose of jurisdiction, it be *ex delicto* or *ex contractu.* If she has a legal right of which the defendant has deprived her, the Court will find and administer a remedy corresponding to her right. This is the perfection of remedial justice.

Assuming, however, that the contract made by Parker with the defendant was entire, and that the portion of the crops which he was to receive at the end of his term of service was in the nature of wages, it is well settled that his failure to perform in full being caused by sickness and death, he does not lose his right to be paid as upon a *quantum meruit.*

The principle enforced in *Thigpen v. Leigh, supra,* has been modified by this Court in *Chamblee v. Baker,* 95 N. C., 98. Referring to that case, SMITH, C. J., says: "It is otherwise

under the present system, and the entire dispute, involving opposing demands, is now adjusted in a single action. This is some relaxation of the doctrine regarding special contracts and the enforcement of the obligations they create. The manifest injustice, upon such technical grounds, of refusing all compensation for work done and not completed (286) * * * and allowing the party to appropriate them (the benefits) to his own use without paying anything, has been often felt and expressed by the judges and a mode sought by which the wrong could be remedied"—citing *Gorman v. Bellamy,* 82 N. C., 496. See also *Brown v. Morris,* 83 N. C., 251, and *Ice Co. v. Coal Co.,* 134 N. C., 574. In *Thigpen v. Leigh, supra,* it appeared that the lessee "of his own accord abandoned the crop in June." However this may be, and without intending to question the principle upon which that case is sustained, further than it may be modified by *Chamblee v. Baker, supra,* it is clear that when the lessee is prevented by the visitation of God, as sickness or death, from performing his contract in full, he or those in succession may recover the amount of the compensation promised, subject to the deduction of such loss or damage as is sustained by his sickness or death.

In *Wolfe v. Howes,* 20 N. Y., 197, 75 Am. Dec., 388, it is said: "There is good reason for the distinction, which seems to obtain in all the cases, between the case of a willful or negligent violation of a contract and that when one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach and tends to preserve the contract inviolable; while in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance." This exception to the general rule is in accordance with the maxim, *actus dei neminem facit injuriam,* and is sustained by a number of cases cited in 20 Am. & Eng. Ency. (2 Ed.), 44.

We do not, however, assent to the proposition that the lessee is a mere servant working for wages. He has an interest in the crops subordinate, it is true, to the rights of the lessor, landowner, as prescribed by section 1754 of The (287) Code. This section, it will be observed, is a part of the Landlord and Tenant Act of 1876-77, and expressly refers to lands rented or leased for agricultural purposes. It is true that the term "cropper" is used in some of the cases in our reports, but, except in the sense that the lessee makes a crop

and the lease or contract has that object in view, the term is not in harmony with the language of the statute. We do not intend by anything said herein to question or doubt the well-defined and secured rights of the landowner as provided by statute and the decisions of this Court. We cannot, however, give our assent to the construction of the statute contended for by the defendant. It recognizes that in many respects the lessee has a property in the crops made, and it is for this reason that, for the purpose of protecting the lessor in the payment of his rent and the performance of any stipulations in the contract, such as ditching, fencing, etc., and the payment of advancements made, it provides that "any and all crops shall be deemed and held to be vested in possession of the lessor or his assigns." * * * In the next sentence the right of the lessor is referred to as "this lien." * * * In section 1755 the lessee is given the right, by complying with the statute, to bring an action for the recovery of such part of the crops as he may be entitled to. In this case the plaintiff was not compelled to resort to the remedy prescribed by section 1756 of The Code. She may pursue her remedy by a civil action to recover the value of the crops, subject to such deductions as the lessor was entitled to by reason of advancements, cost of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract.

There is, however, another view of the case upon which the plaintiff is entitled to maintain her action. It is admitted by the demurrer to the evidence that the defendant, after (288) the allotment of the year's support of which he had full knowledge, agreed with her father that he would gather the cotton, receiving pay for his expense and trouble, and that the father should gather the peanuts and corn. While the defendant did not by this agreement forfeit any of his rights as lessor to be paid the amount due him, he did recognize the right of the plaintiff to have her husband's interest in the crops as allotted to her. When the crops came into his actual possession, either by being saved by himself or by her father, he held them in trust, first to pay himself the amount due, and then for the plaintiff. The failure of the plaintiff's agent to pick the peanuts by January 1, 1903, they having been shocked, did not work a forfeiture of her interest therein; it only entitled the defendant to proceed to have the peanuts picked, and deduct the amount paid therefor and any damage he may have sustained by reason of the failure of the plaintiff to do so.

It is further admitted by the demurrer that just before or after Christmas the plaintiff's father offered to pay the defend-

ant what she owed him, which he declined to accept. He asked for a statement of his account, and upon his refusal to give it he tendered the amount which the defendant had said was due for fertilizers, all of which the defendant refused. The defendant in his answer says that he had a statement of all amounts paid out for saving the crops, but for some reason he fails to introduce any evidence to sustain his allegations. It is true that at the time the demand for settlement was made, some four hundred or five hundred pounds of cotton remained in the field, and the peanuts had not been picked. If the defendant had given this as a reason for not at that time coming to a settlement, the plaintiff would have then had no cause of complaint. He gives another and entirely different reason, indicating clearly that he does not recognize the plaintiff's right to have an account or make any claim to the crops. This was a clear denial of any duty to the plaintiff to respect (289) to the crops and entitled her to bring her action. In any point of view, the Court below correctly refused to dismiss the action, and charged the jury that if they believed the evidence to answer the first issue "Yes." This case is clearly distinguished from *Shearin v. Riggsbee,* 97 N. C., 216, and *Waller v. Bowling,* 108 N. C., 289, 12 L. R. A., 261. The special requests for instructions were all based upon the defendant's contention that the plaintiff was not entitled to maintain her action, and are involved in the motion to nonsuit. They are disposed of by the ruling sustaining his Honor's refusal to direct a nonsuit, and approving the charge upon the first issue.

His Honor charged the jury upon the second issue as follows: "In arriving at your conclusion as to this, you will first ascertain the value of the cotton and peanuts which were raised on the land of the defendant by the plaintiff's husband in 1902; from this you will deduct the cost of the fertilizers used for these crops. You will then ascertain the value of the corn that was raised on this land and the cost of the fertilizers used for this crop; then deduct the cost of the fertilizers from the value of the corn; then divide the amount into four parts, and divide the value of the cotton and peanuts as found by you into two parts; then take one of these parts and one-fourth of the value of the corn and add these items together, and you will then have the amount or value of the plaintiff's interest in the crops, subject to expense of taking care of them by the defendant. From the amount ascertained as the value of the plaintiff's interest in the crops you will then deduct such amount as you find was reasonably necessary to take care of the crops as the husband of the plaintiff was required under his rental contract with

Brown, and then deduct this sum from the amount you find as the value of the plaintiff's interest in the crops subject (290) to this charge, and the amount left will be your answer to the second issue." The defendant excepted. The instruction was correct, and gave the jury the proper rule for arriving at the verdict. If the jury have failed to reach a correct verdict on the second issue, the defendant has no just cause to complain. He alone had the data by which to fix the amount of the plaintiff's interest in the crops after paying all liens thereon. He, we must assume, for reasons satisfactory to himself, withheld it and left the plaintiff to make out her case and the jury to act upon such testimony as she could give them. He shows no damage sustained by the death of the lessee or delay in gathering the peanuts. It is not for us to do more than decide the questions of law presented upon the record, but we cannot refrain from saying that it would seem that a matter so simple, and rights so manifest, might have been settled easily and promptly. The husband died 6 September, 1902, leaving the fruits of his year's labor in the field. The widow and her infants are not yet in the enjoyment of a year's support. We have examined the record and briefs of counsel with care and find no error in the judgment. Let it be

Affirmed.

Cited: Sessoms v. Taylor, 148 N. C., 371.

---

(291)

EASON v. DORTCH.

(Filed 18 October, 1904.)

MORTGAGES—*Foreclosure—Trusts—Executors and Administrators—The Code, sec. 1276—Laws 1901, ch. 186.*

The executor of a trustee in a deed of trust has no power to sell the property conveyed therein, in the absence of a request so to do by one of the *cestuis que trust.*

ACTION by F. P. Eason and others against I. F. Dortch and others, heard by Judge *M. H. Justice,* at February Term, 1904, of GREENE. From a judgment for the defendant the plaintiff Eason appealed.

L. V. Morrill and *G. M. Lindsay,* for the plaintiff.
L. I. Moore, for the defendant.

CLARK, C. J. This is an action for an injunction to prevent a sale of the land of the plaintiffs, which would cast a cloud upon their title. Omitting details unnecessary to the point upon which we place our decision, a deed in trust had been executed upon said land with a power of sale, W. T. Dortch being named as the trustee. Subsequent to the death of the trustee, his executor, the defendant Isaac F. Dortch, has advertised the land for sale by virtue of said power of sale in said deed of trust. In an affidavit filed in this cause by said Dortch he admits that he has not been requested, in writing or otherwise, by any of the *cestuis que trustent* in said deed to advertise the land for sale and has not had any correspondence or communication for years with either of them. Thereupon the injunction was continued to the hearing, and upon appeal that order was affirmed by a *per curiam*. *Eason v. Dortch,* 134 N. C., 753. At the hearing it does not appear that there was any additional evidence to the admissions in the pleadings and affidavits previously filed, but the Judge sustained (292) a demurrer to the evidence and rendered judgment as of nonsuit against the plaintiffs. Prior to chapter 186, Laws 1901, amending section 1276 of The Code, the personal representative of a deceased trustee in a deed of trust to secure a debt had no power to execute the same, and that act, while conferring such power, contains this restriction: "Provided that the administrator or executor of a trustee shall not execute the powers conferred by this act except upon the written request of any creditor secured in or by the deed of trust." There was no evidence or finding of fact contrary to the above affidavit in the cause filed by the defendant Dortch. The injunction was erroneously dissolved, and in rendering the judgment of nonsuit there was

Error.

MONTGOMERY, J., concurring. I concur in the opinion of the Court in its conclusion that the defendant Dortch should have been enjoined from making sale of the property advertised by him. In his answer he did not aver that he had been requested, in writing, by the *cestuis que trust,* the other defendants, to make the sale. In fact, in an affidavit filed in the cause, he admitted that he had not received instructions to make the sale. Our statute (Laws 1901, chap. 186) requires such written instructions and request as a condition precedent to the sale. But that was not the main point in the case, and I desire to express my views upon what I regard the real question raised by the appeal in addition to the matter decided by the Court.

This action was brought under chapter 6, Laws of 1893 for the purpose of having determined and settled an adverse claim of the defendants to a certain piece of land now in the possession of the plaintiffs and claimed as their property. The
(293) defendants, William R. Devries, Devries, Young & Co. and W. R. Devries & Co., who, according to the allegations of the complaint, are setting up an adverse claim to the property, failed to put in an answer to the complaint.

Laws 1893, chap. 6, provides that if the defendant in such an action "disclaims in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." Therefore the plaintiffs here, because the defendants failed to answer, are entitled to a judgment, either final as of *pro confesso,* or interlocutory by default and inquiry, but without recovering their costs. At the proper time the plaintiffs moved before the Court below for final judgment against the defendants above named for want of an answer on their part and the motion was denied. I am of the opinion that such a judgment should have been rendered. This view I am aware is in conflict with the case of *Junge v. MacKnight,* 135 N. C., 105, and I am glad to have an opportunity to say that the decision there was erroneous. The Judge who wrote for the Court that case was well aware at the time that it threatened titles to property acquired under decrees and judgments rendered under the almost uniform practice of the courts for many years, as well as produced uncertainty as to the future practice in an important line of cases. But he felt constrained to take the position announced by a majority of the Court because of the clear and explicit language of sections 385 and 386 of The Code. However, he is now well satisfied that too much consideration was given to the language of the sections, and not enough to the reason of the law and to other sections of The Code, to wit, sections 286 and 393 and the decisions of the Court on the subject. The plaintiff in the present case filed his complaint as the law directed, and the defendants should, under The Code, have demurred or answered. Not
having done either every material allegation of the com-
(294) plaint was to be taken as true. The Code, sec. 268.

What kind of a judgment, then, were the plaintiffs entitled to? It could not be one by default and inquiry, for the reason that under section 268 of The Code there was nothing left to be inquired into. The material allegations of the complaint were to be taken as true. In *Bonham v. Craig,* 80 N. C., 224, it was alleged in the complaint that there was no consideration for the deed, and the allegation was not denied. The

Court said there: "The fact is therefore admitted, and the effect of the admission is as available to the plaintiff as if found by the jury." *Cook v. Guirkin,* 119 N. C., 13. It must be, then, that sections 385 and 386 of The Code have reference to actions for the recovery of money, section 385 applying to actions in the nature of *debt,* the amount being fixed and determined and due by contract; and section 386 applicable where the action sounds in damages. In the former case the judgment is by *default final.* In the latter case there is something to be inquired into and the judgment is to be by default and inquiry. The cause of action is admitted by a failure to answer, but the amount of the recovery is uncertain and to be inquired into. In the present case, therefore, the defendants having failed to answer and the action being not for a money demand, every material allegation of the complaint is admitted and the plaintiffs were entitled to a final judgment, not necessarily for all relief they seek in the complaint, but such as by law they were entitled upon the complaint. And that brings up for consideration the nature and particulars of the complaint. In 1877 Isaiah Rawles and Ann S. Rawles his wife, executed a deed of trust to W. T. Dortch, the defendant's testator, upon a tract of land of 452 acres belonging to the wife, Ann S., to secure a large debt due to the other defendants. The wife, however, reserved her homestead exemption in the tract of land.

The trustee, in 1879, instead of selling the land on de- (295) fault of the payment of the debt under the power contained in the deed of trust, resorted to foreclosure proceedings in the Superior Court of Greene County. Service of the summons issued in that action in September, 1878, was accepted by the wife, Ann S., but it was not served on the husband. That summons was not returned and no complaint was filed. At the March Term, 1879, another summons was issued against both the husband and wife, but service was made upon the husband alone. The complaint was filed in which a sale of the property was demanded for the payment of the debt, and it was expressly declared that the tract of land was the property of the wife and that she had reserved her homestead interest in it. A decree was made in which it was adjudged that the defendants then be foreclosed of the equity of redemption in the land, subject, however, to the defendant Ann S. Rawles' homestead right therein, and the defendant in this action, Isaac F. Dortch, was appointed commissioner to make sale and title to the purchaser in case the amount of the debt fixed in the decree was not paid by a day certain. The commissioner made the sale and reported to Court and it was confirmed. The report of sale was in the

following words: "That he sold said lands, subject to the homestead right therein of the defendant Ann S. Rawles, after due advertisement, for cash, at the court-house door in the town of Snow Hill, on Saturday, 17 January, 1880, at public auction, at which time and place William R. Devries became the purchaser of said lands, as the last and highest bidder, at the price of 1,500. That said sum is a fair, just and reasonable price for said lands. He, therefore, recommends that said sale be in all respects confirmed."

The following is a part of the decree of confirmation: "The commissioner Isaac F. Dortch having reported to this term that he sold the lands described in the pleadings on
(296) 17 January, 1880, subject to the homestead right of the defendant Ann S. Rawles, to William R. Devries, who is one of the plaintiffs, for the sum of $1,500, which sum he reports to be a fair price, and there being no exception filed it is ordered, adjudged and decreed that the sale be confirmed, and said commissioner is ordered to make title in fee to said purchaser for said lands, subject to the homestead right of said Ann S. Rawles, as the same existed at the date of the mortgage named in the pleadings."

Mrs. Rawles had her homestead laid off to her and has since died.

W. R. Devries, one of the defendants, purchased the land at commissioner's sale, having been authorized in the decree to do so, and the plaintiffs claim title to that part of the land upon which Mrs. Rawles selected as a homestead through mesne conveyances from W. R. Devries. Isaac F. Dortch, as executor of W. T. Dortch, who was the trustee named in the deed of trust, has advertised the 542-acre tract of land for sale, the proceeds to be used towards the payment of the balance of the debt mentioned in the deed of trust after the application of the proceeds of the sale of the land by the Court's decree. The ground upon which he claims the right to sell the property is that this Court, in *Swift v. Dixon,* 131 N. C., 42, has decided that W. R. Devries got no title to the land at the commissioner's sale and that the deed of trust is still valid and subsisting. In that case it was decided that Ann S., the wife, was not a party to the suit of the foreclosure proceedings on the ground that there was no connection between the first summons in that proceeding and the last one.

The reasonable and fair interpretation of that decision of the Court is that Devries did not get the title of the wife Ann S., but it does not follow that he did not get the husband's interest in the land. But however that may be, the ques-

tion is whether this land should be sold again in the face (297) of the record in the foreclosure procedings and the deed which Devries, the purchaser, has executed to another for a full and fair price to the land. As has been seen and pointed out from the complaint in the foreclosure proceedings Ann S., the wife, was treated as if she was before the Court in all respects; the prayer was that the *land* itself should be sold subject to her homestead right; in the decree of sale the *land* was ordered to be sold subject to her homestead right and not the interest of the husband in the land; in the report of sale the commissioner said that he sold the *land* subject to the homestead right of the wife, and not the interest of the husband, and that the land brought a fair price, and in the decree of confirmation it was recited that the *land* had been sold subject to the right of the wife's homestead and not the interest of the husband and that the price was fair. I think, therefore, that it would be against good conscience and inequitable to permit the defendants to have the threatened sale of the land claimed by the plaintiffs, and that the proceedings and the judgment in the foreclosure proceedings are an estoppel of record against the defendants. The plaintiffs were entitled to their judgment in the Court below from my point of view.

CONNOR, J., concurs in the concurring opinion.

Cited: *Junge v. MacKnight,* 137 N. C., 288.

---

(298)

BEAL v. RAILROAD CO.

(Filed 25 October, 1904.)

1. EMINENT DOMAIN—*Railroads—Damages—Easements—The Code, sec. 1946.*

   The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken.

2. EMINENT DOMAIN—*Railroads—Easements—Judgments—Damages.*

   In an action for damages for the location of a railroad on the land of the plaintiff the judgment should definitely fix the land over which the road is located and the width of the right of way.

ACTION by J. W. Beal against the Durham and Charlotte Railroad Company, heard by Judge *H. R. Bryan* and a jury,

at February Term, 1904, of CHATHAM. From a judgment for the plaintiff the defendant appealed.

Womack & Hayes, for the plaintiff.
Guthrie & Guthrie, for the defendant.

CONNOR, J. This is a special proceeding brought by the plaintiff to recover damages to his land over which defendant corporation has located its track. There are a number of questions raised which we do not deem it necessary to consider. The pleadings and verdict of the jury establish the following facts: The road was originally located during 1893 over a tract of land which did not at that time belong to the plaintiff. The claim for damages on account of that entry and location is barred by the statute of limitations and is thus eliminated from the case. The defendant, within two years and prior to the purchase of the land by the plaintiff, relocated its road, changing its line so as to avoid a curve over the land purchased after such relocation by the plaintiff. The jury find that (299) by this entry and location the plaintiff has sustained one hundred and fifty dollars damage. The defendant moved in arrest of judgment, assigning quite a number of grounds therefor. The principal contention is that at the time of the entry and new location the land did not belong to the plaintiff, and that whatever damage was sustained belongs to the plaintiff's grantor; that plaintiff took the land subject to the burden. This Court has decided the question adversely to the defendant's contention. We can add nothing to the discussion of the question by SHEPHERD, J., in *Livermon v. R. R.,* 109 N. C., 52; *Phillips v. Telegraph Co.,* 130 N. C., 513, 89 Am. St., 868. The claim of the plaintiff is not for a trespass, which is personal and does not pass with the title, but for payment of an easement acquired by the defendant by the entry and location of its roadbed. The defendant was entitled by its charter or by section 1946 of The Code to enter upon the land and locate its road. It acquired the easement, either by condemnation proceedings properly conducted, or by paying the value thereof, as assessed in a proceeding brought by the owner of the land. The measure of damages in such case is pointed out in *Livermon v. R. R.,* 114 N. C., 692, and his Honor confined the jury to the rule therein prescribed. The defendant says, however, that the description of the land in the complaint is too indefinite and the extent of the easement to be acquired is not fixed in the judgment. That under section 1946 of The Code it is entitled to have a copy of the judgment

recorded in the office of the Register of Deeds in the county wherein the land lies and this record shall constitute its muniment of title. That the judgment rendered in this proceeding neither describes the land or the width of the right of way acquired, nor does it make any reference to the charter or the complaint by which its rights may be fixed. We are of the opinion that the defendant's contention in this re- (300) spect is well founded. The judgment is framed as in an ordinary action for damages for a trespass and confers upon the defendant no right to any easement. The reason upon which the plaintiff is held to be entitled to recover is that he in this manner receives payment for the permanent burden imposed upon his land, and certainly when he receives the amount awarded him the defendant should have some record evidence of the extent of the right thereby acquired. The complaint should have given a more definite description of the land over which the defendant had located its road. The Court upon motion would have required him to have done so, but the defendant made no such motion. If the plaintiff desired to restrict the width of the right of way he should have alleged that full width which defendant was empowered to take was not necessary for its roadbed, etc., or if defendant did not wish to acquire an easement to the extent of its chartered right and pay therefor, either party may have so stated in the pleadings. In the absence of any such suggestion we must assume that it was intended to vest in the defendant a right of way of the width fixed by the charter. This was conceded on the argument. The judgment should be so drawn as to fix definitely the land over which the road is located, the width of the right of way, either by examining the charter, which for that purpose may be put in evidence, or by referring to it by title, etc. When the judgment is so reformed the plaintiff will be entitled to the amount assessed as compensation for the easement. The other grounds upon which the motion in arrest is made cannot be sustained. Neither party will recover any cost in this Court. The judgment is

Modified and affirmed.

Cited: *R. R. v. Olive*, 142 N. C., 270.

(301)

JOYNER v. FUTRELL.

(Filed 25 October, 1904.)

1. LIMITATIONS OF ACTIONS—*Remainders—Estates—Adverse Possession.*

The statute of limitations does not run against a remainderman until the death of the life tenant.

2. JUDICIAL SALES—*Sales—Executors and Administrators.*

A confirmation of a sale of the estate of a decedent is a condition precedent to the exercise by an executor of the right to convey title.

ACTION by M. F. Joyner against C. Futrell, heard by Judge *W. B. Councill* and a jury, at January Term, 1904, of NORTHAMPTON. From a judgment for the plaintiff the defendant appealed.

Peebles & Harris and *Gay & Midgette,* for the plaintiff.
Winborne & Lawrence and *W. E. Daniel,* for the defendant.

WALKER, J. This is an action to recover real property. Both parties claim, either mediately or immediately, under the will of James McDaniel, the land in controversy known as the "eastern portion of the Marsh tract" devised in the first item of the will to A. J. Harrell, trustee for Rebecca Blythe, during her life and at her death it was devised to James Bryant, and the other portion of the tract was devised in the second item to M. F. Joyner, the plaintiff. In the third item it is provided that if Bryant or M. F. Joyner, the plaintiff, should die without heirs of his body, the survivor should have the share of the one so dying. Bryant died without heirs of his body and Rebecca Blythe died afterwards and about four years before this action commenced. The defendant claims the land
(302) by virtue of a sale made under an order of the Court in a proceeding brought in the late County Court by A. J. Harrell, executor of James McDaniel, against the devisees and heirs at law for the sale of the land for assets, and mesne conveyances connecting him with the title of the purchaser at that sale, and he contends that the said proceeding and sale divested the plaintiff of the title he acquired under the will, which was passed to the purchaser at the sale and which has been vested in the defendant by the mesne conveyances. So that the plaintiff is entitled to recover the possession of the land in this case unless that proceeding and the sale were valid and must have

the effect of defeating his title and consequently his right of possession.

The evidence in regard to the proceeding to sell the land for assets in very meager. It consists of (1) an order of sale by which license is given to the executor to sell the real estate of his testator to pay the debts of the estate; (2) a report showing that he had sold the land to James Bolton for $125 and taken bond and security for the purchase money, as required to do by the order of the Court; (3) an entry on the docket of the Court as follows: "Northampton County. September Court, A. D. 1867. The foregoing report of the account of sale of the land belonging to the estate of James McDaniel, deceased, is returned in open Court on oath by A. J. Harrell, executor, and is ordered to be certified and recorded"; (4) a deed from the executor to Godwin M. Powell for the land, in which it is recited that it was sold under an order of the Court and that Powell became the purchaser. There is no affirmative proof that the plaintiff was made a party to the proceeding by the service of process, nor is there any evidence that the sale was ever confirmed by the Court. It also appeared from the documentary evidence that the executor of McDaniel had filed his petition at December Term, 1867, of the County Court in a proceeding against McDaniel's heirs and devisees (303) for a final settlement of his executorship, and his final account showed that he had received as executor a certain gross sum, but it did not appear (unless by inference) that the purchase money of the land was a part of that sum. In that proceeding the executor's final account was approved and confirmed.

It was admitted that the defendant and those under whom he claims have been in the adverse possession of the land since 1867 claiming the same by virtue of the said sale and deed of the executor. The adverse possession of the defendants under color cannot avail them for the purpose of ripening their title. It is an elementary principle that the statute of limitation does not run against any person until his right of action has accrued, and in this case it did not accrue to the plaintiffs, as against the defendants, until the death of the life tenant, Rebecca Blythe, which occurred on 15 May, 1900. So long as she lived they had no right of possession upon which to base a suit for the recovery of the land. *Everett v. Newton,* 118 N. C., 919; *Woodlief v. Wester, ante,* 162.

The only other question which we need consider, that is, as to the validity of the deed of the executor and its sufficiency to pass the title, without any confirmation of the sale by the Court, is equally well settled. This Court, and all courts, we

believe, having jurisdiction to pass upon judicial proceedings for the sale of land have uniformly held that it is necessary that the sale be reported to the Court, and that it be confirmed before the commissioner or other person appointed by the Court to make the sale can have any power to make title to the purchaser. The commissioner is invested with a naked power which must be exercised under the supervision and control of the Court, and he has no authority to act save that which he derives from the Court under its order or judgment. The bidder at a judicial sale, on the other hand, acquires no
(304) right before the sale is reported by the officer and the sale is confirmed by the acceptance of his bid. Until then the bargain with him is not complete and he acquires no title of any kind to the land. He is regarded as a mere preferred proposer until he has been accepted by the Court as the purchaser, and every bidder is presumed to know, because he should know, that his bid is made subject to the condition of its acceptance or rejection by the Court. A formal direction to make title is not always necessary to confer upon the commissioner the power to convey the land to the purchaser by deed, but a confirmation of the sale cannot be dispensed with in any case, unless perhaps in some way it has been waived. It is a condition precedent to the exercise of the right to convey the title. This principle has been settled by numerous authorities. *Bost, ex parte,* 56 N. C., 482; *Brown v. Coble,* 76 N. C., 391; *Mebane v. Mebane,* 80 N. C., 34; *Latta v. Vickers,* 82 N. C., 501; *Foushee v. Durham,* 84 N. C., 56; *Miller v. Feezor,* 82 N. C., 192; *Attorney-General v. Navigation Co.,* 86 N. C., 408; *Dickerson, ex parte,* 111 N. C., 108; *Vanderbilt v. Brown,* 128 N. C., 498; *Mason v. Osgood,* 64 N. C., 467; Rorer Jud. Sales, sec. 122.

In this respect a judicial sale differs from one made by an individual or a sheriff under an execution in his hands. When confirmation of a judicial sale takes place the purchaser acquires an equity to call for the title upon payment of the purchase money (*Farmer v. Daniel,* 82 N. C., 152), and when the transaction is completed by confirmation and conveyance of the title, it all relates back to the day of sale, and the purchaser is invested with the title as of that time. Rorer, *supra,* 122; *Vass v. Arrington,* 89 N. C., 10. As the sale under which the executor made the deed had not been confirmed by the Court, so far as appears in this case, the act of the executor in
(305) attempting to pass the title was without any authority and void. It follows, therefore, that the defendant has acquired no title or right to the possession of the land under

the executor's deed, and, as that is his only source of title, he cannot successfully resist the recovery of the plaintiff in this case. We have found nothing in the record in the nature of a recital, nor any facts from which we can draw any inference or presumption that will change this result. The long possession of the defendant, and those under whom he claims, does not furnish any reason for presuming anything in favor of the regularity of the proceeding and the validity of his deed, as the plaintiff was never put to his action or required to assert his right to the possession of the land until a few years ago. But while the defendant must lose in this suit we think he may yet apply to the Court in the other proceeding, which is still pending, and obtain relief, provided that, upon the facts as they may be made to appear to the Court, he is entitled to it. If he desires to pursue that course he may, as ancillary to his remedy, move the Court for a stay of the writ of possession in this case until that matter can be heard and determined. We are not intimating an opinion upon the merits of such an application in any of its stages, but what has been said is intended to show that the defendant's remedy is not in this action but in the proceeding for the sale of the land. *Lord v. Beard,* 79 N. C., 5; *Lord v. Meroney,* 79 N. C., 15.

With every disposition to sustain proceedings in the County Courts and courts of equity, where the practice and procedure seldom conformed strictly to the law because of the loose methods obtaining in them, we are unable to discover any ground on which we can uphold the proceeding upon (306) which the defendant relies in this case.

The ruling and judgment of the Court below were correct upon the facts as they appeared at the trial.

No error.

Cited: *Webb v. Borden,* 145 N. C., 202.

BROOKS v. HOLTON.

(Filed 1 November, 1904.)

1. PARTIES—*Solicitor—Debts of Decedents—Clerks of Courts.*

A solicitor can not sue for the benefit of the distributees of a deceased person to recover money paid to a clerk of the Superior Court.

2. PARTIES—*Solicitor—Debts of Decedents—Pleadings—Amendments.*

Where a solicitor sued to recover money for the distributees of a decedent, an order directing that said distributees be made parties plaintiff was proper.

ACTION by the State on relation of A. L. Brooks, Solicitor, against A. A. Holton, heard by Judge *C. M. Cooke,* at February Term, 1904, of GUILFORD. From a judgment for the plaintiff the defendant appealed.

G. S. Ferguson, Jr., King & Kimball and *W. P. Bynum, Jr.,* for the plaintiffs.

L. M. Scott and *J. T. Morehead,* for the defendant.

CONNOR, J. This action was brought by E. S. Parker, Solicitor, for the purpose of recovering an amount of money paid to the defendant, Clerk of the Superior Court of Guilford County, by C. R. Benbow, administrator of Mary Stanback, for the benefit of her distributees. The present plaintiff was made a party as the successor of Mr. Parker. The
(307) prayer for judgment was that the plaintiff recover the amount for the benefit of Ada A. Stanback and Belle Stanback, the distributees. The defendant demurred for that the plaintiff had no authority nor was it his duty to sue for the money paid into the Clerk's office. The Judge sustained the demurrer and upon motion of the said distributees ordered that they be made parties plaintiff, and that the pleadings be reformed. * * * To this order the defendant excepted and appealed.

The order made by his Honor is fully sustained by a number of cases decided by this Court. *Cox v. Peebles,* 67 N. C., 97; *Comrs. v. Candler,* 123 N. C., 682. The distributees were the real parties in interest and the amendment in nowise changes the cause of action, the amount which is recoverable, or affects any defense open to the defendants, as the action was originally brought. The case is distinguished from *Goodman v. Goodman,* 72 N. C., 508, where BYNUM, J., says: "The suit was begun by the next of kin who had no right of action, and the attempt is to make that good by adding as a party a person who himself had no existence and no right of action when the suit was commenced." In this case the distributees had a right of action when the suit was begun. The Solicitor expressly says that the money belongs to them and he is suing to recover for their benefit. In *Merrill v. Merrill,* 92 N. C., 657, it was necessary for the substituted plaintiff to set forth a new and different cause of action. This cannot be done. There is

No error.

(308)

TURRENTINE v. WELLINGTON.

(Filed 1 November, 1904.)

1. MASTER AND SERVANT—*Negligence.*

An employer owes the duty to his employees to exercise reasonable and ordinary care to prevent any personal injury to any of them in the prosecution of his work.

2. NEGLIGENCE—*Master and Servant.*

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or done what such a person under the existing circumstances would not have done.

3. CONTRIBUTORY NEGLIGENCE—*Master and Servant.*

If an employee, by the exercise of ordinary and reasonable care, could have seen the danger in time to have escaped, and failed to do so, he is guilty of contributory negligence.

4. INSTRUCTIONS—*Fellow Servants—Master and Servant.*

The failure to give an instruction on the law of fellow servants, the evidence excluding the defense of fellow servant, is not error.

ACTION by F. Turrentine against A. J. Wellington, heard by Judge *C. M. Cooke* and a jury, at March Term, 1904, of ORANGE. From a judgment for the plaintiff the defendant appealed.

Graham & Graham and *Winston & Bryant,* for the plaintiff.
S. M. Gattis, for the defendant.

CONNOR, J. The defendant under the name and style of the Southern Broken Stone Company was engaged by his agents and servants at Hillsboro, N. C., in blasting rock and preparing and furnishing it as ballast for the Southern Railway Company. Plaintiff on the day upon which he was injured was employed by defendant to assist in the work in (309) which he was engaged and assigned to the duty, together with several other employees, of breaking rock into small pieces after being loosened by dynamite. It was usual to explode the dynamite while the hands engaged with the plaintiff were at dinner. On 28 May, 1903, the hands were called back to their work by Mr. Boggs the foreman, and plaintiff being engaged in breaking rock near the bottom of the excavation, was injured by a rock falling some ten or twelve feet from the bench or shelf up the mountain side, which had been loosened by a crowbar, after the explosion of dynamite, by defendant's employees.

He alleges that he was expecting that, as was usual, the foreman in charge of the hands on the mountain side above him would give him warning of the falling rock. That by reason of their failure to do so he was struck by the rock and seriously injured, his leg being broken. The defendant admits that plaintiff was his employee and that he was injured by the falling rock. He denies that his agents and servants were guilty of any negligence in the premises. He avers that the business or employment in which plaintiff was engaged was attended with dangers, and that this was well known to the plaintiff, who assumed the risks incident thereto. That the plaintiff by his own negligence and carelessness contributed to his injury. That if he was injured by the negligence of any other person or persons they were his fellow servants. The Court, without objection, submitted the following issues to the jury:

1. "Was the plaintiff injured by the negligence of the defendant? Answer: 'Yes.'"

2. "Did the plaintiff, by his own negligence contribute to his injury? Answer: 'No.'"

3. "What damages, if any, is the plaintiff entitled to recover? Answer: 'Three hundred dollars.'"

The defendant, at the close of the plaintiff's testimony, moved the Court to dismiss the action as upon nonsuit.
(310) The motion was denied, defendant noted an exception and introduced testimony. He did not renew his motion at the close of the evidence, nor did he ask the Court to instruct the jury that there was no evidence entitling the plaintiff to go to the jury. We note this fact, not because we think that defendant could have successfully made such motion or request, but as a reason for not setting forth the testimony in full. There was evidence fit to be considered by the jury tending to sustain the affirmation of the first and third issues. There was also testimony proper to be considered upon the second issue, the weight and value of all of which was for the jury. The record states that no special instructions were asked by either party. His Honor put his charge in writing. The portions of the charge to which the defendant's exceptions are pointed are:

1. "The defendant owed the duty to his servants or employees to exercise reasonable and ordinary care to prevent any personal injury to any of them in the prosecution of his work."

2. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done."

3. "If the defendant placed a gang of hands on the side or bench of the side of the embankment above the plaintiff and other laborers who were breaking up stones beneath, and if he directed the gang of hands to clear the place of all surface stones in order to prepare for another blast by dynamite, and that the stones when so loosened would roll down the embankment to the level where the hands were at work, and the defendant knew of this fact, it would be the duty of the defendant to see to it that sufficient warning or notice was given to the laborers below that a stone was going to be loosened, to enable them to escape to a place of safety, and failure (311) to do this would be negligence, and if the jury shall find in this case to be as above and that defendant failed to give the warning of the removal of the stones for a sufficient time to enable the plaintiff to escape, the jury should answer the first issue 'Yes;' if the jury should not so find, they will answer the first issue 'No.'"

4. "It was the duty of the plaintiff to exercise reasonable and ordinary care to avoid danger, and if the plaintiff by the exercise of ordinary and reasonable care could have seen the danger in time to have escaped the danger, then he would be guilty of contributory negligence and the jury would answer the second issue 'Yes.' If the jury should not so find, they will answer the second issue 'No.'" To each of said instructions defendant duly excepted and assigns the same as error.

His Honor instructed the jury in regard to the elements of damage and measure thereof which plaintiff was entitled to recover, if the first and second issues were answered in his favor, to which there was no exception. At the conclusion of his charge his Honor said: "This is the law in this case, gentlemen. Take the case and say how you find."

Defendant assigns as error: "That his Honor failed in his charge on the second issue to the jury to explain contributory negligence or to define ordinary care; and that his Honor failed to charge the jury that if the plaintiff was injured by the negligence of a fellow servant, and such negligence was the proximate cause of the injury, then plaintiff could not recover, and the jury would answer the first issue 'No.'"

We do not find any error in his Honor's statement of the law in respect to the measure of duty which the employer owes to his servants or employees. The formula adopted by his Honor has been approved by this Court and is sustained by Sherman & Red. on Neg., sec. 189; 20 Am. & Eng. Ency., 55. The definition of negligence is that given in *R. R.* v. (312) *Jones,* 95 U. S., 442; Sher. & Red. on Neg., 1, and ex-

pressly approved by this Court in *Bradley v. R. R.*, 126 N. C., 735; 21 Am. & Eng. Ency., 458. The third instruction is but an application of the general principle to the testimony and we think entirely correct. There was evidence, if believed by the jury, to sustain the hypothesis submitted to them.

We find no error in the fourth instruction in regard to contributory negligence. The exception is directed rather to the failure of his Honor to explain contributory negligence and define ordinary care to the jury.

We have carefully considered this exception made by defendant and the authorities cited. Certainly the instruction upon the second issue does not conform to the ruling in *S. v. Boyle,* 104 N. C., 800, but that case has been expressly overruled by this Court in *S. v. Beard,* 124 N. C., 811. It is clear that if the Judge undertakes to charge the jury he must do so correctly, which involves the proposition that he must not omit any material element in the definition of a principle or rule of law. There can be no valid criticism of his Honor's statement of the measure of the plaintiff's duty to use reasonable care to avoid injury. He further said: "If the plaintiff by the exercise of ordinary and reasonable care could have seen the danger in time to have escaped the danger, then he would be guilty of contributory negligence." The charge must be read as it was heard by the jury in the light of and with reference to the testimony. His Honor was not dealing in abstractions. The contention of the defendant was, and there was evidence tending to sustain it, that plaintiff had been warned not to work with his back to the side of the mountain, and that as the rock rolled down some one "hollored," and others working near to him got out of the way and were not injured.

From this testimony the counsel had, we assume,
(313) argued to the jury that if plaintiff had worked with his face to the mountain side, or had been on the lookout, he would not have been injured, and it was with reference to this evidence and argument that the instruction was given. It was clearly correct. If defendant had desired to have the jury instructed with more particularity he should have so requested. Referring to a similar exception made in *Kendrick v. Dellinger,* 117 N. C., 491, AVERY, J., says: "In the absence of a more specific request, it is not such error as the defendant could avail himself of to instruct the jury in the general terms employed by the Court." In regard to the failure of the Judge to make any ruling upon the law of fellow servant, it would seem that he was not requested to do so. If he had been, the testimony seems to exclude the defense, as the per-

son whose duty it was to give the warning or to provide for it being given, was the superintendent of the quarry and not a fellow servant. Upon a careful examination of the record we find no reversible error, and the judgment must be

Affirmed.

Cited: *Simmons v. Davenport,* 140 N. C., 411.

(314)

RICHARDSON v. INSURANCE CO.

(Filed 1 November, 1904.)

1. INSURANCE—*Sales—Questions for Jury.*

The question whether the title to goods had passed, within the meaning of a clause in an insurance policy stipulating a forfeiture in case of change of title, is for the jury.

2. SALES—*Insurance.*

Where a sale of goods is made, and nothing more is to be done, and the price is agreed upon, but nothing said about payment or delivery, future risks of fire are upon the purchaser, although he can not take the goods away before he pays the price.

ACTION by U. C. Richardson against the Insurance Company of North America, heard by Judge *C. M. Cooke,* at February Term, 1904, of GUILFORD. From a judgment for the defendant the plaintiff appealed.

G. S. Bradshaw, for the plaintiff.
King & Kimball, for the defendant.

MONTGOMERY, J. There was a clause in the policy of insurance by which a forfeiture was worked in case there should be any change, other than by the death of the insured, in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or by judgment or by voluntary act of the insured. The plaintiff in his notice of loss to the defendant company stated that he had made a verbal sale to L. D. McDonald but had not turned the property over to him. If that had been all of the evidence bearing on the question of a sale of the goods the judgment of his Honor dismissing the plaintiff's action would have been a proper one. But McDonald testified that although he had paid $300 on the purchase price (315)

of the goods, had agreed upon the price and was engaged in taking an inventory when the fire occurred, yet that there was an understanding between him and the plaintiff that he, McDonald, and the plaintiff when the inventory should be completed were to have a settlement and the plaintiff was to take a mortgage securing a note for the remainder of the stock. That evidence should have been submitted to the jury as to whether the title had been passed and the sale completed. His Honor treated the case as if nothing had been said between the plaintiff and McDonald about the manner of payment for the goods, but McDonald's evidence was to the effect that they were to be paid for in part by a mortgage upon his property. In a transaction of a purchase of goods where nothing is to be done, the price agreed upon and nothing is said about payment or delivery, the property passes at once and the future risk is put upon the purchaser, although he cannot take the goods away before he pays the price. That was the principle laid down in *Jenkins v. Jarrett,* 70 N. C., 255. The Court there refers to Blackburn on Sales, where the author cites the opinion of *Bailey,* J., in *Simmons v. Swift,* 5 B. & C., 862, as follows: "Generally speaking, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." Upon a careful reading it will be found that the same view is announced in *Woods v. Fuller,* 27 N. C., p. 26. To the same effect is *Millhiser v. Erdman,* 98 N. C., p. 292; 2 Am. St., 334. There the plaintiff had shipped to the defendant a lot of tobacco with the understanding and agreement that the defendant should execute his promissory notes at three, four and five months time in payment of the same. The de-
(316) fendant refused to execute the notes, whereupon the plaintiff sued the defendant for the possession of the tobacco. This Court held that the execution and delivery of the notes was an essential part of the contract and that no title passed to the tobacco because the contract had not been performed.

Error.

BARKER v. BARKER.

(Filed 1 November, 1904.)

1. DIVORCE—*Alimony—Findings of Court—Fees—The Code, sec. 1291.*

   Upon a motion for alimony it is sufficient for the Court to find that the facts are as alleged in the answer and the affidavits filed in support of the motion.

2. DIVORCE—*Alimony—Notice—Findings of Court.*

   No notice of a motion for alimony is necessary where it is alleged and the Court finds it as a fact that the husband has abandoned the wife and is outside the State.

3. DIVORCE—*Alimony—Question for Court—Appeal.*

   The amount of alimony to a wife is within the discretion of the trial judge and is not reviewable unless abused.

4. DIVORCE—*Appeal—Alimony Pendente Lite.*

   An appeal lies from an order granting alimony *pendente lite.*

5. DIVORCE—*Injunction—Execution.*

   Where alimony *pendente lite* is allowed the wife, and the husband appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal.

ACTION by John Barker against Dellia M. Barker, heard by Judge *C. M. Cooke,* at February Term, 1904, of GUILFORD. From an order awarding the defendant alimony (317) *pendente lite* the plaintiff appealed and from an order by Judge *T. J. Shaw* granting an injunction to stop the sale of the property and to stay the execution pending the appeal the defendant appealed.

J. A. Barringer, G. S. Ferguson, Jr., and *W. P. Bynum, Jr.,* for the plaintiff.

L. M. Scott and *Stedman & Cook,* for the defendant.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. The plaintiff brought this action against the defendant for divorce, and she in her answer denied the allegations of the complaint and set up a cause of action against the plaintiff for a divorce from him, with a prayer for alimony pending litigation and an allowance to pay the expenses of litigation, including counsel fees. The complaint was filed at January Term, 1904, of GUILFORD, and at February Term the defendant having filed her answer made a motion for alimony *pendente lite* and for an allowance to her attorneys to

enable her to prepare and prosecute her suit, and an order was made at that term of the Court granting her the sum of $50 per month as alimony and $150 for the fees of her counsel.

The first exception which the plaintiff makes to the order is that the Court did not find the facts upon which it was made. The facts upon which such orders may be made are required to be found by the Judge under section 1291 of The Code. The language of The Code is as follows: "If any married woman shall apply to a Court for a divorce from the bonds of matrimony, or from bed and board with her husband, and shall set forth in her complaint such facts, which upon application for alimony shall be found by the Judge to be true and to
(318) entitle her to the relief demanded in the complaint." * * * In the statement of the case on appeal made up by the Judge it is stated that "The Court then proceeded to hear the motion upon the answer and affidavits offered by the defendant, and the affidavit offered and read by the plaintiff's attorney of one John Sockwell in regard to the extent and value of the property of the said plaintiff; after considering the affidavits and the hearing of the argument of counsel, found the facts to be as alleged in the answer and cross complaint and affidavits to be true, and adjudged that the defendant was entitled to alimony *pendent lite,* and a sufficient amount to pay reasonable attorneys' fees."

His Honor might have found the facts by particularly setting them forth *seriatim,* and in that manner it seems the plaintiff insisted that it should have been done. But his Honor's method was almost in the identical language of The Code. He found that the facts set forth in the complaint, answer and affidavits were true, and we can see from an inspection of those pleadings and affidavits that they contained allegations and averments which, if true, entitled her to the relief demanded in her answer. The exception cannot be sustained.

The second exception is that the order was contrary to law because the plaintiff was absent from North Carolina, and neither he nor his attorneys had notice of the motion for alimony. Five days' notice is prescribed by section 1291 of The Code as the time to be given before such order may be made. The defendant's counsel insist, however, that that rule of notice does not apply to motion made in open Court, but only to such as may be made in vacation. However that may be, in the second proviso in section 1291, it is written "that if the husband shall have abandoned his wife and left the State, or shall be in parts unknown, or shall be about to remove
(319) or dispose of his property for the purpose of defeating

the claim of his wife, no notice shall be necessary." The defendant in her affidavit had affirmed "that the plaintiff is now in Hot Springs, Ark., and has been for about thirty days; that the day after the filing of his complaint, to-wit, the 21st day of January, 1904, he left the State of North Carolina, stating that he would be absent from thirty to ninety days; that the defendant has good reason to believe and does believe that the plaintiff left the State for the purpose of defeating her in her claim for alimony at this term of the Court, for the want of five days' notice as required by law; that the plaintiff before leaving the State, for several months had been selling and disposing of his property, to-wit, cattle, hogs, grain and provender at the farm, and had been collecting money due him whenever he could make collections, and that he carried with him from this State a large amount of money, for the purpose of defeating her in her claim for alimony." The second exception is without merit.

The third exception was that the allowance was excessive. That matter was in the sound discretion of the Judge and is not reviewable on appeal unless there has been an abuse of discretion. *Moore v. Moore,* 130 N. C., 333. That officer is required to make such allowances as shall appear to him just and proper, having regard to the circumstances of the parties. He heard affidavits bearing upon the value of the plaintiff's property and made the order, and we cannot see any abuse of the discretion allowed him in the premises. If it is in fact so, the plaintiff has it in his power at any time to make application to a Judge to have such order modified or vacated. The exception is not sustained.

The fourth exception is disposed of under the discussion of the second.

No error.

DEFENDANT'S APPEAL. (320)

MONTGOMERY, J. The plaintiff in this case had appealed from the order of the Judge, in which alimony *pendente lite* had been granted to the defendant, and the appeal perfected, except that the plaintiff and defendant were awaiting a time and place to be fixed by Judge *Cooke,* who granted the order, to make out the case on appeal. In the interval the defendant issued execution upon the property of the plaintiff. Under that execution the sheriff had levied upon the property of the plaintiff and had advertised it for sale to satisfy the execution. The plaintiff was not allowed to give bond and stay the execution, and he appealed to Judge *Shaw,* after notice to the defendant,

for an injunction to stop the sale of the property and stay the execution until the appeal could be heard by the Supreme Court. Upon the hearing of the matter the injunction and restraint were ordered until the plaintiff's appeal could be heard, and from that order the defendant appealed.

The injunction was properly granted if an appeal lies from an order granting alimony *pendente lite*. That question is settled in the affirmative in the case of *Moore v. Moore*, 130 N. C., 333.

No error.

(321)

CHRISTIAN v. RAILROAD CO.

(Filed 1 November, 1904.)

1. BONDS—*Executors and Administrators—Costs—The Code, secs. 210, 548, 553, 1498, 1500.*

   A personal representative may sue *in forma pauperis*.

2. APPEAL—*Executors and Administrators—Bonds—Prosecution Bond.*

   The refusal of the trial judge to require a prosecution bond is not appealable.

ACTION by J. B. Christian, administrator of A. B. Wosser, against the Atlantic and North Carolina Railroad Company, heard by Judge *H. R. Bryan*, at October Term, 1904, of DURHAM. From an order allowing the plaintiff to sue *in forma pauperis*, the defendant appealed.

Winston & Bryant, for the plaintiff.
W. C. Munroe and *Fuller & Fuller*, for the defendant.

CLARK, C. J. This is an action by an administrator for the wrongful death of his intestate, under The Code, sec. 1498. The plaintiff having been allowed to bring the action *in forma pauperis* under The Code, sec. 210, the defendant moved to require the plaintiff to file a prosecution bond, which the Court refused. The only point intended to be presented is whether an executor or administrator can bring an action *in forma pauperis*. It has been the unquestioned practice since the adoption of The Code, thirty-six years ago, that a personal representative could sue as a pauper upon proper affidavit and certificate. *Allison v. R. R.*, 129 N. C., at p. 344. The language of section 210 is "any person." These words are broad enough to include any litigant whatever, and hence residents of

another State can sue here *in forma pauperis. Porter v.* (322) *Jones,* 68 N. C., 320. In *Brendle v. Heron,* 98 N. C., 496, it was held that a guardian could sue *in forma pauperis.* The words in section 553 authorizing "any party" to appeal without giving bond (upon similar affidavit and certificate) were held to include administrators and executors. *Mason v. Osgood,* 71 N. C., 212; *Hamlin v. Neighbors,* 75 N. C., 66.

Under the English law it was held, *Sykes v. Sykes,* 4 L. R., at p. 648, that it "would be contrary to justice and creating a new precedent to hold the insolvency of an executor to be ground for compelling him to give security for costs." Under 23 Henry VIII, in an action by the personal representative on a cause of action accrued during the lifetime of the testator or intestate, the executor or administrator was not personally liable for costs (unless he knowingly brought a wrong action or was guilty of negligence or improper conduct), but he was liable when the action was upon a contract made with himself or for a wrong where the right of action accrued to him, because he then sued in his own right and not *en autre droit.* 8 Enc. Pl. & Pr., 728; *Arrington v. Coleman,* 5 N. C., 102; *Collins v. Roberts,* 28 N. C., 201. This distinction explains the case of *McKiel v. Cutler,* 45 N. C., 139, upon which the defendant relies. There the action was brought by the personal representative *en autre droit* and not, as here, in his own right, and it was held that his affidavit that "the estate was insolvent, except as to its interest in the property sued for, was insufficient, for *non constat* the creditors, legatees or next of kin for whose benefit the suit was brought might be amply able to give security and pay costs." But here the cause of action accrued to the plaintiff alone. No one else could bring the action. *Killian v. R. R.,* 128 N. C., 261. It never accrued to the intestate. Though the recovery must be distributed, as provided by The Code, sec. 1500, it will not be assets of the estate, and the plaintiff sues in his own right and not *en autre droit.* (323) Therefore he is individually liable for costs and must give bond unless excused by leave to sue as a pauper, and an allegation of his inability to give bond.

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the Court may well refuse leave to sue as a pauper, under its discretion (*Dale v. Presnell,* 119 N. C., 489), unless, as said in *McKiel v. Cutler, supra,* it appears that the beneficiaries of the estate cannot give bond, for the officers of the Court ought not needlessly be deprived of pay for their services. But when, as here, the

estate is insolvent and the recovery is problematical, if the plaintiff himself is unable to give bond the Court upon proper evidence of a good cause of action should permit the action to be begun *in forma pauperis.* There is no requirement that those who may share in the recovery, if made, shall give bond for costs, as in cases where the action is upon a contract or claim in favor of the intestate or testator or to recover property belonging to the estate.

If the Court had granted the motion and dismissed the action an appeal would lie, because that "determines the action." The Code, sec. 548. But the refusal of a motion to dismiss an action on any ground whatever is never appealable. *Cooper v. Wyman,* 122 N. C., 784, 65 Am. St., 731, and numerous cases cited in Clark's Code (3 Ed.), p. 738. And a refusal to require a prosecution bond is not a judgment upon the merits of the controversy materially affecting the ultimate result of the litigation so as to require its decision on appeal, and the possible delay of six to eighteen months which a defendant could always obtain by making such collateral motion. The presumption is that the Court decides correctly. If the final judgment is against the defendant, the judgment refusing to re-
(324) quire a bond, even if incorrect, becomes immaterial error, and the appeal is a useless waste of time and expense. If, on the contrary, the defendant obtains the final judgment, the exception brings the point up for review, and, if there is error, judgment will be given requiring the plaintiff to pay costs.

When this case goes back the affidavit should be amended to aver the inability of the administrator himself to give bond, and on failure to aver this he should give bond. Though we must dismiss the appeal for the reasons given, we pass upon these points, as the Court in its discretion has often done. *S. v. Wylde,* 110 N. C., 500. This is the better practice, for the law can thus be settled without authorizing the stopping of the proceedings and delay by appeals on collateral and interlocutory judgments.

Appeal dismissed.

DOUGLAS, J., concurring only in result. I fully concur with the Court that an executor or administrator can sue *in forma pauperis* under sections 209 and 210 of The Code; but I do not think that it is necessary for the administrator to be personally a pauper in order to do so. The Code nowhere says so. Section 209 provides that the Clerk shall require a bond in the sum of two hundred dollars, or require a deposit of money in like

amount or a written authority to sue before issuing summons. Section 210 allows *any person* to sue as a pauper upon proving that he has a good cause of action, and "making affidavit that he is unable to comply with the last section." I understand this to mean that he is unable to comply as administrator. The statute does not say that *any pauper* may be allowed to sue, but that *any person* may sue *as a pauper*. An administrator suing under what, for the want of a better name, may be called Lord Campbell's Act, rarely, if ever, has any money in his hands belonging to the distributees; and it may often happen that the distributees cannot justify in the necessary amount. (325) I assume that section 209 of The Code contemplates a justified bond, as that is the usual way of determining the sufficiency of the surety. This justification is on the part of the sureties and not of the principal. The solvency or insolvency of the latter makes no difference as far as the bond is concerned. If the principal is insolvent, but yet can obtain sufficient sureties, he must give the bond. On the contrary, if he is solvent and yet cannot give sufficient surety, his bond will not be accepted. In that event he must deposit the $200 in money if able to do so; but I do not understand that he is required to deposit his own money when suing *en autre droit*. Neither the letter nor the reason of the law seems to require it. The bond is not required to protect the officers in the payment of their costs, but upon the specific condition that "the plaintiff shall pay the defendant all such costs as the defendant shall recover of him in the action." The Code, sec. 209.

Moreover, I think that any person has the right of appeal *in forma pauperis* when he brings himself within the terms of the statute.

I am aware that this Court has held that a refusal to dismiss is not appealable, and while I may have some doubts as to the strict correctness of the rule in all cases, it seems too well settled to be now seriously disturbed. However, I see no reason why an appeal should not lie from a judgment by default and inquiry if its determination might end the case.

I suppose the plaintiff should comply with the terms of the statute as herein construed, and that his failure to do so, either by amendment or a new suit, would entitle the defendant to move for a dismissal; but as the appeal is premature, we can decide the question only by intimation or anticipation.

WALKER, J., concurring in result. My opinion is that (326) the plaintiff, as administrator, was entitled to sue *in forma pauperis* under section 210 of The Code, if he

showed that he had a good cause of action and that he was unable to comply with the requirement of section 209, and further made it appear that those for whose benefit the suit is really brought were insolvent and unable to comply with the provisions of the latter section. The principle decided in *McKiel v. Cutler,* 45 N. C., 139, is applicable to this case. I also think that the defendant had the right to appeal from the refusal of the Court to require the plaintiff to give a prosecution bond to secure the payment of any costs adjudged against him or to file an order of the Judge or the Clerk permitting him to sue as a pauper under section 209, which order should be based upon a proper finding as to the cause of action and an affidavit of inability to comply with section 209 as provided by section 210. It seems to me that the right of appeal in such a case is clearly given by the first part of section 548 of The Code, which reads as follows: "An appeal may be taken from every judicial order or determination of a Judge of a Superior Court, upon or involving a matter of law or legal inference whether made in or out of term, which affects a substantial right claimed in any action or proceeding." If the appeal does not lie until the final judgment is rendered and that judgment is in favor of the defendant, he might have a judgment against the plaintiff for costs, it is true, but of what value would it be to him if the plaintiff is insolvent and the costs are not secured by a bond? At that stage of the case the Court could not compel the plaintiff to secure the costs, because he might well say: "I have lost my case and am out of Court and prefer to stay out." The bond for costs is required as a condition of the plaintiff's enjoying the right to sue and to prosecute his action in the Court and the Court can require it to be given or deny to the plaintiff the right to sue. But I know of no law by which he can be required to give a bond at the end of litigation when he
(327) has been cast in the suit. The defendant will therefore lose a substantial right and be greatly prejudiced if his right to appeal should be postponed until the action has been tried. Indeed it may be doubted if he can appeal at that time, as this Court will not entertain an appeal when the subject matter of the action has been settled and the only remaining question is one of costs. See cases collected in Clark's Code (3 Ed.), sec. 548, at p. 739. But if an appeal will lie, and the ruling of the Court to which exception has been taken should be reversed, the defendant would find that while nominally successful he has emerged from the contest empty handed. It would be but another illustration of keeping the word of promise to the ear and breaking it to the hope. In any possible

outcome of the case he would have his own costs to pay, if the plaintiff is insolvent.

MONTGOMERY, J., concurs in the concurring opinion of WALKER, J.

---

(328)

HOUSTON v. LUMBER CO.

(Filed 1 November, 1904.)

1. APPEAL—*Notice—The Code, sec. 549.*

   A party to an action may appeal by serving notice thereof within ten days after the adjournment of court.

2. APPEAL—*Appearances.*

   The entry of a special appearance does not authorize counsel so appearing to appeal from a judgment.

3. APPEAL—*Judgment by Default.*

   An appeal by counsel, "appearing specially," from a judgment by default is premature.

ACTION by B. R. Houston against the Greensboro Lumber Company and J. T. B. Shaw, receiver, heard by Judge *C. M. Cooke,* at January Term, 1904, of DURHAM. From a judgment for the plaintiff the defendant lumber company appealed.

J. C. Biggs and *Boone & Reade,* for the plaintiff.
Winston & Bryant and *J. A. Barringer,* for the defendant lumber company.

CLARK, C. J. The summons issued against the "Greensboro Lumber Co. and J. T. B. Shaw, receiver." It was served upon "J. T. B. Shaw, receiver of the Greensboro Lumber Company." The action was dismissed as to the receiver on demurrer because leave of Court had not been obtained to bring action against the receiver. There was no answer or demurrer filed as to the company and judgment against it was taken by default and inquiry. After the adjournment for the term, but within ten days thereafter, the defendant entered a special appearance and gave notice of appeal.

A party to an action can take his appeal by serving notice within ten days after adjournment of Court. The (329) Code, sec. 549; *Russell v. Hearne,* 113 N. C., 361; *Davison v. Land Co.,* 120 N. C., 259. But the appeal must be

taken by a party to the action, and the entry of a special appearance did not authorize counsel so appearing to appeal. An appeal by counsel "appearing specially" is no appeal. *Clark v. Mfg. Co.*, 110 N. C., 111.

The appeal, even if it had been regularly taken, was premature. If not duly served with process, the defendant "could either have disregarded the further proceedings of the Court, which would have been a nullity, or it could have had its exception noted and proceeded with the trial." *Guilford v. Georgia Co.*, 109 N. C., 312; *Mullen v. Canal Co.*, 112 N. C., 109, and numerous cases cited in Clark's Code (3 Ed.), p. 738; *Brown v. Nimocks*, 126 N. C., 808; *Cooper v. Wyman*, 122 N. C., 784, 65 Am. St., 731.

Appeal dismissed.

EDWARDS v. LEMMOND.

(Filed 1 November, 1904.)

EXECUTORS AND ADMINISTRATORS—*Limitations of Actions—The Code, secs. 136, 158, 1402, 1488—Laws 1891, ch. 113.*

An action against an executor or administrator is barred in ten years after the two years allowed for the settlement of estates have expired.

ACTION by Unity E. Edwards against R. W. Lemmond, heard by Judge *R. B. Peebles* and a jury, at August Term, 1904, of UNION. From a judgment for the defendant the plaintiff appealed.

(330) *Adams, Jerome & Armfield,* for the plaintiff.
Redwine & Stack and *Lorenzo Medlin,* for the defendant.

CLARK, C. J. This was a proceeding for a settlement of Addison Whitley's estate, commenced before the Clerk and removed to the civil issue docket upon issues of fact being joined. Whitley died in 1866, having appointed his wife Samira Whitley his executrix. She filed an account in 1870, showing a small balance in her hands. She died in 1901. The plaintiff administered on the estate of Addison Whitley and the defendant administered on Samira Whitley's estate. His Honor held that the account filed in 1870 was not a final account. But under

the instructions of the Court the jury found that the plaintiff's action was barred by the statute of limitations and from the judgment rendered the plaintiff appealed. The action was commenced 17 September, 1903. The only point raised by the appeal is as to the statute of limitations.

Section 1488 of The Code forbids an executor or administrator to hold in his hands, after two years from his qualification, more of the deceased's estate than amounts to his necessary charges, etc., and requires an immediate payment of the estate to the persons to whom the same "may be due by law or by the will of the deceased." Section 1402 affords any one interested in the estate a right and a remedy to compel a final settlement "at any time after two years." The right of action certainly accrued two years after qualification. In certain cases suit may be brought within two years, as where the executor is insolvent and wasting the property. *Godwin v. Watford,* 107 N. C., 168.

At the end of two years the law makes the demand and puts an end to the express trust, though no express demand is made by any party interested upon the executor or administrator. He is in default, and an action will lie at the end of the two years at the instance of any one entitled to have an account and settlement of the estate. WALKER, J., in *Self* (331) *v. Shugart,* 135 N. C., at bottom of p. 194. It is familiar learning that the statute begins to run whenever the party becomes liable to an action if the plaintiff is under no disability. *Eller v. Church,* 121 N. C., 269. There having been no action begun within ten years, during which actions could have been brought, this action is barred by The Code, sec. 158. *Hunt v. Wheeler,* 116 N. C., 424. In *Wyrick v. Wyrick,* 106 N. C., 84, this was intimated and was reaffirmed in *Kennedy v. Cromwell,* 108 N. C., 1. *Grant v. Hughes,* 94 N. C., 231, and *Bushee v. Surles,* 77 N. C., 62, relied on by the plaintiff, were both cases where the original administration began under the law prior to The Code, as is stated by DAVIS, J., in *Woody v. Brooks,* 102 N. C., at p. 344. The same is true of *Phifer v. Berry,* 110 N. C., 463. At that time such actions were governed by the former law. The Code, sec. 136; *Brittain v. Dickson,* 104 N. C., 547. But section 136 has been repealed by chapter 113, Laws 1891, and the statute of limitations prescribed by The Code is applicable to this case, though original administration was taken out in 1866. *Nunnery v. Averitt,* 111 N. C., 394; *Alexander v. Gibbon,* 118 N. C., 796, 54 Am. St., 757. If this were not the case this action would still be barred by the unrebutted presumption of settlement

arising from the lapse of twenty years under the former law. *Thompson v. Nations,* 112 N. C., 508. The dictum in *Woody v. Brooks,* 102 N. C., at p. 339 (decided by a divided Court), that no statute runs unless a final account is filed, was overruled in *Kennedy v. Cromwell,* 108 N. C., 1, as appears by the dissenting opinion of MERRIMON, C. J., in the latter case. In *Kennedy v. Cromwell,* the intestate guardian never filed any final account—only made a return in 1862—and never in any way accounted or settled with the ward, but the Court held that the ward was barred. While the opinion was based on the fact that there was a demand and refusal, yet it says: "In
(332) any aspect of the case the claim of the plaintiff is barred by the statute of limitations and the Court below should have dismissed the action."

The learned Judge below gives his reasons for his ruling in this case so aptly that we quote them: "After providing a number of special statutes of limitation, none of which include the case at bar, section 158 provides that 'An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued.' It is clear to my mind that the purpose of this statute was to leave no one (where no disabilities exist) exposed to an action for a longer period than ten years. The expression that the trust of an administrator or executor is a 'continuing trust,' in the sense that it requires a demand and refusal before an action can be maintained by a legatee or distributee, is misleading. Section 1488 of The Code closes the trust in two years after the qualification, and after then there can be no question that a legatee or distributee can maintain an action without demand and refusal. It is the statute, and not the demand and refusal, that closes the trust. The cause of action certainly accrued two years after the qualification. The action must be brought 'within ten years after the cause of action accrued.' If this position is not true there is no statute of limitation applicable to this class of cases, and the estates of executors and administrators are liable to be successfully sued twenty, thirty and forty years after their deaths if one witness can be found, as in this case, who will say that within twenty years he heard the executor or administrator acknowledge that the claim had not been paid. This would open wide the door to fraud and the temptation to perjury."

As to the personal property given the widow for her life, if it still exists, it cannot be recovered in this action, but must be sued for by the legatees entitled thereto. It is true
(333) it was ordered to be sold after the death of the executrix

and divided between them, but the testator could not have intended that the executrix should do this, and the plaintiff administratrix *c. t. a.* could have no greater power.

No error.

Cited: Settle v. Settle, 141 N. C., 574.

MARSH v. GRIFFIN.

(Filed 1 November, 1904.)

1. MORTGAGES—*Acknowledgments—Husband and Wife—Laws 1889, ch. 389—Fraud.*

   Where a privy examination is properly certified it will not be held invalid because procured by fraud, duress or undue influence, unless the grantee had notice thereof or participated therein.

2. DEEDS—*Estates—Remainders—The Code, secs. 1325, 1329.*

   A deed to a person and to "her heirs and assigns during her natural life and at her death to belong to her bodily heirs, to have and to hold in fee simple forever," conveys a fee-simple title to the grantee named.

ACTION by H. B. Marsh and others against A. T. Griffin and others, heard by Judge *R. B. Peebles* and a jury, at August Term, 1904, of UNION. From a judgment for the plaintiffs the defendants appealed.

Redwine & Stack, for the plaintiffs.
Adams, Jerome & Armfield, for the defendants.

CLARK, C. J. This is an action for foreclosure of a mortgage on the wife's land, executed by her jointly with her husband. In her answer she avers that the execution of the mortgage "was procured by the fraud and undue influence of her said husband, who had represented to her and induced her to believe that the said mortgage was only for half the (334) debt attempted to be secured thereby," and that relying upon his representations she failed to read the mortgage before signing the same. But there is no allegation or proof that the mortgagee had notice of or participated in such fraudulent representations. The privy examination is properly certified. Chapter 389, Laws 1889. provides that where a privy examination is properly certified it shall not be held invalid because

procured by fraud, duress or undue influence unless the grantee had notice of or participated in the same. *Butner v. Blevins,* 125 N. C., 585; *Bank v. Ireland,* 122 N. C., 571; *Riggan v. Sledge,* 116 N. C., 87. The certificate is in proper form, and besides there is neither proof nor allegation of any irregularity in taking the privy examination. The wife states that she told the justice she could read, that he gave her the paper to read, that she read part of it and signed it, telling the justice she knew what it was, and that she told him (her husband being absent), in reply to his inquiry, that she signed it freely and voluntarily and without fear or compulsion of her husband. In *Butner v. Blevins,* 125 N. C., 585, this inquiry was not put, but the Court held that the grantee being ignorant of that fact was protected by chapter 389, Laws 1889.

The words of the *habendum* in the deed to the defendant are "to her, the party of the second part, her heirs and assigns during her natural life and at her death then to belong to her bodily heirs to have and to hold in fee simple forever." The contention that this deed gave her only a tenancy in common with her children is unfounded. The Code, sec. 1239, providing that a limitation "to the heirs of a living person shall be construed to be to the children of such person," applies only when there is no precedent estate conveyed to said living person, else it would not only repeal the rule in Shelley's case, but would pervert every conveyance to "A and his heirs"
(335) into something entirely different from what those words have always been understood to mean.

Here the words "to her, the party of the second part, her heirs and assigns during her natural life" are contradictory and irreconcilable. Taking the rule that in such cases "the first words in a deed and the last words in a will control," we must disregard the words "for her natural life." There is then conferred a fee simple upon the grantee. The additional words "and at her death then to belong to her bodily heirs to have and to hold in fee simple forever," coming after the fee simple already given her, if they have any effect at all, constitute simply an attempt to limit a fee tail after a fee simple and are nugatory. Taking all the words together, if there is here anything more than the random use of legal terms by a grantor ignorant of their purport and use, we should say that the grantor meant to convey an estate for life to the defendant with remainder to the heirs of her body. This, by the rule in Shelley's case and The Code, sec. 1325, conveys a fee simple. Construing the words strictly, as we have said, it is a conveyance to A and heirs with remainder to the heirs of her body. The words

"bodily heirs" have the same meaning as "heirs of the body," and are words of limitation and not words of purchase. RUFFIN, J., in *Donnell v. Mateer,* 40 N. C., 7, cited since in *Worrell v. Vinson,* 50 N. C., 94, and *Leathers v. Gray,* 101 N. C., 164, 9 Am. St., 39, in which last the limitation is very similar to this. Almost in the same language as here is the limitation in *Edgerton v. Aycock,* 123 N. C., 134, and *Chamblee v. Broughton,* 120 N. C., 170, in both of which it was held that the rule in Shelley's case applied. The words used as the basis of a dictum in *Williams v. Beasley,* 60 N. C., 104, do not occur in this deed. They did occur, however, in *Edgerton v. Aycock, supra,* and a direct ruling was made to the (336) contrary of the dictum in *Williams v. Beasley.*

The other exceptions require no discussion. There is

No error.

Cited: Jones v. Ragsdale, 141 N. C., 207.

ANDREWS v. WELLINGTON.

(Filed 1 November, 1904.)

COMPROMISE AND SETTLEMENT—*Contracts—Options.*

As a part of the settlement of an action defendant's assignor agreed that if it or its assigns should pay to plaintiff's assignor the sum of $100 per annum, etc., the latter would accept such sum in full of all damages sustained to his premises by certain blasting operations. Under such agreement it was optional with the promisor to pay the amount specified or remain liable for damages, at its election, and hence no action was maintainable to recover the amount so specified.

ACTION by J. H. Andrews against A. J. Wellington, heard by Judge *C. M. Cooke,* at March Term, 1904, of ORANGE. From a judgment for the plaintiff the defendant appealed.

Winston & Bryant and *Graham & Graham,* for the plaintiff.
S. M. Gattis, for the defendant.

MONTGOMERY, J. Mr. Graham, counsel of the plaintiff (appellee), in his argument here stated that many years ago the plaintiff's grantor M. D. Eaton, a retired naval officer, desirous of passing his latter years in quiet selected a spot near

the ancient town of Hillsboro on the beautiful waters of the Eno, and surrounded by a chain of heights assuming the proportions almost of a mountain for his home. Within a few years great changes occurred in his surroundings. The
(337) Farmer's Alliance opened upon one side of him a factory for the manufacture of goods for the agriculturists, a noisy cotton mill was constructed on another side, and on a third the Southern Stone Company, assignor of the defendant, opened a quarry and commenced the blasting of rock with dynamite, the charges of which when exploded made the earth tremble and filled the premises of the retired officer with debris and broken stone to his great personal danger and the injury of his property. Filled with disappointment and vexation he sold out his premises to the plaintiff and sought more congenial surroundings. Before he departed, however, he had attempted to bring the Southern Stone Company to an accounting for the injuries it had caused his property by an action in the Courts. The suit was compromised and settled by an agreement in writing and signed by both parties. The Southern Stone Company paid him in cash $300. The agreement contained a further provision, which is the subject of the present action, and the same is in the following words: "And the said M. D. Eaton does further agree that if the said Southern Stone Company or its assigns will pay to the said M. D. Eaton the sum of $100 per annum while operating its quarry, beginning with 1 May, 1901, the said M. D. Eaton will accept the said sum in full of all damages, and release the said Southern Stone Company from any damage whatever that may occur to his land or premises in consequence of the operations of said Southern Stone Company. But this agreement shall not operate to release said Southern Stone Company from liability for any injury to the person of said M. D. Eaton which may hereafter occur if the same should result from the negligence of said Southern Stone Company and without proper warning given to the said Eaton by the blowing of the whistle or by any other means by which he may seek shelter and protection."

The plaintiff, who is the grantee of Eaton, brought this
(338) action against the defendant, who is the assignee of the Southern Stone Company, to recover as liquidated damages $100 per year under the contract between Eaton and the company. His Honor, upon the complaint and answer and the agreement aforesaid, gave judgment for $100 against the defendant due up to 1 May, 1903 (several annual payments having been theretofore made by the defendant under the agreement betwen Eaton and the company), and declared that the

same was a lien on the land of the defendant. We are of the opinion that the plaintiff was not entitled to the judgment in either form. Whether or not the Southern Stone Company under the agreement with Eaton would pay him $100 per year while operating its quarry was a matter entirely optional on its part. The language of that part of the agreement is "that *if* the said Southern Stone Company or its assignees will pay to the said Eaton the said sum of $100 per annum, etc., the said Eaton will accept the said sum in full of all damages," etc.

That company had its choice to pay the $100 as yearly damages or to decline to do so, and if injury occurred through blasting rock to Eaton's premises to abide the result of a suit in damages for such injury. The agreement was a mere personal promise and obligation of the Southern Stone Company, and the defendant, who is the assignee of that company, has made no contract or obligation with either Eaton or his grantee, the plaintiff, and is not in the least bound by the agreement and obligation of the Southern Stone Company.

Reversed.

---

(339)

HILL v. DALTON.

(Filed 15 November, 1904.)

1. BOUNDARIES—*Evidence—Processioning—Laws 1893, ch. 22.*

   The boundary lines in a junior grant are no evidence of the true line in a senior grant.

2. PROCESSIONING—*Burden of Proof.*

   In a processioning proceeding the burden of proof is on the party seeking to establish the boundary line.

ACTION by J. H. Hill against Thornton Dalton and others, heard by Judge *W. A. Hoke* and a jury, at January Term, 1904, of FORSYTH. From a judgment for plaintiff the defendants appealed.

Watson, Buxton & Watson and *Glenn, Manly & Hendren,* for the plaintiff.

Lindsay Patterson, for the defendant.

CONNOR, J. This is a special proceeding instituted pursuant to the provisions of chapter 22, Laws 1893, being an amendment to chapter 48 of The Code entitled "Processioning." The

proceeding was begun before the Clerk, and after passing through the various stages of the litigation as prescribed by the statute reached the Superior Court by appeal. The case is distinguished from the large majority of such proceedings in that, under the wise guidance of the able counsel on both sides of the controversy, it has been successfully carried through the various and usually disastrous paths of litigation in the search after the "true line" without any suggestion of irregularity or departure from orderly procedure. The sole suggestion of this character is found in the very mild remark of the defendant at the end of his brief; "but it may be doubted if the clerk had jurisdiction of the controversy as constituted." Usually this comes (340) from the party who begins the proceeding to "procession" his land and settle a "disputed line"—resulting generally in finding a large number of disputed lines and involving parties, counsel and Court in a hopeless labyrinth, the surveyor being the only person who takes profit by the controversy.

It became necessary to locate a grant issued to James McKaughn before the line in dispute could be settled. This was the senior grant. A grant junior thereto was issued to John Jacob Blum and one just south thereof to John Rights. The plaintiff claimed under this grant, "beginning at a pine, corner of the John Jacob Blum tract, thence east with line of that tract fifty-seven chains to a white oak in the James McKaughn line, thence south," etc. The defendants are owners of adjoining tracts. His Honor submitted the following issue to the jury: "Which is the true and correct dividing line between the lands of petitioner and defendants?" The only exception necessary to be considered is to the following instruction given to the jury: "The Court further told the jury that the correct location of the James McKaughn grant being the older, the true line of that grant would determine the dividing line between the parties; that the said grant, being the older, could not be changed at all by the location of the John Jacob Blum grant which was younger, yet the location and calls of the John Jacob Blum grant if established could be considered by the jury as a circumstance on the question of whether the James McKaughn tract had been properly located as claimed by defendants." The criticism of the defendants is directed to so much of the instruction as directs the jury to consider the calls and location of the Blum grant as a circumstance in locating the McKaughn grant. It would seem that this Court has held with the contention of the defendants. In *Sasser v. Herring,* 114 N. C., 340, the Court held it was error to charge the jury that they (341) could consider the calls in a junior grant, when ascer-

tained, as a circumstance taken in connection with other circumstances in ascertaining the true line of the senior grant. This decision was cited and approved in *Euliss v. McAdams*, 108 N. C., 507. The marking of a tree or placing a stone at the time of surveying the junior grant to mark the end of a call for the line of the senior grant could have no other force or effect than the declaration of the surveyor that such marked tree or stone was in such line. In the absence of any evidence that he was dead, or that his declaration was competent under the line of decisions of this Court as cited and reviewed by WALKER, J., in *Yow v. Hamilton, post,* 357, such declaration is incompetent. The exception must be sustained. The defendants except to that portion of his Honor's charge which they insist placed the burden of proof upon them. In this proceeding the form of the issue, which we think is correct, renders it difficult to say who holds the affirmative or carries the laboring oar. The purpose is to establish a disputed line. As the plaintiff is the original actor, it would seem that the burden is upon him to make good his contention. It is not perfectly clear that his Honor placed the burden on the defendants. For the error in the instruction there must be a

New trial.

Cited: *S. c.*, 140 N. C., 10; *Woody v. Fountain*, 143 N. C., 71; *Green v. Williams*, 144 N. C., 63.

---

(342)

REDD v. COTTON MILLS.

(Filed 15 November, 1904.)

1. NUISANCES.

The blowing of cotton factory whistles is not a nuisance *per se.*

2. NUISANCES—*Evidence—Injunction—Question for Jury.*

Where the evidence is not sufficient to establish a nuisance, an injunction will not be granted to restrain the act until it is established to be a nuisance by a verdict of a jury.

ACTION by E. M. Redd against the Edna Cotton Mills, heard by Judge *W. R. Allen,* at Winston, N. C. From a judgment for the defendant the plaintiff appealed.

Watson, Buxton & Watson, for the plaintiff.

Glenn, Manly & Hendren and *Scott & Reid,* for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff against the defendant for the recovery of damages alleged to have been sustained by means of a nuisance maintained by the defendant and to have the nuisance abated by injunctive process. The injury for which damages are claimed is alleged to be to the health of the plaintiff's family and himself, and the nuisance the blowing of a steam-whistle at the early hours of 4:30, 5:30 and 5:50 o'clock a. m. for the space of from two to seven minutes duration. The whistle is attached to the engine of the defendant company and its blasts are declared to be "long, shrill, shrieking, discordant, startling, terrific; awakening the plaintiff and his family, disturbing his and their sleep and seriously interfering with the reasonable enjoyment of their home and seriously impairing their health. Before the defendant had answered the plaintiff served a notice upon defendant that a motion would be made before the Judge of the dis-
(343) trict for an order restraining the defendant from blowing the whistle of its engine between the hours of 9 p. m. and 6:30 a. m. Upon the plaintiff's complaint and affidavits and the defendant's affidavits the motion was denied and the plaintiff appealed.

From the plaintiff's complaint and affidavits there was evidence going to show that for years the defendant's whistle had been blown at 4.30, 5:30 and 5:50 o'clock a. m.; that the blasts were from two to seven minutes long; that they were shrill, startling, shrieking and terrific; that the night's rest of the plaintiff and several other families was broken up by the blasts of the whistle, the plaintiff's health impaired, and numbers of other families affected with nervousness. The evidence of the plaintiff further tended to show that the property of the plaintiff and others, situated as his and theirs was in respect to the mill, had depreciated in value by reason of the blowing of the whistle. The evidence afforded by the affidavits of the defendant tended to show that the blowing of the whistle did not disturb the sleep of the affiants or produce discomfort in their homes; that the blasts of the whistle were useful to the defendant in the conduct of its business; that the property in the neighborhood had not been impaired in value; that the evidence contained in plaintiff's affidavits was that of his friends and kinspeople, and that his health had not been affected by the blasts of the whistle, but was due to other causes, he being an extremely nervous and excitable man.

We think his Honor was right in refusing to grant the injunction. The blowing of whistles at factories to regulate and direct the order of work may be necessary to the proper conduct

of business, certainly it is not a nuisance *per se*. Such sounds and noises as these whistles are capable of making can become nuisances, however, and the protecting arm of the law can be invoked to prevent such. Injury to health and destruction of the comforts of one's home can be accom- (344) plished by frightful noises just as well as by means of noxious and offensive odors. *Dorsey v. Allen,* 85 N. C., 358, 39 Am. Rep., 704. But the courts are always slow to interefere by injunction in the conduct and management of business enterprises. Of course where a nuisance is established by the evidence, no private enterprise for the mere purpose of bringing gain to its owner can be allowed to destroy one's home or to impair his health. Both are irreparable injuries, and no damage can compensate a man for the destruction of his home or for the undermining of his health. *Clark v. Lawrence,* 59 N. C., 83, 78 Am. Dec., 241; *Barnes v. Calhoun,* 37 N. C., 199.

In the present case, however, the evidence does not satisfy us that the blowing of the whistle by the defendant amounted to a nuisance. In such a case under the old practice, that is, where the Court of Equity was not satisfied upon all the evidence, that the thing complained of was a nuisance, there would be no interference or action until the fact of "nuisance" had been established by law. *Simpson v. Justice,* 43 N. C., 115. So here we think the jury by their verdict ought to pass upon the evidence and find, under the instructions of the Judge, whether or not the manner in which the whistle is blown was a nuisance, that is, whether or not the plaintiff's health and home have been impaired and injured by the blowing of the whistle.

No error.

(345)

REYNOLDS v. RAILROAD CO.

(Filed 15 November, 1904.)

PLEADINGS—*Amendments—Torts—The Code, secs. 213, 267, 276—Actions.*

It is not error to allow a plaintiff to amend his complaint, assumed to state a cause of action on contract, so as to declare on a tort arising out of the same transaction.

ACTION by J. K. Reynolds against the Mt. Airy and Eastern Railway Company, heard by Judge *W. R. Allen,* at April Term, 1904, of SURRY.

This action was brought to recover damages for a breach of

contract and for an injunction against the operation of defendant's railway upon plaintiff's land. It is alleged in the complaint that for certain valuable considerations, which are set forth in detail, the defendant promised and agreed to construct and operate a line of railway from the town of Mount Airy to the White Sulphur Springs, which are owned by plaintiff and at which he has a hotel and conducts a summer resort. It is further alleged that for the purpose of constructing said railway the defendant appropriated and used, with the consent of the proper authorities and of the plaintiff, a carriage and wagon road from Mount Airy to the Springs upon condition that it would have the proposed railway line completed and ready for the transportation of the guests of the plaintiff from Mount Airy to the Springs by the time the season commenced in 1899. The plaintiff then alleges, with much particularity, the various negotiations between him and the defendant with a view of bringing about a spedy fulfillment of the contract, and also the continued failure of the defendant to comply with its promises. It is then alleged as follows: "That the defendant throughout the whole transaction, as shown by its conduct towards the plaintiff, has intended from the beginning only to use the plaintiff in order to carry out its original pur-
(346) pose of building and using said railroad solely as a tramway or lumber road, intending to abandon the same as soon as the lumber was exhausted." The defendant in its answer denies all the material allegations of the complaint, and sets up a counter claim arising out of the same transaction as that mentioned in the complaint, or at least connected with the subject of the action; it is not necessary to set it out with any more particularity. Subsequently the plaintiff moved to amend his complaint "so as to declare upon a tort instead of upon a contract as set out in the present complaint," and the motion having been granted the defendant excepted "on the ground that the proposed amendment would change the nature of the action and that the allowance of it was not within the power of the Court," and appealed from the other.

Watson, Buxton & Watson, for the plaintiff.
Carter & Lewellyn and *Lindsay Patterson,* for the defendant.

WALKER, J., after stating the facts. The Code provides that a plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, when they all arise out of the same transaction or a transaction connected with the same sub-

ject of action. The Code, sec. 267. This being so, the plaintiff could have added his cause of action in tort to the cause of action already alleged, if he had been so minded, provided it appeared that the second cause of action arose out of the same transaction, or was founded upon a transaction connected with the same subject of action as the first. Under said provision of the law a cause of action in contract can be joined with one in tort, if they both come within the same class designated in The Code, sec. 276 (1). This has been well settled by recent decisions. *Hodges v. R. R.*, 105 N. C., 170; *Ben-* (347) *ton v. Collins*, 118 N. C., 196; *Cook v. Smith*, 119 N. C., 350; *Daniel v. Fowler*, 120 N. C., 14. The reason why the two causes of action in tort and in contract should be joined and the inconvenience of any other rule is clearly stated by the present Chief Justice in *Cook v. Smith* and *Daniel v. Fowler*. If the plaintiff could have added to his present cause of action another one sounding in tort, why should he not be allowed to substitute the latter for the former, as it will not be a new cause of action in any sense if it is one which is based upon the same transaction or connected with the subject of the action. The power of the Judge, in the exercise of his discretion and under the circumstances, to permit him to add another cause of action in tort cannot we think be questioned, nor, consequently, can the power to substitute the one for the other.

We have assumed that the plaintiff intends in his proposed cause of action to declare in tort upon the same transaction as the one upon which the present cause of action is founded. The precise nature of the amendment does not appear in the record. It is only stated that the plaintiff was allowed to amend by declaring on a tort instead of on a contract. This of course is not sufficiently definite to give us any idea of the nature and scope of the amendment, but the general form of the order indicates that the plaintiff will at least substantially rely upon the facts as now pleaded, adding thereto such averments as may be necessary to convert the cause of action, so far as its form is concerned, from one in contract to one in tort. We must assume this to be the case, as we are not permitted to presume, if the fact does not clearly appear, that the Court committed error. The Court has the general power to allow amendments, and the liberal exercise of this power is encouraged for the purpose of trying causes upon their real merits. If, in this particular case, the Court did not have the power, the appellant should have had the facts so stated in the rec- (348) ord as to show that it did not. In other words, he had the right to have the plaintiff state the substance of the amend-

ment, so that he could avail himself of any valid exception to the ruling of the Court if there was any.

If we are right in our assumption as to the nature of the amendment, the latter will not come within the rule that the plaintiff cannot amend by setting up a new and different cause of action not germane to the first, as it will not be such but merely a different mode of stating the same cause of action and the correction of a mistake in pleading by the insertion of other allegations material to the case, which will not change substantially the claim but will merely conform it to the facts to be proved. The Code, sec. 273; *Simpson v. Lumber Co.*, 133 N. C., 95; *Ely v. Early*, 94 N. C., 1; *King v. Dudley*, 113 N. C., 167. In this respect the order of the Judge is fully sustained by what is said in *Pender v. Mallett*, 123 N. C., at page 61: "The second complaint is not for a different cause of action and antagonistic to the first, but merely a different mode of stating the same cause of action, and, if it were as the demurrer alleges, the second complaint is in effect a substituted complaint by leave of the Court, and might be different or even antagonistic to that stated in the original complaint, for this is not the case of an amendment of summons or even of the complaint, to confer jurisdiction by charging an entirely new cause of action or evading defenses in the original action, which would not be admissible." This case seems to us to be directly in point, whether the plaintiff proposes to substitute a new cause of action or not, and it must govern this case. The juridiction of this Court will not be affected in the least by the change in the pleading, nor will the defendant be deprived of any defense he would otherwise have had, and, as to the statute of limitations,

(349) if it is applicable, and it appears in any development of the case that the plaintiff has set up an entirely new cause of action, not connected with or growing out of the transaction as now set forth in the complaint, but entirely foreign to it, the defendant may by answer avail himself of the limitation in bar of the action, which for that purpose will be treated as having been commenced at the date of the amended complaint. *Christmas v. Mitchell*, 38 N. C., 535; *Gill v. Young*, 88 N. C., 58; *Sams v. Price*, 121 N. C., 392; *Hester v. Mullen*, 107 N. C., at p. 726. This is not a case in which the proof establishes a case wholly different from that made in the pleading (*Carpenter v. Huffsteller*, 87 N. C., 273), for there has been no proof.

We have not overlooked the fact that the plaintiff has almost charged the defendant with the commission of a tort, as will appear from that part of his complaint which we have quoted

in stating the case. It may be that he merely intends to rely upon the tort thus indicated and to state his alleged cause of action with more fullness and technical accuracy. If that is the cause of action upon which he will declare in his new complaint, we do not wish to be understood by what we have said as intimating any opinion as to its validity. In any view we can take of the case we are of the opinion that the ruling of the Court was correct.

No error.

Cited: Fisher v. Trust Co., 138 N. C., 243.

(350)

PRATT v. CHAFFIN.

(Filed 15 November, 1904.)

EVIDENCE—*Contracts.*

Evidence of a parol agreement between a purchaser of goods and the agent of the seller, that a written order was not to be binding unless it was satisfactory to another member of the firm of which the purchaser was a member, was competent.

ACTION by Walter Pratt & Company against G. W. Chaffin & Company, heard by Judge *W. R. Allen* and a jury, at Spring Term, 1904, of STOKES.

The plaintiffs sued the defendants upon an account for goods sold and delivered pursuant to a printed order of 16 October, 1903, to which the firm name was signed by one of the copartners. The defendants admitted the signing and delivery of the order to plaintiffs' agent, who was their traveling salesman, but alleged that it was signed by the partner of Chaffin upon condition and with the agreement that it should be submitted to his partner Hill upon his return, and if not satisfactory to him that it should not bind the defendants, and in such event they would write to the plaintiffs at once and order them not to ship the goods; that the partner Hill, who was absent, and subject to whose approval the order was signed, returned in a short time and said that the contract was not satisfactory to him, and on the next morning, 17 October, after the order was signed, the defendants wrote and mailed to the plaintiffs a letter asking them not to ship the goods, and that the partner Hill would retire and the firm would go out of business; that plaintiffs received the letter on 21 October, and wrote de-

fendants that they had received the order and shipped the goods on the 20th. The goods reached the town of Germanton, defendants' home, but they refused to take them from the depot, having notified plaintiffs not to ship. Evidence tending (351) to establish the defense was introduced under plaintiff's objection, to which they duly excepted.

The plaintiffs requested his Honor to give certain instructions to the jury to the effect that the order was not subject to be countermanded and that the letter of defendants to plaintiffs of 17 October was not a sufficient countermand. The Judge declined to give the special instructions prayed for, and among other things charged the jury "that if they found from the evidence that it was agreed at the time of signing the contract that it should not be binding on defendants unless satisfactory to Hill, that it was not satisfactory to Hill, that defendants notified plaintiffs and refused to receive the goods, to answer the issue 'No.'" Plaintiffs excepted. The jury found for defendants, and from a judgment on the verdict the plaintiffs appealed.

J. D. Humphreys and *N. O. Petree,* for the plaintiffs.
Watson, Buxton & Watson, for the defendants.

CONNOR, J., after stating the facts. The exception of the plaintiffs is based upon the theory that the testimony in regard to the agreement, made prior to the signing of the order by defendant Chaffin, tended to contradict or add to the terms of the contract. This is a misconception of the purpose and effect of the testimony. The defendants admitted that the order for the goods was signed as alleged and that it was delivered to plaintiffs' agent, but say that at the time of signing and delivering there was an express agreement that it was not of any binding force or validity unless satisfactory to Hill; that by virtue of this agreement the contract was incomplete, and that the assent of Hill was a condition precedent to the completion of the contract. In this consists the distinction between this case and those cited in the excellent brief of plaintiffs' counsel. The distinction is clearly pointed out in several cases to be (352) found in the Reports. SHEPHERD, C. J., in *Kelly v. Oliver,* 113 N. C., 442, speaking of testimony of this character, says: "This does not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of the contingency."

Judge *Miller,* in *Ware v. Allen,* 128 U. S., 590, thus states the principle upon which such testimony is admissible: "We

are of the opinion that this evidence shows that the contract upon which this suit is brought never went into effect, that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases well recognized in the law by which an instrument, whether delivered to a third person as an escrow or to the obligees in it, is made to depend as to its going into operation upon events to occur or to be ascertained thereafter."

Devens, J., in *Wilson v. Powers,* 131 Mass., 539, says: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to void its effect. This is not to show any modification or alteration of the instrument, but that it never became operative and that its obligation never commenced."

Crompton, J., in *Pym v. Campbell,* 6 E. & B., 88, says: "If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition because the agreement on the face of the writing would have been absolute and could not be varied, but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernathie approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper purporting to be a signed agreement was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid (353) or something else done." 1 Elliott on Ev., sec. 575. These authorities amply sustain his Honor's ruling admitting the testimony.

The contention made by the plaintiffs that, because of the statement in the order, there was no understanding with the salesman, except as printed or written on the order, the defendants are prevented from showing the agreement, assumes the very question in controversy whether there was any valid, binding contract. The jury having found in accordance with the defendants' uncontradicted testimony, there was no contract to be varied or added to. It was the misfortune of the plaintiffs that their salesman sent them the other immediately and without informing them of the agreement which he had made with the defendants. This is one of a number of cases before us at this term in which parties have signed long and complicated printed contracts for the purchase of goods, and, in various forms, set up defenses based upon parol agreements with salesmen or agents. It would seem that men of intelligence, both vendors and vendees, would have learned the necessity of read-

ing and understanding the terms and provisions of such contracts before signing and accepting them.

We have adhered to the well-settled principle that in the absence of allegation and proof of fraud or mutual mistake, the solemn contracts of men evidenced by their signature to printed or written agreements cannot be varied or changed by parol evidence. *Machine Co. v. Hill,* 136 N. C., 128, and *Register Co. v. Hill,* 136 N. C., 272.

This case comes clearly within the distinction pointed out. The instructions asked by the plaintiffs could not have been given. They assumed that a contract had been made and that the defendants were endeavoring to rescind it by coun-
(354) termanding the order. The question of the right to countermand does not arise for the reasons given. There is no error, and the judgment must be

Affirmed.

Cited: Hughes v. Crooker, 148 N. C., 320.

OIL CO. v. GROCERY CO.

(Filed 15 November, 1904.)

1. CLAIM AND DELIVERY—*Judgments—Alternative—Replevin—The Code, secs. 324, 431—Laws 1885, ch. 50.*

   In claim and delivery the judgment should be for the delivery of the property or its value.

2. APPEAL—*Verdict.*

   Where a verdict is set aside, not as a matter of discretion, but as a matter of law, an appeal lies.

3. APPEAL—*Judgment—Verdict.*

   The refusal of a judgment upon a verdict is a denial of a substantial right, and is appealable.

ACTION by the Globe Oil Company against the Messick Grocery Company, heard by Judge *W. R. Allen* and a jury, at March Term, 1904, of FORSYTH. From a judgment for the plaintiff for less than the relief demanded he appealed.

L. M. Swink for the plaintiff.
No counsel for the defendant.

CLARK, C. J. This was an action for the recovery of personal property or for its value if it cannot be delivered. The jury found on issues submitted that the plaintiff was the owner and entitled to the possession of the property and that its value was $362.80. It had been agreed by the parties (355) that if the plaintiff should recover damages he would be "entitled to recover interest on the value of the property from 1 May, 1902, and nothing more." The plaintiff asked judgment upon the verdict for recovery of the property, or if this could not be had, for recovery of its value as assessed by the jury with interest from the first day of the term, and interest on the value of the property from 1 May, 1902, for its detention. This last is clearly the meaning of the agreement of the parties as to damages.

The plaintiff was entitled to the alternative judgment as asked, for the delivery of the property if to be had, and, if not, then its value as assessed by the jury. The Code, sec. 431; *Council v. Averett,* 90 N. C., 168; *Hall v. Tillman,* 103 N. C., 276; *Grubbs v. Stephenson,* 117 N. C., 66. The Code, sec. 324, was amended by chapter 50, Laws 1885, to make the condition of the bond and the liability of the sureties harmonize with the terms of the judgment against the defendant. To same purport, *Jarman v. Ward,* 67 N. C., 33; *Smithdeal v. Wilkerson,* 100 N. C., 55.

The court below refused the alternative judgment allowed by section 431 of The Code on the ground that there had been no evidence of the destruction of the property, and set aside the finding upon the issue as to the value of the property as immaterial, and rendered judgment for the recovery of the property only, retaining the cause that the issue as to the value of the property and damages be ascertained after the return of the execution. This was taking "two bites at a cherry." This is one of the very few cases in which an alternative judgment is authorized. If the sheriff cannot find the specific property it would be a useless waste of time to report that fact to the next term and cause another jury to determine its value, when the whole matter can be passed upon as authorized by The Code, secs. 324 and 431, at one trial, execution can issue to the sheriff to take the property into his possession, or, if the (356) property cannot be found, to collect its value as assessed by the jury.

The verdict upon the issue as to the value of the property having been set aside, not as a matter of discretion, but upon a ruling as to its legal effect, an appeal lay. *Wood v. R. R.,* 131 N. C., 48; *Thomas v. Myers,* 87 N. C., 31; *Gay v. Nash,* 84

N. C., 333; *Bryan v. Heck,* 67 N. C., 322. The refusal of judgment upon the verdict was the denial of a substantial right and appealable. *Griffin v. Light Co.,* 111 N. C., 438.

The order setting aside the verdict upon the second and third issues must be reversed, and the cause remanded that judgment may be entered upon the verdict in accordance with this opinion.

Error.

---

(357)

YOW v. HAMILTON.

(Filed 15 November, 1904.)

1. BOUNDARIES—*Evidence—Declarations.*

   In an action to determine the boundaries to land, the declarations made relative thereto *ante litem motam* by a disinterested deceased person are admissible, though the surveyor thereof is a witness.

2. WITNESSES—*Evidence—Declarations—The Code, sec. 590.*

   An interested witness may testify to declarations of a deceased person relative to boundary lines.

3. INSTRUCTIONS.

   The failure of a trial judge to instruct upon any given phase of the evidence is not error unless he was specially requested to do so.

4. COSTS—*Supreme Court—Transcript—Appeal—Supreme Court Rule 22.*

   An appellant will be taxed with the cost of unnecessary and irrelevant matter in the record in the case on appeal.

ACTION by Rufus Yow against J. F. Hamilton and wife, heard by Judge *C. M. Cooke* and a jury, at July Term, 1904, of RANDOLPH. From a judgment for the plaintiff the defendants appealed.

Robins & Robins and *O. L. Sapp* for the plaintiff.
Brittain & Gregson for the defendants.

WALKER, J. This action was brought to recover real property. The plaintiff claimed under Beersheba Hill and the defendants under Hannah Stout, who in 1891 were tenants in common of a tract of land which in that year they divided. In order to make an equal partition of the tract a survey was made

and the dividing line was run and marked by the surveyor, and deeds were executed in accordance with the (358) boundaries as ascertained by the survey. The parties afterwards differed as to the true location of the dividing line and this suit was brought to settle that difference.

In order to show where the dividing line is the plaintiff introduced as a witness M. F. Laughlin, who testified as to material declarations made by his father, D. J. Laughlin, to him as to certain trees which were in the dividing line. This testimony met with an objection from the defendants, which was overruled and they excepted. The grounds of the objection are (1) that it is not an ancient boundary, and hearsay evidence is therefore incompetent; (2) that W. C. Hammer, the surveyor who ran and marked the line, is now living and was examined as a witness in the case, and that hearsay evidence is not admissible if there is a living witness, as his evidence is, of course, the best and, under the rule as to primary and secondary evidence, the best evidence must always be produced.

Neither of the grounds of objection is tenable and the evidence was clearly competent. The error lies in failing to distinguish between evidence by reputation, which is competent only as to ancient boundaries, and hearsay evidence, as it is called, which consists in the declarations of deceased persons and is competent as to those of more recent origin. Both kinds of evidence are admissible in all controversies relating to boundaries when confined within their proper limits. "In the latter, namely, hearsay evidence, it is necessary as a preliminary to its admissibility to prove that the person whose statement it is proposed to offer in evidence is dead; not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness; whereas, it is manifest that in respect to evidence by reputation, this preliminary question cannot arise." *Dobson v. Finley,* 53 N. C., 495; *Shaffer v. Gaynor,* 117 N. C., 15; *Westfeldt v. Adams,* 131 N. (359) C., 379. It may be further said concerning hearsay evidence or declarations as to boundaries that there are three prerequisites to the competency of such evidence, (1) that the declaration must come from a disinterested person; (2) the declarations must have been made *ante litem motam,* and (3) the person who made them must be deceased, so that he cannot be produced and heard in person as a witness. *Smith v. Headrick,* 93 N. C., 210. That such declarations are competent to show where lines and corners are, when the preliminary facts have been found, has been frequently decided by this Court. *Harris*

v. Powell, 3 N. C., 349; *Gervin v. Meredith,* 4 N. C., 635; *Hartzog v. Hubbard,* 19 N. C., 241; *Dancy v. Sugg,* 19 N. C., 515; *Hedrick v. Gobble,* 63 N. C., 48; *Toole v. Peterson,* 31 N. C., 180; *Caldwell v. Neely,* 81 N. C., 116; *Huffman v. Walker,* 83 N. C., 411; *Mason v. McCormick,* 85 N. C., 226; *Bethea v. Byrd,* 95 N. C., 311, 59 Am. Rep., 240. We refer especially to the clear statement of the rule by HENDERSON, C. J., for the Court, in *Sasser v. Herring,* 14 N. C., 340: "We have in questions of boundary given to the single declarations of a deceased individual as to a line or corner the weight of common reputation, and permitted such declarations to be proven under the rule that in questions of boundary hearsay is evidence. Whether this is within the spirit and reason of the rule it is now too late to inquire. It is the well established law in this State. And if the propriety of the rule was now *res integra* perhaps the necessity of the case arising from the situation of our country, and the want of self-evident *termini* of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles upon which the rules of evidence are founded." In *Whitehurst v.*
(360) *Pettipher,* 87 N. C., 179, 42 Am. Rep., 520, SMITH, C. J., after stating it to have been well settled by a series of decisions commencing in the year 1805, "That, in questions of private boundary, the declarations of disinterested persons since deceased made before any controversy has arisen are admissible to show their location," proceeded as follows: "The declaration is received under the conditions mentioned as evidence, instead of the sworn statement for which it is substituted, when the party making it is dead and the evidence would otherwise be lost. It is manifest that if the declarant were alive, and would be allowed to prove the fact to which the declaration relates, the declaration itself may be proved after his death." In *Smith v. Headrick, supra,* the same learned Judge says: "A series of decisions (commencing at the end of the last century and ending in 1884 with *Fry v. Currie,* 91 N. C., 436) has fully established the doctrine of the admissibility of parol declarations to show private boundaries when they proceed from aged and disinterested persons since deceased and are made *ante litem motam.* These are the three essential conditions to the competency of this form of hearsay or traditionary evidence in questions of disputed boundaries. The opportunities which the declarant had may be inquired into in determining the *value* but not the *competency* of the declaration and, as such, properly furnish a subject for comment before the jury."

Counsel for defendant contended that as Mr. Hammer is living, his is the best evidence of the true location of the line. This, we think, is a total misconception of what is meant in this connection by the term "best or primary evidence." It refers not to the testimony of other witnesses who are living and can be produced, but to the testimony of the deceased witness himself, if he were now living and could testify under oath and cross-examination, and to his declaration as being the next best or secondary evidence, as by reason of the death of the declarant his sworn testimony cannot be had. The rule (361) requiring the production of the best evidence excludes only that evidence which itself indicates the existence of more original sources of information. But where there is no substitution of evidence but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed. It is intended by it to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. Thus understood, the rule is essential to the pure administration of justice, and having been adopted for practical purposes it must be applied always so as to promote the ends for which it was designed. 1 Greenleaf Evidence, sec. 82.

The defendants objected to the testimony of the witness R. S. Craven as to declarations of D. J. Laughlin concerning the location of the dividing line made to him which were similar to those made to the witness M. F. Laughlin. The objection was based upon the ground already considered and upon the additional ground that R. S. Craven was an interested witness, as the plaintiff claimed from him, and, further, because the defendants derived their title through Claudia Hill Craven, now deceased, who was the wife of the witness, and defendant contends that for these reasons he is disqualified under section 50 of The Code. We are unable to perceive how this can be so. The case comes neither within the letter nor the spirit of that section. It is there provided that an interested witness or a person from, through, or under whom a party to be affected by the event of the action claims, shall not testify concerning a personal transaction or communication between the witness and a person then deceased under whom the party against whom he is introduced as a witness claims. Surely no such state of facts is presented here, and there is no testimony having even the slightest appearance of being forbidden by the law. Clark's Code (3 Ed.), sec. 590, and notes; *Bunn v. Todd,* (362) 107 N. C., 266. The witness testified only to what a disinterested person told him, one who had no interest in or con-

nection with the suit or the matter in controversy and under whom no claim was made by defendant. We fail to see how the fact that the witness was the husband of Claudia Hill Craven, under whom the defendants derived their title, disqualified him. He did not testify to the declarations of his wife, but to those of D. J. Laughlin, and the objection was addressed solely to the latter. Such evidence has heretofore been admitted without any contention that it was incompetent under section 590 of The Code. *Whitehurst v. Pettipher,* 87 N. C., 179; *Huffman v. Walker,* 83 N. C., 411. The objection is therefore manifestly untenable. The remaining exception is that his Honor failed to caution the jury that the hearsay evidence as to the location of the dividing line was not entitled to as much weight as the direct evidence of W. C. Hammer, who testified in person as to the true location of that line. When an appellant complains that the Judge omitted to give a charge upon any given phase of the evidence, the rule, which has some exceptions not applicable here, requires him to show that the Judge was specially asked to give the desired instruction. *Patterson v. Mills,* 121 N. C., at p. 269, where the cases on this subject are carefully collected by the present Chief Justice who wrote the opinion of the Court in that case. It appears in this case that there was no special prayer for the instruction and that the objection was clearly waived. We extract the following statement from the case: "There were no requests for special instructions by either the plaintiff or the defendants. His Honor fully instructed the jury as to the contentions of both parties. There was no request made by either party for his Honor to put his charge in writing. The defendant did not except to any failure of his Honor to charge on any par-
(363) ticular phase of the case until making out his case on appeal." It is true the Court did not, in so many words, tell the jury that the testimony of W. C. Hammer was entitled to more weight than that of M. F. Laughlin and R. S. Craven, but even if he did not, and conceding that it would have been proper to have done so, the defendants' objection to the inadvertent omission comes too late.

The plaintiff moved in this Court to tax the appellant with the costs of unnecessary matter in the record and case on appeal under Rule 22. It is unnecessary to pass upon this motion, as the plaintiff wins in the suit, but we again call the attention of the members of the bar to this important provision. Unnecessary and irrelevant matter increases the costs and encumbers the record, sometimes producing confusion and thus preventing a proper and intelligent understanding and consideration of the

case. We would have granted the motion if our judgment had been the other way. In all other respects the record is prepared in strict compliance with the statute and the rule of this Court. It contains a special assignment of errors at the end of the case on appeal, which is an essential part of the record and is therefore required in all cases. If proper reference is made in each assignment to the page of the record where the exception upon which it is based will be found, it constitutes a most valuable aid to counsel in the argument and to this Court in the consideration and decision of the case. The observance of this requirement is a matter of the first importance. We find no error in the rulings of the court to which the defendant has taken exception.

No error.

Cited: Hill v. Dalton, post, 341; *Hemphill v. Hemphill,* 138 N. C., 506; *Bonner v. Stotesbury,* 139 N. C., 7; *Hill v. Dalton,* 140 N. C., 16; *Bland v. Beasley, ib.,* 631; *Baker v. R. R.,* 144 N. C., 41; *Nelson v. Tob. Co.,* 141 N. C., 420; *Lumber Co. v. Branch,* 150 N. C., 241; *Lumber Co. v. Triplett,* 151 N. C., 411.

(364)

CHAFFIN v. MANUFACTURING CO.

(Filed 15 November, 1904.)

DAMAGES—*Nominal—Waters and Watercourses.*

In an action for damages for maintaining a dam, an instruction that to entitle the plaintiff to nominal damages he must show damages to an "appreciable" extent is erroneous, he being entitled to nominal damages if the water is ponded on his land to any extent.

MOTION to rehear this case, reported in 135 N. C., 95. Motion dismissed.

Watson, Buxton & Watson, Glenn, Manly & Hendren and *T. B. Bailey* for the petitioners.

Lindsay Patterson, E. L. Gaither and *E. J. Justice* in opposition.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided by this Court at Spring Term, 1904,

and is reported in 135 N. C., 95. We then held that the Court committed an error in its charge to the jury on the question of nominal damages, which charge was as follows: "If you find from the evidence that the erection of the dam caused water to be ponded on the land of the plaintiffs to any appreciable extent, the plaintiffs would be entitled to recover nominal damages, although you might not be satisfied that the plaintiffs had suffered substantial damages." Counsel do not allege in the petition to rehear, nor do the certifying members of the bar state, that there was any error whatever in the principles laid down by the court in its opinion, but the specific assignment of error is that this Court misunderstood and misinterpreted the charge of the trial court, which they say conforms in every respect with the principles of law declared by this Court.

(365) If error there was in our decision, either in stating the general principles of law relating to such cases as this one or in applying those principles to the special facts of the case, we must be quick to correct it and to reverse the former ruling. It is not only our plain duty so to do, but it will always be gratifying to be able to correct any error or inadvertence, so that no harm will ultimately come to the party who may have been prejudiced by our decision. But in this case, after a most careful consideration of the assignment of error in all its bearings and a thorough re-examination of the law, we are constrained to say that nothing has been shown which should induce us to change our former ruling. With the additional light which the petition, the certificate of members of the bar and the able briefs of counsel on the rehearing have shed upon the subject, we are as firmly convinced now as we were at last hearing that there was error in the instruction of the Court, which we have copied above from the case. His Honor told the jury that the plaintiffs were entitled to recover nominal damages if the water was ponded on their land to any *appreciable* extent. We think they were so entitled if it was ponded on the land to any extent. If the land was covered by water at all, however inappreciable the extent of the invasion of the plaintiffs' right, they are entitled to nominal damages, provided, however, it was caused by the erection of the dam. The very use of the word "appreciable" to qualify the word "extent" implies that the land might be covered to some extent and yet the plaintiffs would not be entitled to recover nominal damages; their right to recover such damages depending upon whether the extent of the invasion of their premises could be appreciated or estimated. If the use of the word "appreciable" did not imply that the land might be covered to some extent without the plaintiffs being

entitled to nominal damages, why use the word at all? It certainly can not be said that the term "appreciable (366) extent" is precisely synonymous with the words "any extent" in scope and meaning, for if so, as we have said, the use of the word "appreciable" was superfluous. It can make no difference how very small or how much less than any assignable quantity or value the injury to another's right may be, and we use the word "injury" now, as we did before, in its technical sense, the injured party is entitled to nominal damages, for they are based not upon any idea of damage however trivial, but are solely predicated on the infraction of a right when there has been no damage proved, and they are awarded because of the distinct legal wrong committed, however imperceptible, from which the law conclusively presumes that there has been some damage, in the absence of proof of any kind of damage. They are given, as is said in our former opinion, not as any equivalent for the wrong but in recognition of the technical injury and to determine and establish the plaintiffs' right. 1 Joyce Damages, sec. 9.

But we think the error in this instruction more clearly appears when it is considered in connection with a subsequent instruction of the Court upon the question of damages. The Court charged the jury as follows: "If the plaintiffs have been damaged and the erection of the dam caused any damage, they are entitled to recover damages. If not damaged, or if damaged and the dam not the cause of the damage, they are entitled to recover nothing." In this instruction the jury told that if the erection of the dam caused damage the plaintiffs are entitled to recover it, but if the plaintiffs were not damaged "they are entitled to recover nothing." In other words, the plaintiffs are not entitled to recover anything, not even nominal damages, unless they have proved that they were damaged. The Court is here speaking of the damage and not of the injury or the technical invasion of the right. The first instruction re- (367) lated to the trespass, the act of raising the water in the stream so that it flowed upon the plaintiffs' land, and this instruction refers to the consequent damage. It will be observed that the Court charged that if there was no damage shown the plaintiffs would recover "nothing," not even nominal damages, whereas it is conceded, as it should be, that if there was even a technical invasion of their premises the plaintiffs were entitled to recover at least nominal damages, even though they showed no actual or substantial damages. In any view we are able to take of the case, we think the charge of the Court in the particulars mentioned was at least calculated to mislead

the jury (*Bank v. Gilmer,* 116 N. C., 705), even if it was not in itself erroneous, and we still think it was so.

The plaintiffs' counsel contend in their brief on the rehearing that the evidence of the plaintiffs showed that the water had been raised in the stream by the dam six feet, and that of the defendant that it had been raised two feet and nine inches. We do not consider this contention of counsel, for we are not fully advised as to how this rise affected the plaintiffs' land, if at all, and it is well not to express any opinion based upon the contention, as the defendant may be able to show at the next trial that there was not even any technical injury to the plaintiffs' land.

The views we expressed at the last term, and those which we now hold, seem to be strongly supported by a recent text-book which we find to be of exceptional merit. The writer substantially says: Each owner of land along a watercourse has the natural right to have the stream maintain the condition which nature gives it throughout the entire extent of its territory. This rule gives him the right to have the water leave his land at its lowest level, as well as the right to have the water come down to him from above. Rights in running water are (368) governed by the maxim, *aqua currit et debet currere ut currere solebat.* The right to the natural flow of the stream is a natural right and depends solely on ownership of the banks of the stream, regardless of whether any use has been made of it or not. Any swelling of the stream over the line is an invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect not only for present needs but for possible future ones. It constitutes a direct trespass upon his property which he may seek the aid of the courts to redress, and he is not bound to show that he is specially injured to maintain the action. Injury is shown as soon as it appears that the water is backed over the line. The upper proprietor has a right to protect himself from the acquisition of prescriptive rights at least, and that right is not diminished by the fact that he has no present use for his rights to their full extent. When the rights of the upper owner are invaded, the law presumes damage. The maxim of the common law that the owner of the soil has absolute dominion over it above and below the surface, and damage caused to others by his rightful command over his own soil is *damnum absque injuria* has no application to such a case. Throwing the water back on the upper land is a nuisance in and of itself, of which the upper owner may complain whenever he desires to do so, whether it is a direct injury to him or not. He has a right to have his land free from the water and can object to its pres-

ence whenever he chooses; and the lower owner has no right in the premises. Farnham Waters and Water Rights, secs. 546, 547 and 551.

The plaintiffs' counsel again complain of the charge of the Court upon the degree of proof required of the plaintiffs to entitle them to a verdict. The charge of the Judge should be considered in its entirety. Isolated expressions are not a fair or reliable test of judicial accuracy. Reviewing the charge as a whole, upon this point, we are satisfied that (369) it is sustained by reason and the weight of authority.

We do not think the decision of the Court at the last term is erroneous in the respect complained of and it must therefore stand. This dismisses the petition.

Petition dismissed.

WINGATE v. PARKER.

(Filed 15 November, 1904.)

TAXATION—*Municipal Corporations—Const. N. C., Art V, sec. 1; Art. VII, secs. 7, 9, 13, 14; Art. VIII, sec. 4—Laws (Private) 1901, ch. 109—Laws (Private) 1903, ch. 258.*

The provision in the State Constitution requiring a proportional poll and property tax does not apply to municipal corporations.

ACTION by J. P. Wingate against D. L. Parker, heard by Judge *C. M. Cooke,* at Statesville, N. C., 16 August, 1904. From a judgment for the defendant the plaintiff appealed.

John L. Rendleman and *T. C. Linn* for the plaintiff.
John S. Henderson and *P. S. Carlton* for the defendant.

CLARK, C. J. The town of Spencer is authorized by its charter to levy an *ad valorem* tax on all real and personal property not exceeding one dollar on every one hundred dollars worth of property, and a per capita tax not exceeding fifty cents on all persons liable to poll tax residing in the town. Laws (Private) 1901, ch. 109, sec. 18, as amended by Laws (Private) 1903, ch. 258, sec. 5. For the year 1903 the town levied a tax of fifty cents no each poll and fifty cents on each one hundred dollars worth of property.

This is an action to restrain the collection of such tax (370) upon the ground that it is illegal and void because it does not observe the equation between the tax on property and

polls required by Article V, sec. 1, of the State Constitution. Each article of the Constitution has its special scope. Article V concerns only State and county revenue and taxation. Section 1 of that article provides: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

It is clear that this section applies solely to State and county taxation. It requires (1) that the General Assembly shall levy a capitation tax on every male between twenty-one and fifty years of age; (2) that it shall be equal to the tax laid on three hundred dollars of property at cash valuation; (3) that the county commissioners may exempt from capitation tax in special cases, on account of poverty and infirmity, and (4) that the State and county capitation tax shall never exceed two dollars on the head. If this section embraces municipal taxation, such taxation could very rarely be levied at all, for in most if not all the counties this limit has been reached.

The provisions as to municipal taxation are to be found only in Article VII, secs. 7, 9 and 13, while section 14 of said article exempts from the power conferred upon the General Assembly to repeal all the other sections of that article; and in Article VIII, sec. 4, which specially makes it "the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation,
(371) assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." So that, exclusive of the provisions of sections 7, 9, and 13 of Article VII (which have no application in this controversy), the only restriction upon municipal taxation is such as the Legislature may see fit to prescribe, and the town of Spencer has not exceeded the limitations and powers as to taxation set out in its charter.

In *Jones v. Comrs.*, 107 N. C., 248, MERRIMON, C. J., for a unanimous court holds that the equation prescribed by Article V, sec. 1, does not apply to municipal corporations. On page 258 he says: "But it is settled by many decisions of this court that it (Article V, sec. 1) does not establish an exclusive system or scheme of taxation applicable and to be observed in all cases and for all purposes; that on the contrary it applies only to the

revenue and taxation necessary for the ordinary purposes of the State and the several counties thereof. * * * The article does not provide or declare that the equation so established shall be of universal and exclusive application; it expressly mentions only the State and counties in connection with the subjects of revenue and taxation, and does not mention cities, towns or municipal corporations, or make any reference thereto or provide for or as to them. * * * And it is singular that it fails to make some reference to municipal corporations in such respect if it was intended to embrace them. That it does not so intend, is more manifest in that they are expressly provided for in such respects in another distinct article of the Constitution. * * * Article VII of the Constitution is entitled 'Municipal Corporations' and is exclusively devoted to that subject." This article, in section 9, provides that "All taxes levied by any city or town must be uniform and *ad valorem* upon all property in the same," and nowhere is there any provi- (372) sion requiring the equation of taxation between property and polls to be observed. And in concluding the opinion he further says, on page 263: "We are therefore of opinion that the equation and limitation of taxation established by the Constitution (Article V, sec. 1) applies only to taxes levied for the ordinary purposes of the State and counties." And again, at bottom of page 264: "We know that it has been said, *obiter,* in several cases that the equation and limitation of taxation referred to above must be observed in levying taxes for municipal purposes, but it has not been so decided, certainly not expressly decided; nor can it be, in our judgment, without defeating the true intent reasonably appearing."

This is the last expression of the Court upon the subject. Nothing can be found to the contrary except in *obiter dicta,* previously, which are expressly overruled by that case, and we think properly so. In some instances the charter prescribes a similar equation and then it must be observed, not as a constitutional requirement but by virtue of the legislative restriction.

In dissolving the restraining order there was

No error.

Cited: Board of Education v. Comrs., 137 N. C., 313; *Perry v. Comrs.,* 148 N. C., 523.

(373)

HOWELL v. PARKER.

(Filed 15 November, 1904.)

1. DOWER—*Widow.*

Where the purchaser has paid the purchase price and been put in possession, but no deed executed, his widow is entitled to have such property valued in allotting her dower.

2. DOWER—*Allotment—Venue—Laws 1903, ch. 314—The Code, sec. 2103.*

Dower must be allotted in a single action brought in the county in which the deceased last usually resided.

3. DOWER—*Allotment—Widow.*

The dower of a widow shall embrace the residence last usually occupied by the deceased husband, and if the value thereof is as much as one-third of the realty of which the husband died seized, the widow has no interest in the balance of the estate.

4. DOWER—*Widow—Allotment.*

Where a widow fails for fourteen years to have her dower allotted, she cannot take dower in lands bought by third persons from the heirs, where there is enough realty left out of which to secure her dower.

ACTION by Julia F. Howell and another against T. S. Parker and others, heard by Judge *O. H. Allen,* at March Term, 1904, of STANLY. From a judgment for the plaintiffs the defendants appealed.

Shepherd & Shepherd, L. H. Clement and *J. R. Price* for the plaintiffs.

R. L. Smith and *R. E. Austin* for the defendants.

CLARK, C. J. This is a petition for partition filed before the Clerk of the Superior Court of Stanly County. M. B. Howell bought the tract of land in 1885, paid the purchase
(374) money in full and entered into possession as owner, but died in 1889 without having received a deed, which was executed, however, to his heirs at law by the vendor in 1891. Two of the heirs at law subsequently conveyed their two-fifths interest to the defendant Parker, who has two others of the heirs at law as co-defendants. Another heir at law and the widow of M. B. Howell are the plaintiffs. It is agreed that at the time of his death, and for several years prior thereto, M. B. Howell resided in Salisbury, Rowan County; that the lands in this action are worth $1,000, and that M. B. Howell died seized and possessed of the following: One house and lot, his usual

residence in Salisbury, worth $1,600; another house and lot in Albemarle worth $1,500, and a tract of 144 acres, also in Stanly County, worth $375; that no memorandum in writing was made when M. B. Howell purchased the land, and that no dower has ever been allotted to the widow.

It is immaterial that no memorandum in writing was made at the time of the sale, for the vendor has not pleaded the statute of frauds and in fact has made the conveyance to the heirs at law of the purchaser. The purchase money having been paid in full and the purchaser put in possession, he had an equitable estate which his widow is entitled to have valued in allotting her dower. *Love v. McClure,* 99 N. C., 290, and cases cited. But it appears by the facts agreed that the value of all the realty, including the tract in question, amounts to $4,475, and that the residence and lot in Rowan are worth $1,600, being something over "one-third in value" of the realty. As the statute, The Code, sec. 2103, provides "in which third part *shall be* included the dwelling house in which her husband usually resided," * * * it follows that the widow has no interest in this tract beyond the right to have its value taken into consideration in estimating the value of the dower to be allotted to her.

It is suggested by counsel that the widow could waive (375) the right to the residence. If that were true, she might elect to take the whole of this tract, but it might well be questioned if a court would permit her to take her dower in the whole or in part of this tract to the detriment of the purchaser of an interest in this tract from two of the heirs at law after she has delayed for fourteen years to indicate that she would ask allotment of property other than that named in the statute. It might be inequitable to permit such election after such laches, when she can get her full dower without detriment to anyone. But the point has been presented, and it has been held *Askew v. Bynum,* 81 N. C., 350, not only that the dower must be allotted in proceedings instituted in the county of the husband's last usual residence, but DILLARD, J., says, on p. 352, that "The quantity to be assigned is one-third interest in value of all such lands, with a *peremptory direction* to include the dwelling-house in which the husband usually resided. * * * It is provided that the assignment may be made (subject to the *restriction* to embrace the dwelling-house, etc.), not in every separate tract, but in one body, or several, on one or more tracts, having a due regard to the interests of the heirs and rights of the widow." The Court noticed and negatived the claim that one-third in value of lands of which the husband died seized and possessed must be allotted in each county, and says (p. 356) that the

allotment of dower must be made by the court in the county where the husband last usually resided, and must be "assigned around the dwelling-house," unless, of course, the third should be more than the value of such house and appurtenances.

The widow in this case should have her "one-third in value" of her husband's realty allotted to her by proceedings instituted in Rowan County, "in which third part shall be included the dwelling-house," * * * as the statute provides. When (376) the residence and lot are not such third she may have other lands allotted. If such were the case here, then if this partition had been made it would have been subject to her dower rights, certainly in the absence of any equity in favor of the purchasers from the heirs by reason of the fourteen years' failure of the widow to have her dower allotted and there being other lands available. But dower could in no event be allotted in partition proceedings. It must be laid off once for all, in the whole estate, by proper proceedings in Rowan County. If before the allotment of dower the heirs at law partition the realty the shares are subject to the possibility of dower being laid off therein in a proper proceeding. But it is only after dower has been actually allotted upon a tract that the widow can have the value of her dower assessed in partition proceedings of such tract. "Fragmentary dower" is not allowable. Laws 1893, ch. 314, prescribe that dower shall be allotted in one proceeding, though the realty may lie in more than one county. Further, it affirmatively appears that the homestead and lot in Rowan County will furnish the one-third part to which she is entitled. In adjudging, therefore, that the widow "is entitled to a dower interest in the proceeds of the sale," and ordering a reference to report its value according to the established annuity tables, there was error.

It may be that cases of hardship will arise from the requirement that the one-third shall embrace the residence. But dower is entirely statutory, and the language of the statute and of the decision construing it as well, are so explicit and peremptory that any relief must be sought in a modification of the statute.

Error.

WALKER, J., concurs in result.

Cited: *Harrington v. Harrington,* 142 N. C., 520.

(377)

LATON v. CROWELL.

(Filed 15 November, 1904.)

DEEDS—*Evidence—Recordation—Laws 1885, ch. 147—The Code, sec. 1245.*

A deed executed prior to the registration act of 1885, ch. 147, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act.

ACTION by J. W. Laton against R. A. Crowell, heard by Judge *O. H. Allen* and a jury, at March Term, 1904, of STANLY.

This is an action for the recovery of land. Both parties claimed under John Cox. Plaintiff introduced a deed from said Cox and wife to Jane Simpson, bearing date 1 March, 1883, registered 13 August, 1901; deed from Nathan Simpson and wife, Jane, bearing date 3 August, 1901, registered 10 August, 1901.

The defendants introduced a deed in trust from Cox to A. C. Freeman, bearing date 21 January, 1884, recorded 17 March, 1891. Deed from A. C. Freeman, trustee, to E. J. Freeman, bearing date 17 October, 1891, registered same day. Deed from E. J. Freeman and wife to A. C. Freeman, bearing date 17 October, 1891, registered 19 October, 1891. Deed from the widow and heirs at law of A. C. Freeman to defendants, duly registered. Record in case of *A. C. Freeman v. John Cox and Nathan Simpson,* Fall Term, 1891, STANLY, complaint averring title to *locus in quo* in plaintiff, that defendants were in possession, etc. Judgment by default for plaintiff. This record was admitted after objection by plaintiff. Exception. The plaintiff introduced Nathan Simpson and proposed to show that Jane Simpson and plaintiff claiming under her have been in the open, notorious, adverse and actual possession of (378) the land described in the complaint under a deed from John Cox to her as color of title ever since the date of said deed in 1883 to some time in the summer of 1900 under well-known metes and bounds. The defendant objected. Objection sustained. Plaintiff excepted. Upon the intimation of the court that plaintiff could not recover, he submitted to a nonsuit and appealed.

J. Milton Brown, Adams, Jerome & Armfield and *J. C. Wright* for the plaintiff.

R. L. Smith and *R. E. Austin* for the defendant.

CONNOR, J., after stating the case. The testimony should have been received, not for the purpose suggested, but to show, if believed by the jury, that the plaintiff's case came within the proviso in chapter 147, Laws 1885. After declaring that no deed, etc., should be effectual to pass title as against purchasers and creditors, except from the registration thereof, is the following language: "Provided that no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment, either in person or by his, her or their tenants of such land * * * at the time of the execution of such second deed," etc. The deed to Jane Simpson having been executed 1 March, 1884, comes strictly within the proviso if it is shown that she was in possession under said deed at the time of the execution of the mortgage deed of 21 January, 1884. The history of the registration laws of the State shows that frequent efforts were made to place deeds in respect to registration as affecting purchasers and creditors on the same footing with mortgages and
(379) deeds in trust. As the State became an inviting field for the investment of capital in the development of its resources in mines, lumber, water-power and agriculture, the laxity of our registration laws were found to be an obstacle to progress. The General Assembly at each session having passed acts extending the time for the registration of deeds, section 1245 of The Code requiring registration within two years after the date of deeds was not only abrogated but was misleading. This Court uniformly held that the grantee holding an unregistered deed had either an incomplete, or, as was sometimes said, an equitable title, which became perfect when the deed was registered and related back to its delivery; that the title when perfected by registration was paramount to title acquired by a purchaser for value without notice from the grantor although registered before the deed of prior date. The question is discussed with his usual ability, and the authorities reviewed by RUFFIN, J., in *Phifer v. Barnhart,* 88 N. C., 333. In this condition of the law it was impossible to make a perfect abstract of title to land or buy with safety. When the General Assembly of 1885 undertook to legislate on the subject, it was objected that so radical a change and departure from the law and policy which had prevailed for more than a century would endanger many titles and encourage frauds. To meet this well founded apprehension the safeguards expressed in the several provisos found in the statute were incorporated. The effect of the first

was to extend the time of the operation of the act to 1 January, 1886. The second proviso protected titles acquired and held under unregistered deeds prior to 1 December, 1885, if the holders of such titles were in the actual possession of the lands, or persons purchasing from the grantor had actual or constructive notice of such unregistered deed. The deed to Jane Simpson is within the second proviso. It is true, the case comes within the evil intended to be remedied by the statute. It was impossible, in putting into operation a change so (380) radical, in respect to a subject so important, to prevent some hard cases. If the defendant and those under whom he claims knew that Jane Simpson and those claiming under her were in the actual possession of the land at the time the mortgage was executed, prudence would have suggested that they make inquiry in regard to her claim. It is held by this Court in *Cowen v. Withrow,* 116 N. C., 771, that the deed could be registered after 1 January, 1886, and that when so registered it came within the principle announced in *Phifer v. Barnhart, supra,* and conferred a good title as against the mortgage deed under which defendant derives his title. Of course, what is here said applies only to deeds coming within the proviso. The deed was not color of title, but after registration it conferred a perfect title. *Austin v. Staten,* 126 N. C., 783, and *Collins v. Davis,* 132 N. C., 106, have no application to the facts in this case. The record in the suit of *Freeman v. Cox and Nathan Simpson* was not admissible against the plaintiff claiming under Jane Simpson, who was not a party thereto. The judgment in that action did not affect her rights. In rejecting the testimony offered to show Jane Simpson's possession there was error, for which the plaintiff is entitled to a

New trial.

(381)

HARRISON v. TELEGRAPH CO.

(Filed 15 November, 1904.)

INSTRUCTIONS—*Negligence—Damages—Telegraphs.*

In an action against a telegraph company for failure to deliver a telegram, it is error for the trial judge to assume in his instructions the fact of the relationship of the plaintiff to the deceased, there being no evidence or legal admission thereof, though the fact was not questioned on the trial.

ACTION by Annie Harrison and husband against the Western Union Telegraph Company, heard by Judge *O. H. Allen* and a

jury, at February Term, 1904, of ROWAN. From a judgment for the plaintiffs the defendant appealed.

R. Lee Wright, George W. Garland and *Walser & Walser* for the plaintiffs.

C. W. Tillett, F. H. Busbee & Son and *E. C. Gregory* for the defendant.

DOUGLAS, J. This is an action brought by the *feme* plaintiff to recover damages for the negligent failure to deliver a telegram within a reasonable time. This failure to promptly deliver, of itself, raised the presumption of negligence aside from the substantial testimony tending to prove it. *Sherrill v. Telegraph Co.*, 116 N. C., 655; *Hendricks v. Telegraph Co.*, 126 N. C., 304, 78 Am. St., 658; *Laudie v. Telegraph Co.*, 126 N. C., 431, 78 Am. St., 668; *Rosser v. Telegraph Co.*, 130 N. C., 251; *Hunter v. Telegraph Co.*, 130 N. C., 602; *Cogdell v. Telegraph Co.*, 135 N. C., 431.

The telegram was in the following words: "Banson died this morning at 6 o'clock. Buried 4 o'clock to-morrow." Stating upon its face the pregnant facts of death and burial, it (382) was sufficient of itself to put the defendant on notice of its importance aside from the testimony tending to show special information given by the plaintiff to the defendant company. *Hunter v. Telegraph Co.*, 135 N. C., 458, and cases therein cited.

We do not understand the defendant seriously to contest the verdict as to its own negligence, but to direct its contentions principally, if not solely, to the measure and quantum of damages. There is but one exception which we deem necessary for discussion. The court below charged as follows: "While there is no direct evidence that the *feme* plaintiff suffered any mental anguish from not being able to see her son's body or to attend the funeral, yet the jury are allowed to presume the existence of such pain and mental anguish from the relationship existing between the *feme* plaintiff and her son." We think there was error in this part of the charge inasmuch as his Honor assumed as proved the alleged relationship. He should have charged substantially as follows: "If you find from the evidence that the plaintiff was the mother of the deceased, the law then raises the presumption of mental suffering on her part." It is but just to his Honor to say that the fact of such relationship seems not to have been called in question upon the trial, but, as we cannot find in the record any legal admission to that effect either expressly or by necessary implication, and as the defend-

ant insists upon the exception, we must adhere to the general rule requiring all material allegations to be proved by the party alleging them. This matter does not come under any of the exceptions to the rule. Indeed, the fact of such relationship was peculiarly within the knowledge of the plaintiff to whose recovery it was essential in the absence of other proof of suffering. It now seems to be an admitted fact, appearing from an uncontradicted affidavit filed in support of a motion for a new trial on account of newly discovered testimony, that the deceased was the son of the male plaintiff but the step- (383) son of the female plaintiff, who is the real plaintiff in this action.

Such relationship does not, in our opinion, raise the presumption of mental suffering. We do not base our decision as to the error in the charge upon the newly discovered testimony, but upon the general rule of law, the wisdom of which is, however, emphasized by such testimony. We do not mean to intimate in any degree that the facts of the actual relationship were willfully concealed by the plaintiff, but they are none the less material. Neither do we mean to say that she did not endure mental suffering or that she is not entitled to a substantial recovery. These are matters of proof. It may well be that standing in the place of a mother, she had learned to love him with the affection of a mother, and that in the long years of intimate association the mental ties of affection had become so entwined that she knew no difference between the ties of nature and of law. If so, she may show it, and recover such damages as the jury may deem an adequate compensation for her mental suffering, or such part thereof, as may have been caused by the negligence of the defendant.

This case comes clearly within the rule in Cashion's case, and can perhaps best be illustrated by the following extracts from the opinions in that and Bright's case.

In *Cashion v. Telegraph Co.*, 123 N. C., 267, this Court says, on page 274: "But beyond the marriage state this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger and sometimes an unwelcome intruder in the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist, but it must be shown. * * * We do not mean to say that dam- (384) ages for mental anguish may not be recovered from 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."

In *Bright v. Telegraph Co.*, 132 N. C., 317, this Court says, on page 322: "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 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 reared 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 (385) 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." For the error in the charge as herein pointed out, a new trial must be ordered.

New trial.

CONNOR, J., concurs in result.

STEWART v. RAILROAD CO.

(Filed 15 November, 1904.)

1. EVIDENCE—*Pleadings.*

In an action against a railroad company for the wrongful death of plaintiff's decedent on its track, for the purpose of showing an admission of the killing by defendant a portion of a paragraph of defendant's answer containing such admission is admissible without the remaining portion.

2. HARMLESS ERROR—*Evidence—Issues.*

The exclusion of evidence relative to an issue found in favor of the party offering the evidence is harmless error.

3. EVIDENCE—*Railroads—Crossings.*

The failure of an engineer to sound his whistle at crossings other than the one at which the deceased was killed is not competent.

4. CONTRIBUTORY NEGLIGENCE—*Evidence—Railroads—Damages.*

In an action to recover damages for killing a person who was on the track drunk, the trial judge should instruct that the deceased was guilty of contributory negligence.

5. INSTRUCTIONS—*Negligence—Contributory Negligence.*

The refusal to give special instructions on the question of contributory negligence will not be reviewed where, on the evidence of the plaintiff himself, the court properly held as a matter of law that decedent was guilty of such negligence.

6. INSTRUCTIONS—*Trial.*

It is proper to refuse an instruction where there is no evidence on which to base it.

7. NEGLIGENCE—*Presumptions.*

The law presumes that a person killed by the negligence of another exercised due care himself, and that a person, here an engineer, does his duty.

8. NEGLIGENCE—*Railroads—Presumptions.*

An engineer is justified in assuming that a person apparently in possession of his senses, if on the track will get out of the way of a train.

ACTION by J. J. Stewart against the North Carolina (386) Railroad Company, heard by Judge *O. H. Allen* and a jury, at February Term, 1904, of ROWAN. From a judgment for the defendant the plaintiff appealed.

R. Lee Wright and *P. S. Carlton* for the plaintiff.

T. C. Linn, F. H. Busbee and *Charles Price* for the defendant.

MONTGOMERY, J. This action was brought to recover damages from the defendant on account of the killing of the plaintiff's intestate through the alleged negligence of the defendant. On the trial the plaintiff first introduced as a witness the widow of the deceased, who proved the age of the intestate, that he worked in a cotton mill at one dollar per day, that his health was good, also his habits, and that he left one child. The mortuary tables showing the intestate's expectancy were next introduced. Then the plaintiff offered in evidence a part of the first paragraph of the defendant's answer, to wit, "that the plaintiff's intestate was struck by the engine pulling train thirty-four at the time alleged; that no one saw him struck or ever
(387) heard him say anything about how he was struck, but the defendant alleges that the said deceased, J. R. Reeves, was upon the track and that the engineer of train thirty-four did not see him until he saw him fall." That evidence was objected to by the defendant unless the whole paragraph should be admitted. The omitted part of the paragraph, separated from the other by a colon, was in these words: "That the engineer and fireman were keeping a lookout, and in no way upon said occasion was the defendant negligent in its conduct against the said deceased." * * * The objection was sustained and the evidence offered excluded.

It was competent to show the killing of the intestate by the defendant and also to show its negligence. It was an admission, complete in itself, and the plaintiff was not compelled to put in matter of explanation or exculpation on the part of the defendant. The defendant would have that privilege itself. 1 Greenleaf Ev. (16 Ed.), sec. 201. But the error was harmless, for the first issue, "did the defendant negligently kill the plaintiff's intestate?" was answered in the affirmative. The broken paragraph was not evidence tending to show that the defendant could have avoided killing the intestate, on the supposition that the plaintiff was guilty of contributory negligence. There had been, up to the time the evidence was refused, no testimony offered on the part of the plaintiff going to show any opportunity the defendant might have had of avoiding the killing.

In the case on appeal it is stated that the *defendant* asked the witness Carter how many crossings there were between this crossing and Charlotte, and that the plaintiff objected and the objection was sustained. In the plaintiff's brief, however, his counsel state that the *plaintiff* asked the question and excepted to its exclusion. His contention was that within half a mile before reaching the crossing where the intestate was
(388) killed there were within one-half a mile from that spot

at least five public crossings, and that if the engineer had given his signals at each of those crossings, the intestate or some other person would have heard them, and also that the failure to blow at each of those crossings was some evidence that proper signals were not given for the crossing where the intestate was killed, and that therefore the engineer was not exercising a proper lookout.

That view of the law no doubt was derived from the decision in *Fulp v. R. R.*, 120 N. C., 525. There is not raised in this case the question whether or not an engineer in charge of a moving locomotive is required to sound the whistle for a crossing in order to give notice to a pedestrian who is on the track beyond the crossing. We are clear, however, that if we should hold that to be the law, we would not extend the requirement to more than one crossing. His Honor was right in refusing the evidence.

His Honor instructed the jury to answer the second issue—that of contributory negligence on the part of the plaintiff—"Yes," if the killing of the deceased by the train is proved. There was no disputed fact concerning the intestate's conduct at the time he was killed. The evidence introduced by the plaintiff tended to show that the intestate was drinking, or drunk, that he was sitting or lying upon or very near the defendant's track, that there was an injury, mortal, on the forehead and one on the back of his head, that he was seen going toward this crossing in a state of intoxication, and the blood and hair were found on a bar of the cattle-guard by the track of the railroad and that the body was found there. One witness said: "If he had been sitting on the cattle-guard, erect, I think he would have been hit about the chest; if he had been sitting there, leaning over, facing the track sidewise, I think the steam-pipe to the steam-chest would have struck him on the head. The hole in the front part of his head corresponds with the size of (389) this pipe or steam-cock in the steam-chest. This steam-pipe or cock projects out from the steam-chest and comes over the cross-beam on the end of the cattle-guard. To have hit him over the eye, he would have to be sitting with his head looking up the road. I cannot explain how it made only a little hole over the eye. He would have to be sitting sideways." As a matter of law, upon that evidence, his Honor properly told the jury that the intestate was guilty of negligence if they found that he was killed by the train. *Neal v. R. R.*, 126 N. C., 634, 49 L. R. A., 684; *Pharr v. R. R.*, 119 N. C., 757; *Frazier v. R. R.*, 130 N. C., 357.

The plaintiff requested his Honor to give twenty-four special

instructions to the jury, and in his exceptions he insists that only one, the first, was given, and he excepted to nearly every sentence of the charge-in-chief. The special instructions asked, numbered one, two, three, four, sixteen, bore upon the question of contributory negligence of the plaintiff and need not be considered, for we have said that upon the evidence of the plaintiff the Judge correctly held as a matter of law that the intestate was guilty of contributory negligence and so instructed the jury. Requests numbered five, seven, ten, thirteen, fourteen, fifteen, seventeen and eighteen were given in substance in the main charge. Requests numbered six, twelve and nineteen need not be noticed, for they related to the first issue, and that issue was found against the defendant.

The twenty-fourth request was on the question of damages, and that was not pertinent, owing to the disposition that was made of the second issue. Requests numbered eight and nine were in substance that the law devolved upon the defendant the duty to keep a vigilant lookout in operating its trains when approaching public crossings, and if the defendant failed to keep such lookout and such failure was the proximate
(390) cause of the intestate's injury, the jury should answer the first and third issues "Yes." His Honor properly refused to give the instruction, for there was no evidence tending to show that the failure to give signals for the crossing was the proximate cause of the injury. It did not appear from any of the evidence that the intestate could have heard the signals or could have gotten out of danger if he had heard them. There was no harm in refusing to give prayers numbered twenty and twenty-two, for the reason that the first issue was found against the defendant, and the second was, upon the evidence of the plaintiff, ordered to be found for the defendant and against the plaintiff.

The twenty-first prayer was in these words: "If the jury find from the evidence that the plaintiff's intestate was drunk and was in a helpless condition upon or near the track and was unable to realize the dangerous position he was in, then the intestate would not be guilty of contributory negligence, and the jury should answer the second issue 'No.'" His Honor properly refused to give that instruction.

We cannot understand how it can be contended that a man who would drink spirituous liquor until he should become unconscious, or take anything else until he should become insensible, and then lie down in that state upon a railroad track, is in the exercise of due care for his personal safety. Such a contention seems to us to be trifling with the law. In *Pickett v.*

R. R., 117 N. C., 616, 53 Am. St., 611, 30 L. R. A., 257, where two negro boys laid down on a railroad track and went to sleep, it was held that they were guilty of contributory negligence; and so, in *Lloyd v. R. R.*, 118 N. C., 1010, 54 Am. St., 764, where a man drunk and lying on the track was killed, it was held that he was negligent.

The twenty-third prayer was properly refused, for it is founded on evidence offered but properly excluded.

The plaintiff in the first instruction prayed for asked (391) his Honor to tell the jury that "The law presumes that a person found dead and killed by the negligence of another exercised due care himself." The instruction was given as asked but his Honor added, "likewise the law presumes that a person, such as an engineer, does his duty," to which the plaintiff excepted. His Honor went on to say further: "In fact, as a rule, the law does not presume negligence, and it requires a person who charges a breach of duty or negligence to prove it." The plaintiff exctepted to the latter clause of that sentence.

The question raised by this last exception has been frequently held by this Court against the plaintiff, and we see no error in the instruction of the Judge to which the first exception was directed.

On the third issue the court in drawing a distinction between injury by trains to animals and human beings said: "The law is different as to a dumb animal and a human being because of the intelligence of the human being. If a human being is upon or near a track and apparently in possession of his senses, the engineer is justified in assuming that such person will use his faculties for his own safety and get out of the way, and he would not be required to stop or slack his speed." The plaintiff excepted to that proposition of law. It was true. And although it was without strict application to the facts of this case, it could have done the plaintiff's cause no harm. The court went on to say: "But if a person on or near enough to the track to be in danger is down and in such a condition as to indicate that he is helpless, then it becomes the duty of the engineer to take notice of this apparently helpless condition if he sees him in time, or could have seen him in time in the exercise of due care." The plaintiff excepted to that part of the charge. He contends that the instruction made the liability of the defendant in this case to depend on whether the intes- (392) tate was actually *down*, and leaving the jury under the impression that unless they found the intestate was actually down they should answer the third issue—the last clear chance,

as it is called—"No." The exception was too technical to be sustained. The jury could not have been misled by it.

No error.

DOUGLAS, J., dissents.

Cited: Hedrick v. R. R., 136 N. C., 513; *Morrow v. R. R.*, 147 N. C., 628; *Strickland v. R. R.*, 150 N. C., 8; *Hockfield v. R. R., ib.*, 421.

EAMES v. ARMSTRONG.

(Filed 15 November, 1904.)

1. VENUE—*Covenants—The Code, sec. 190.*

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated.

2. REMOVAL OF CAUSES—*Venue—Witnesses—Judge.*

The removal of a cause from one county to another, on the ground that the essential evidence upon which the case depends is located in the latter county, is a matter within the legal discretion of the trial judge.

ACTION by Richard Eames against C. A. Armstrong and others, heard by Judge *M. H. Justice* and a jury, at May Term, 1904, of ROWAN. From a judgment for the plaintiff the defendants appealed.

John S. Henderson and *Overman & Gregory* for the plaintiffs.

T. F. Kluttz and *L. H. Clement* for the defendant.

DOUGLAS, J. This is an action for damages in a breach of covenant in a deed conveying land. The covenants sued
(393) on are set out in section 3 of the complaint as follows: "That the said deed so made, executed and delivered as aforesaid, contained covenants in substance as follows: 'And the said parties of the first part (*i. e.*, the said C. A. Armstrong and wife, N. J. Armstrong, the defendants in this action, covenant that they are seized of the premises (*i. e.*, the lands described in said deed and in this complaint) in fee, and have right to convey the same in fee simple; that the same are free and clear from all encumbrances.'" The plaintiff further alleges that

at the execution of the deed the defendants did not own the land, were not in possession thereof, and had no right to convey it. Wherefore he demanded damages in the sum of $2,300, the purchase price of the land. The defendants in apt time demanded a removal of the action to Montgomery County in which the land is situated. This motion was refused.

The naked question before us is whether this action comes within any of the provisions of section 190 of The Code, which is as follows: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, in cases provided in The Code:

(1) For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right of interest, and for injuries to real property.

(2) For the partition of real property.

(3) For the foreclosure of a mortgage of real property.

(4) For the recovery of personal property distrained for any cause."

It does not so appear to us, at least as the pleadings now stand. The plaintiff does not claim any interest in the land. On the contrary, he disclaims any interest therein—his alleged failure to acquire any such interest constituting his cause of action. If he wins his case the title to the land will (394) be in no way affected; while if he loses it we cannot see how the title of those not parties to the action could be affected thereby.

The defendants rely on *Mfg. Co. v. Brower,* 105 N. C., 440, and *Fraley v. March,* 68 N. C., 160, but those cases, construed in the light of their essential facts, do not sustain their contention. In the former case the court says, on page 445: "The chief, and, so far as Buxton is concerned, the only purpose of this action is to compel J. C. Buxton, the trustee, to sell lands in the county of Surry, and to order Brower to convey the Buck Shoals lands to the Brower Manufacturing Company," etc. In *Fraley v. March,* the following is the entire opinion of the Court: "The law of the venue of actions, with reference to the residence of the parties, does not govern this case, but the law of the venue with reference to the 'subject of the action.' It is substantially an action 'for the foreclosure of a mortgage of real property,' and that must be tried in the county where the land is situate." C. C. P., 66.

The plaintiff relies upon *Phillips v. Holmes,* 71 N. C., 250, which seems to us in point. In that case the Court says, on page 252: "Apart from this provision of The Code fixing the

venue, the action is upon a personal covenant sounding in damages. The covenant is not that certain improvements shall be put upon the land, but that if they are put upon the land they shall be paid for; in effect, therefore, the action is simply for work and labor done, and in no sense differs from other personal actions. On a breach of the covenant, it becomes a mere personal right which remains with the covenantee or his executors and does not descend with the land or run with it."

Baruch v. Long, 117 N. C., 509, seems also to sustain the same principle. In that case the action was brought to
(395) set aside certain docketed judgments, as "being in the nature of a statutory mortgage," but it was held that the case was not removable as a matter of right, as such a lien upon land is not an interest therein. In that case CLARK, J., in speaking for the court, says: "The Judge in his discretion might remove the action if the convenience of witnesses or the ends of justice would be promoted by the change, * * * but he cannot be required to remove the cause upon the grounds stated." These words apply peculiarly to the case at bar. It might well have been removed to the county of Montgomery if the essential evidence upon which the case depended was located in that county, but this was a matter within the legal discretion of the Judge and not reviewable by us in the absence of any suggestion of abuse. The judgment of the court below is

Affirmed.

---

(396)

GROCERY CO. v. RAILROAD.

(Filed 15 November, 1904.)

1. ISSUES—*Trial.*

Where the issues submitted are sufficient, the refusal to submit those tendered by defendant is not error.

2. CARRIERS—*Penalties—Bills of Lading.*

In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant is estopped to claim that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth.

3. STATUTES—*Penalties—The Code, secs. 3764, 1967, 1764, 1767—Laws 1901, ch. 634—Laws 1903, ch. 590.*

The repeal of a statute does not affect an action brought thereunder, before the repeal, for any penalty incurred.

4. CARRIERS—*Penalties—Police Power—Railroads.*

A statute providing a penalty for failure or delay in the shipment of freight is valid.

ACTION by the Lexington Grocery Company against the Southern Railway Company, heard by Judge *O. H. Allen* and a jury, at April Term, 1904, of DAVIDSON.

This is an action to recover the statutory penalty for failure to ship within the time limited by the statute a box of nutmegs, which with three other separate packages of goods was delivered to the defendant at High Point for shipment on 12 December, 1902. The defendant issued one bill of lading including the four packages. Its material parts are as follows:

"Received by the Southern Railway Company at High Point Station, 2 December, 1902, from Lexington Gro. Co., the property described below, in apparent good order. (397) * * * Articles: 1 box raisins, weight 25 pounds; 1 box cakes, weight 25 pounds; 1 box nutmegs, weight 3 pounds; 1 pkg. 4 caddies tob., weight 10 pounds. Rel. Recd. in Rain. Consignee: M. E. & S. E. Allen. Destination: Franklinville, N. C. Consignee's address as information only, and not for purpose of delivery."

The box of nutmegs was correctly marked to M. E. & S. E. Allen, Franklinville, N. C. The defendant introduced evidence tending to show that the other three packages were erroneously marked to M. E. Allen, Asheboro, N. C., and were shipped to that place. The box of nutmegs was not shipped at all.

The issues and answers thereto are as follows:

"1. Did defendant receive from plaintiff for shipment the four packages of goods mentioned in the complaint? Ans. 'Yes.'"

"2. Were the four packages of goods delivered by plaintiff to the defendant company at High Point properly addressed to M. E. & S. E. Allen, Franklinville, N. C., or any of them, and if any, which ones? Ans. 'Yes, as to the nutmegs.'"

"3. Did the defendant company fail to ship the said goods, or any of them, from High Point after 7 December, 1902? Ans. 'Three packages 10 December, 1902, to Asheboro; nutmegs not shipped.'"

"4. What was the value of the goods at the time of their delivery to the defendant? Ans. '$17.07.'"

"5. What was the value of the goods at the time they were tendered to the plaintiff? Ans. '$7.'"

"6. How much, if any, is plaintiff entitled to recover of defendant as a penalty for failure to ship said goods? Ans. '$320.'"

The parties contended that the first, third and fifth issues should be answered by his Honor, and that the (398) sixth issue should also be answered by him as a matter of

law upon the findings of the jury on the second and fourth issues. The defendant tendered issues which were refused by the court.

From a judgment for the plaintiff the defendant appealed.

McCrary & Ruark and *F. C. Robbins* for the plaintiff.

Glenn, Manly & Hendren, Walser & Walser, F. H. Busbee and *A. B. Andrews, Jr.*, for the defendant.

DOUGLAS, J., after stating the facts. As the issues submitted appear to us to have been sufficient, we see no error in the refusal of his Honor to submit those tendered by the defendant. The defendant's prayers for instruction were properly refused. The defendant contends that the four packages constituted one shipment, and that the mismarking of three of them was sufficient excuse for not shipping the fourth. A sufficient answer to this contention is that the defendant shipped to Asheboro the three packages that were wrongly marked, and failed to ship the package that was correctly marked in accordance with the bill of lading. The packages were in fact separate and distinct, and it does not appear that retaining the nutmegs helped or could help the defendant to find the three packages that it had already shipped to Asheboro. The failure to ship that package is without legal excuse, and clearly comes within the letter and spirit of the prohibiting statute.

The defendant again contends that the penalty, if any, has been incurred, comes within the provisions of chapter 590, Laws 1903, and not under chapter 634, Laws 1901.

A brief review of the legislative history of penalties for the non-shipment of freight may serve to illustrate the intent and spirit of the law. They apparently originated with the Act of March 22, 1875, being chapter 240, Laws 1874-75. (399) Section 1967 of The Code is an exact copy of the second section of the said act, and is as follows: "It shall be unlawful for any railroad company operating in this State to allow any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped to any person suing for the same."

Chapter 520, Laws 1891, amends section 1967 of The Code by striking out the penalty of twenty-five dollars, and providing that the railroad company shall pay "to the party aggrieved double the loss or damage actually sustained by reason of said freight so remaining unshipped."

Chapter 634, Laws 1901, repealed chapter 520, Laws 1891, and re-enacted section 1967 of The Code, amending it, however, changing the penalty of twenty-five dollars per day to five dollars per day and all actual damages, both penalty and damages being recoverable only by the aggrieved party. The amount of penalty is erroneously printed in Laws 1901, as five hundred dollars, instead of five dollars as it is in the original act.

Section 3, chap. 590, Laws 1903, is as follows: "That it shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this State to omit or neglect to transport any goods or merchandise received by it and billed to or from any place in this State for shipment for a longer period than four days after the receipt of the same, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or to allow any such goods or merchandise to remain at any intermediate point more than forty-eight hours, unless otherwise provided for by the Corporation Commission. Each and every company (400) violating any provision of this section shall forfeit to the party aggrieved the sum of $25 for the first day and five dollars for each and every day of such unlawful detention thereafter, in case such shipment is made in carload lots, and in less quantities the forfeiture shall be twelve dollars and fifty cents for the first day and two dollars and fifty cents for each succeeding day; provided the forfeiture shall not be collected for more than thirty days." Section 5 of said chapter is as follows: "That all laws in conflict herewith are hereby repealed, and that this act shall be in force from and after its ratification." This act does not expressly affect pending suits and it cannot do so by implication.

Section 3764 of The Code, in chap. 59, relating to the repeal and construction of statutes, is as follows: "The repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred, or for the recovery of any rights accruing under such statute."

The principle governing the application of statutes creating a cause of action where none existed before have been well settled in this State. Of course where the statute has been repealed, and there has been no assertion or attempted assertion of any right thereunder prior to such repeal, all right of action is necessarily destroyed. This is too well settled to require any citation of authority and is universally recognized.

Where the right has been asserted during the life of the statute, as for instance an action instituted to recover a penalty,

the plaintiff acquires an inchoate right subject to be defeated by express legislative action. *Dyer v. Ellington,* 126 N. C., 941. Where the statute is simply repealed and no allusion is made to pending actions, the inchoate rights therein acquired are not interfered with, but may be prosecuted to a final recov-
(401) ery. The Code, sec. 3764; *Wilmington v. Cronly,* 122 N. C., 388. Where suit is brought during the life of the statute and pending at its repeal, without having gone to judgment, the Legislature may by express terms take away the right of action. *Dyer v. Ellington, supra.* When the plaintiff has obtained a judgment for the penalty before the repeal of the statute, he has a vested right therein which cannot be taken away by the Legislature. *Durham v. Anders,* 128 N. C., 207, 83 Am. St., 668.

In *Dyer v. Ellington, supra,* on page 944, quoted with approval in *Durham v. Anders, supra,* on page 210, this Court says: "An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one created by the act. He has in a certain sense an inchoate right when he brings suit, that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty; but he has no vested right to the penaly until judgment. Until it becomes *vested,* we think it can be destroyed by the Legislature. * * * If the penalty had been reduced to judgment, or had been given to the party in the nature of liquidated damages, the case would be essentially different."

Cooley in his work on Constitutional Limitations says, at p. 443: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered." But the same distinguished author says, at page 443: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

This action was brought on 10 February, 1903; while chapter 590, Laws 1903, was ratified on 9 March, 1903. It was therefore brought under the act of 1901, the only act
(402) then in existence, and was not interfered with by the act of 1903, which makes no reference to pending cases. In fact, the act of 1903 does not profess to repeal the act of 1901 in express terms, as it makes no allusion thereto. Its only repealing clause is section 5, providing "that all laws in conflict herewith are hereby repealed." Given their wdest possible latitude, these words cannot be construed to interfere with pending

cases. The defendant, while professedly approving of the statutory imposition of penalties which it says was "made for an honest purpose," insists upon such a construction as would defeat any practical purpose. The nature and essential purposes of statutory penalties are ably and elaborately discussed by Justice RODMAN, speaking for the Court in *Branch v. R. R.*, 77 N. C., 348, wherein he says, on page 349: "The principle is this, 'When private property is devoted to a public use it is subject to public regulations.' And this is more especially true when the owner has either a legal or a virtual monopoly of the business in which the property is used. This principle has immemorially in England, and in this country from its first settlement, been assumed in acts of the several Legislatures, prescribing charges of innkeepers, ferrymen and other public carriers, public wharfingers, warehousemen, etc. Laws 1798 (Revised Code, chap. 79, sec. 3), as to ordinaries and innkeepers authorized the county courts to rate their prices for liquor, diet, lodging, provender, etc. Laws 1779 (Revised Code, chap. 101, sec. 27) regulates in like manner the tolls at public ferries and Laws 1777 (Revised Code, chap. 71, sec. 61) the tolls at public mills. The constitutionality of these acts has never been questioned, but they have been always regarded as wise and politic exercises of the police power of the State. There can be no distinction in principle between the power to enact those acts and the one in question in this case. Of course it (403) cannot affect this case that the defendant is a corporation. Corporations, like all other persons, are subject to the police power of the State. There is no exemption in this respect in the charter of the company. It was granted great privileges in consideration of the performance of certain duties to the public. It enjoys a virtual monopoly of the carriage of freights within a certain distance on each side of its line across nearly the entire breath of the State. It enjoys through the proverbial 'wisdom of the Legislature' the privilege of having its property exempt from the general burden of taxation. There could not be a clearer case of property devoted for a valuable consideration to a public use, and consequently subject to public regulation. That the regulation in question is within the scope of the police power of the State seems clear to us. A common carrier is bound by the common law to convey goods committed to him for that purpose within a reasonable time, and, on failure, is liable in damages. The Legislature considered the common law liability as insufficient to compel the performance of the public duty. It must have thought that the interests of local shippers, for whose interest principally the road was built and against

whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage in order that the company might obtain the carriage from points where there were competing lines by land and water, as from Wilmington or Augusta. It declared, therefore, that the maximum of delay should be five days after a receipt for carriage, and imposed a penalty for every day's delay beyond. *The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforced an admitted duty.*" (Italics ours.)

(404) The defendant also lays stress upon the difference between the value of the goods and the amount of the penalty recovered. In the well known case of *McGowan v. R. R.*, 95 N. C., 417, known as the "Rice case," the plaintiff recovered over $3,000 in penalties for allowing twenty-seven bags of rice to remain unshipped from Mt. Olive to Goldsboro from 21 November, 1884, to 21 March, 1885. In *Carter v. R. R.*, 126 N. C., 437, this Court, in discussing the kindred sections of The Code, secs. 1764 and 1767, says, on page 440: "The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should, under all circumstances, exactly equal the injury; while punishment, to be effective, must exceed the injury, or at least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the carrier to pay a penalty of fifty dollars than to go to any extra expense or trouble to obtain the necessary cars."

As we see no error in the trial of the case, the judgment of the Court below is

Affirmed.

Cited: Summers v. R. R., 138 N. C., 289; *Stone v. R. R.*, 144 N. C., 229, 232.

(405)

BLAIR v. COAKLEY.

(Filed 15 November, 1904.)

1. APPEAL—*Case on Appeal—Findings of Court.*

Where the case on appeal prepared by counsel conflicts with a statement of a fact found by the judge, the latter must control.

2. APPEAL—*County Commissioners—Highways—Laws 1901, ch. 28—The Code, sec. 2039.*

Under Laws 1901, ch. 21, sec. 1, an appeal from the action of the county commissioners in altering a public road should be taken to the next term of the Superior Court, though it was a criminal term.

3. HIGHWAYS—*Appeals—County Commissioners—Justices of the Peace—Highways—The Code, secs. 875, 883, 565.*

An appeal from the board of county commissioners in establishing a public road should be taken in accordance with those sections of The Code applicable to appeals from a justice of the peace.

ACTION by S. O. Blair and others against S. F. Coakley, heard by Judge *R. B. Peebles,* at August Term, 1904, of UNION.

This was a proceeding to alter a public road over the land of the defendant, brought before the Board of Commissioners of Union County and heard in July, 1904, on or prior to the 8th day of that month. The defendant, through his counsel, entered a special appearance and moved to dismiss the proceeding upon the following grounds: 1. For that the petition does not state over whose land the proposed road would run. 2. For that it does not appear that the persons over whose land the proposed road would run have been duly notified. 3. For that it appears that the persons over whose land the proposed road runs have not been notified. 4. For that it does not state that the proposed road is a public necessity.

The board overruled the motion and proceeded to hear and determine the case upon the evidence. They decided (406) that the alteration of the road was a public necessity and granted the prayer of the petition. The defendant excepted and appealed under section 2039 of The Code. He gave due notice of his appeal and on July 8 filed a bond to secure the costs of the appeal as required by the board, and asked that proper transcript of the proceedings be sent to the Superior Court. He took no further action in the matter, and it does not appear that he either paid or tendered payment of the costs of the transcript. The next term of the Superior Court after the appeal was taken commenced on 1 August, 1904, and was for the trial of criminal cases only (Laws 1901, chap. 28, sec. 1, p. 169),

although the second section of that act (p. 175) provides as follows: "Civil process shall be returned to, and pleadings filed at, all the courts herein designated as exclusively criminal; motions in civil actions may be heard upon due notice at such criminal terms; and trials in civil actions, which do not require a jury, may be heard at such criminal terms by consent." The next term of the Court was held on 22 August. It is provided by the act just mentioned that "the first week (of that term) shall be for the trial of criminal cases and the second week for the trial of civil cases alone."

The week for the trial of civil cases commenced then on 29 August. On 31 August the plaintiffs caused the papers to be filed and the case to be docketed in the Superior Court, and moved to dismiss the appeal, the defendant having taken no action before the board or in the Superior Court by motion for a *recordari* or for a rule on the board to send up the case. The Judge allowed the motion of the plaintiffs and dismissed the appeal. Defendant excepted and appealed.

(407) *Williams & Lemmond,* for the plaintiffs.
Redwine & Stack, for the defendant.

WALKER, J., after stating the facts. It is stated in the record, as a fact found by the Judge, that the defendant, after the appeal was dismissed, moved to dismiss the case for the reasons set out in his motion to the same effect before the board. This motion was denied and defendant excepted. It is stated in the case on appeal prepared by counsel that this motion to dismiss the case was made before the appeal was dismissed, but in this conflict the finding of the Judge and the record must control. The motion certainly came too late, even if it should have been granted had it been made earlier. *Davenport v. Grissom,* 113 N. C., 38.

We are of the opinion that the appeal should have been docketed at the term of the Court which commenced on the first Monday of August (1 August), although it was for the trial of criminal cases alone. The provisions of section 2, chap. 28, Laws 1901, are very broad and comprehensive, and are certainly sufficient in their scope to include a case of this kind. By section 2 civil process may be returned to, and pleadings filed at, that term; motions may be heard upon notice and trials had in all civil actions which do not require a jury. See also, section 7. It seems from these provisions of the law that it was intended that all papers in civil cases, required to be returned to the next term of the Superior Court, should be so returned without regard to whether it is a civil or criminal term, and

that such proceedings may be had in any civil case as do not require the intervention of a jury. This being so, we cannot see why the appeal in this case was not required to be sent up to the first term of the Court, although it was a criminal term, as the motion of the defendant, upon his special appearance, to dismiss, could have been heard at said term, and if the Court had decided either for or against the defendant and this Court had approved the judgment, provided the case had been brought here by a further appeal, it would have finally (408) determined the action. Besides, the appellee has the right to have the case there, if the appellant intends to prosecute his appeal, so that he may make such motions as may be necessary to protect his rights and to speed the trial of the cause, and this seems to be the true intent of section 2 of the act. So that the case comes not only within the spirit but also within the letter of the act. But this Court, upon a full consideration of this statute, has decided that the appeal must be taken and he return made to the next term, whether criminal or civil, under the provisions of section 2. *Johnson v. Andrews,* 132 N. C., 376; *Pants Co. v. Smith,* 125 N. C., 588. Again, in all proceedings to lay out or alter public roads The Code, sec. 2039, gives the right of appeal but does not provide any method or machinery for perfecting and prosecuting the appeal except the requirement that a bond shall be given by the appellant to the appellee "as provided in other cases of appeal," and that the Superior Court at term shall hear the whole matter anew. It is further enacted by that section that an appeal may be taken from the judgment of the Superior Court "as is provided in other cases of apeal" in The Code. In the absence of any procedure prescribed by statute, we must proceed by analogy to the practice in other like cases, so that the intent and purpose of the Legislature may be effectuated as near as may be, and that the right of appeal may be preserved to the citizen, and at the same time not abused. It is well, therefore, to adopt the rules regulating appeals from justices' courts as being more nearly analogous to those which should govern in cases like the one under review, and more likely to carry out the intention of the Legislature and less apt to work injustice to the parties. We think, further, that those rules are reasonable and necessary to prevent delay and they can easily be observed. *Pants Co. v. Smith, supra.* It is required in the case of an (409) appeal from a justice that he shall, within ten days after the appeal is taken and notice given, make a return to the appellate court and file with the Clerk thereof the papers, proceedings and judgment in the case and the notice of appeal.

He may be compelled to make such return by attachment, but he is not bound to make it until his fees are paid. The appeal is heard upon the original papers. Provision is made for correcting the return and for the giving of an undertaking by the appellant. The Code, sec. 875—883 and section 565. It cannot be successfully maintained that the defendant has complied with those requirements of the statute, but whether or not he should be held to a strict observance of them we do not think that, reasoning from general principles, he has shown such a degree of diligence as entitles him to the favor or consideration of the Court. An appellant who merely prays an appeal and files a bond does not take an appeal within the meaning of the statute. *Wilson v. Seagle,* 84 N. C., 110. Without discussing the question whether it is his duty to see that a proper transcript is sent to the appellate court, he must at least put the Clerk under the obligation to act by paying or tendering his fees. *Sanders v. Thompson,* 114 N. C., 282; *Andrews v. Whisnant,* 83 N. C., 446. But the appellant took no action at all. He did not move at the first term for a *recordari* or rule on the commissioners to send up the case. If he found at the first term of the Court that the transcript or the papers had not been sent up and the case duly docketed, it was his plain duty, as has been repeatedly decided by this Court, to move at once for the necessary writ or process to perfect his appeal. *Howerton v. Henderson,* 86 N. C., 718; *Sutter v. Brittle,* 92 N. C., 53; *Pittman v. Kimberly,* 92 N. C., 562; *Wilson v. Seagle, supra.* When the appellant fails to perform his duty, the appellate court having cognizance of the case may, upon the papers (410) being filed and the case docketed, dismiss the appeal. *Avery v. Pritchard,* 93 N. C., 266. The law requires this diligence on the part of the appellant in perfecting and prosecuting his appeal in order that the successful party may not be subjected by delay to the risk of losing the fruits of his victory or postponed in their enjoyment by the laches of his opponent. If an appellant should be permitted to move in a cause at his convenience and pleasure the right of appeal which is given for a useful purpose could easily be made to harass and vex the appellee (*Ballard v. Gay,* 108 N. C., 544; *S. v. Johnson,* 109 N. C., 852; *Davenport v. Grissom, supra*), who is entitled to know when the litigation is at an end and to know, too, within a reasonable time.

Laws 1899, chap. 443, provide that in appeals from justices' courts, if the appellant fails to docket his appeal in time the appellee may docket the case and upon motion have the judgment of the justice affirmed and recover the costs of the appeal.

The judgment affirming is in substance equivalent to a judgment dismissing the action. The latter is given when no appeal has been docketed, as in this case, and the former when the appeal has been docketed and the record sent up, but no case on appeal has been filed. It certainly was not intended that the Court should look into the record for the purpose of passing upon the merits of the exceptions in the lower Court, for this would be to give the appellant, who has been in fault, the full benefit of his appeal, and the act would be self destructive. *Davenport v. Grissom, supra.* In construing a statute we must ascertain the intention, for when a case is brought clearly within the intention of the law it is within the law itself. *People v. Lacombe,* 99 N. Y., 43. It is manifest what mischief was intended to be remedied, and we must so interpret the statute as to suppress the mischief and advance the remedy. In view of the facts and circumstances of this case we be- (411) lieve the law has been substantially followed by the Court below.

No error.

Cited: Love v. Love, 139 N. C., 365; *Cook v. Vickers,* 141 N. C., 107; *Sutphin v. Sparger,* 150 N. C., 518; *McKenzie v. Development Co.,* 151 N. C., 277, 278; *Love v. Huffines,* 151 N. C., 380.

LONDON v. BYNUM.

(Filed 15 November, 1904.)

1. PARTNERSHIP—*Marshaling Assets—Exoneration.*

Where parties execute a mortgage on two tracts of land, one of which they afterwards sell to a corporation for a consideration that the corporation will pay the partnership debt, creditors of the corporation cannot compel the creditors of the partnership to sell the tract not conveyed to the corporation before receiving their *pro rata* part of the assets of the corporation.

2. JUDGMENTS—*Deeds—Marshaling Assets.*

Partners, who conveyed property to a corporation of which they were directors and withheld the deed from record for two years, are not entitled to avail themselves of a stipulation in the deed for the payment of certain partnership debts, as against their individual creditors who record judgments before the said registration.

3. CORPORATIONS—*Partnerships—Marshaling Assets.*

Where a corporation assumed the existing debts of a partnership as a part consideration for a conveyance of partnership property, the debts of the corporation, which became insolvent, were not entitled to a preference over those of the partnership.

LONDON *v.* BYNUM.

ACTION by W. L. London against L. B. Bynum and others, heard by Judge *H. R. Bryan,* at May Term, 1904 of CHATHAM. From a judgment for the plaintiff the defendant appealed.

(412) *R. H. Hayes,* for the plaintiff.

H. A. London and *Shepherd & Shepherd,* for the defendant.

MONTGOMERY, J. We deem it unnecessary to discuss in this case either the doctrine of exoneration or that of marshaling of securities. The facts agreed on by the parties do not raise any such questions. The rights and duties of the plaintiff in the premises arise upon the terms and stipulations contained in a certain deed, of date 22 January, 1902, executed by the defendants, L. B. Bynum, C. W. Bynum and E. L. Haughton, who had theretofore been doing business as a partnership under the name of Bynum & Haughton, to the Bynum Milling and Mercantile Company. In that deed were conveyed eight acres of land, the property of the three above named defendants, and known as the "Bynum Mill," and it was expressly agreed and stipulated therein as a part of the consideration thereof that the grantee (the Bynum Milling and Mercantile Company) should assume and obligate itself to pay, first, "the existing indebtedness of L. B. and C. W. Bynum, amounting to $3,750 and interest, which is secured by a deed of trust upon the real estate herein conveyed, as well as upon certain other property of C. W. Bynum; second, all the existing indebtedness of the copartnership of the parties of the first part, growing out of its mercantile and milling business."

The debt of $3,750 is still unpaid, and besides there is still due of the indebtedness of the old partnership of Bynum & Haughton about $2,000. The plaintiff is the duly appointed receiver of the now insolvent corporation, the Bynum Milling and Mercantile Company, and contends that the 340 acres of land belonging to C. W. Bynum, which was conveyed in the deed of trust along with the eight acres known as the "Bynum Mill," the property of L. V. Bynum, C. W. Bynum and E. L. Haughton, to secure the $3,750 debt, should be sold and the
(413) proceeds applied to that debt before that creditor should be allowed to participate in the proceeds of the sale of the eight acre mill tract. His Honor took that view of the matter, and as a part of the judgment, Erwin, the trustee, was directed to sell the 340 acres, the property of C. W. Bynum, and apply the proceeds to the discharge of the $3,750.

We do not concur in the conclusion of the Court below. As

we have said, the debt of $3,750 was the debt of the two Bynums and it was secured by a deed of trust upon property, the mill tract of eight acres belonging to L. B. and C. W. Bynum and E. L. Haughton, and 340 acres belonging to C. W. Bynum individually. The deed from the Bynums and Haughton to the Bynum Mill and Mercantile Company, of which corporation the plaintiff is receiver, contains the specific stipulation that as a part of its consideration the grantee (the corporation) should assume the debt of $3,750, and when the corporation received that deed, that act was equivalent to a promise to release the individual property of C. W. Bynum (the 340 acres) from the operation of the deed of trust.

The judgment contained a further direction and order that the plaintiff receiver sell the eight acre mill tract, and out of two-thirds of the proceeds he should first pay off two judgments, one in favor of W. A. Foushee and the other in favor of W. V. Atwater, obtained at August Term, 1903, of Chatham Superior Court, against L. B. Bynum and C. W. Bynum—the said judgments having been obtained before the deed from L. B. Bynum, C. W. Bynum and E. L. Haughton to the Bynum Mill and Mercantile Company had been registered. The defendants except to that part of the judgment, on the ground that a part of the consideration of the deed from the Bynums and Haughton to the corporation was that the partnership debts of Bynum & Haughton should be paid by the corporation next after the $3,750 debt of the Bynums had been paid, and that (414) those judgments were not judgments against the partnership of Bynum & Haughton. It is true that the judgments, so far as the facts agreed disclose, were obtained against the Bynums as individuals and the deed from the Bynums and Haughton to the corporation did contain an agreement, on the part of the corporation, to pay the partnership debts after the debt of $3,750 should have been paid, but the only stockholders and directors of the corporation, C. W. Bynum, L. B. Bynum and E. L. Haughton, were the members of the partnership also, and they were the three men who made the deed to the corporation. They withheld the deed from registration for two years. In that interim Foushee and Atwater procured their judgments against the two Bynums, and their judgments became liens on the interests of the two Bynums in the mill property, which was two-thirds of the whole. For that state of affairs the Bynums and Haughton are alone responsible and they cannot complain that, to that extent, they lost the benefit of the stipulation in their deed to the corporation that the debts of the old firm should be paid by the corporation. They cannot take ad-

vantage of their own laches. The exception cannot be sustained. His Honor held, however, that the receiver should pay, out of the proceeds of the sale of the mill property the debts of the corporation before he paid those of the old firm of Bynum and Haughton. We think that was error, for the reason that in the deed from the Bynums and Haughton to the corporation, the corporation agreed, as a part of the consideration of the deed, that it would assume the debts of the late partnership. Except as to that part of the judgment concerning the Foushee and Atwater judgments, there is

Error.

---

(415)

IN RE BOYETT.

(Filed 15 November, 1904.)

1. INSANE PERSONS—*Constitutional Law—Hospitals—Due Process of Law—Laws 1899, ch. 1—Const. N. C., Art. II, sec. 10.*

   An act providing that a judge may, when a person indicted for homicide is acquitted on the ground of insanity, in his discretion commit said person to the hospital for the dangerous insane to remain there until discharged by the General Assembly, is unconstitutional.

2. INSANE PERSONS—*Habeas Corpus—Hospitals.*

   A person illegally detained in a hospital for the dangerous insane cannot be released on *habeas corpus* if he is insane at the time of the return of the writ.

PETITION by Emmett Boyett for a writ of *habeas corpus,* heard by Judge *G. S. Ferguson,* in Raleigh, 28 September, 1904. From an order denying the writ, the petitioner appealed.

Land & Cowper, for the petitioner.

CONNOR, J., The petition herein was filed by E. M. Land on behalf of Emmett Boyett on 28 September, 1904, before his Honor Judge *Ferguson,* setting forth that Emmett Boyett was detained of his liberty by J. S. Mann, Esq., Superintendent of the Hospital for the Dangerous Insane in the city of Raleigh, N. C. That such detention was by virtue of an order made by the Judge at November Term, 1903, of LENOIR. That at said term said Boyett, pursuant to indictment theretofore found by the grand jury, was put on trial charged with the murder of his wife Lena Boyett. That upon his arraignment on said indictment he pleaded not guilty and was upon such plea tried

before the Court and jury. That by the verdict of the jury he was acquitted of said charge. That to sustain (416) his said plea he introduced evidence tending to show that he was insane at the time he killed his wife, and that it was upon such evidence that he relied for his acquittal. That after said verdict was returned by the jury his Honor the Judge presiding made the following order: "Whereas Emmett Boyett was indicted at the above term of the Lenoir Superior Court for the murder of Lena Boyett, his wife, and whereas upon trial of said indictment before the petit jury duly empaneled to try same it was admitted by the prisoner's counsel that said prisoner did kill his said wife by shooting her, and whereas said counsel pleaded insanity as a defense to said indictment, and whereas the jury acquitted the said prisoner on the ground of insanity, it is therefore ordered and adjudged by the Court in the exercise of its discretion, in accordance with section 65, Laws 1899, chap. 1, that said Emmett Boyett be at once committed to the Hospital for the Dangerous Insane to be kept in custody therein as provided in said section, and until discharged in accordance with the provisions of section 67 of said act, or otherwise discharged according to law. (Chapter 1, Laws 1899). The sheriff of Lenoir County is commanded at once to deliver said prisoner to the Hospital for the Dangerous Insane at Raleigh and to the authorities governing the same."

That no investigation has been had for the purpose of determining the mental condition at any other time than that of the homicide. That when the verdict was rendered and the Court committed him to the custody of the sheriff he moved the Court that an inquiry as to his mental condition at that time he had. That the Court refused the motion and made the order set out in the record. Judge *Ferguson* issued the writ of *habeas corpus* as prayed for. Pursuant thereto the officer in charge of the dangerous insane produced the body of the said Boyett, making return to said writ that the said (417) Boyett was "confined in the Hospital for the Criminal Insane by virtue of the order of Judge *Brown,* one of the Judges of the Superior Court of North Carolina, made at the November Term, 1903, of the Superior Court of Lenoir County, a copy of which is herewith filed." Upon the hearing before his Honor Judge *Ferguson,* a certified copy of the record in the case of *State v. Boyett* in the Superior Court of LENOIR was introduced by which the facts set out in the petition were verified. Dr. J. R. Rogers, the physician in charge of the Hospital for the Criminal Insane of this State, filed an affidavit stating that he had given careful examination and

study of said Boyett in reference to his mental condition, and that in his opinion Boyett "is of sound mind and has entirely recovered from any mental derangement from which he may have suffered in the past." His Honor denied the motion that Boyett be discharged and remanded him to the custody of the superintendent of the Hospital. From this order the petitioner appealed.

The order committing the petitioner to the Hospital for the Dangerous Insane was made pursuant to the provision of chapter 1, Laws 1899, entitled "An act to revise, consolidate and amend the insanity laws of this State."

Section 65 provides that "When any person accused of the crime of murder * * * shall have escaped indictment, or shall have been acquitted upon the trial upon the ground of insanity, * * * the Court before which such proceedings are had shall in its discretion commit such person to the Hospital for the Dangerous Insane to be kept in custody therein for treatment and care as herein provided," etc.

Section 67 provides that "No person acquitted of a capital felony on the ground of insanity and committed to the Hospital for the Dangerous Insane shall be discharged therefrom unless an act authorizing his discharge be passed by the General (418) Assembly." Other provisions are made in this section for the discharge of persons committed under section 65 upon indictments of lower grade.

The petitioner concedes that the order of committal made by his Honor Judge *Brown* is authorized by the terms of the statute. He attacks its validity upon the ground that the statute, section 65, in conferring the power to commit a person acquitted on the grounds of insanity at the time the act was committed, and section 67 prescribing the only mode by which he may be released from custody, violates both the State and Federal Constitutions, in that—

First. No provision is made for giving the persons so acquitted notice or an opportunity to be heard, or requiring the question of his insanity at that time to be inquired into. That on the contrary the Court is empowered "in its discretion," without any finding of facts in respect to his mental condition, to commit him to the Hospital for an indefinite period of time.

Second. That not only is there an absence of any provision by which in a judicial proceeding his mental condition can at any time thereafter be inquired into, but by express language he is deprived of his constitutional right to the writ of *habeas corpus* or any other remedial writ, the sole power to grant relief being conferred upon the Legislature.

These contentions, it must be conceded, present serious questions involving the liberty of the citizen and his constitutional rights. The right and duty of the State to provide for the care and treatment of its insane with such confinement and restraint of their liberty as may be necessary for that purpose is conceded. It is made the duty of the General Assembly to do so. Const., Art. XI, sec. 10. It is also conceded that the State may, pursuant to general laws, and after proper judicial proceedings, confine insane persons for their own protection and that of other persons. "The State, in respect to the care of the insane, owes a duty to these unfortunate people as (419) well as to the public, * * * and undoubtedly has the right to provide for the involuntary confinement of the harmlessly insane in order that proper medical treatment may be given and a cure effected." Tiedeman Lim. Police Power, 106. It is also true that to meet sudden emergencies and prevent other self destruction or injury or harm to other persons an insane person may be restrained temporarily without any adjudication of his insanity. The writers and courts have not undertaken to define the limitations of the power which the State has to deal with these unfortunate people, except by the announcement of general principles essential to their welfare and the protection of the public. We do not propose to enter upon a discussion of this delicate subject. It is discussed with ability by Mr. Tiedeman in his work on Limitations of Police Power, chap. 5. See also, Buswell on Insanity, p. 33. A very different question is presented when the Legislature undertakes to confer upon courts discretionary power to confine persons in asylums or hospitals and makes no provision for notice or adjudication before the order for confinement or for review of such discretion after the person is committed. It is well settled that a person acquitted by a jury upon the ground of insanity existing at the time of the commission of the act is entitled to all of the protection and constitutional rights as if acquitted upon any other ground. He enters his plea and upon issue joined by the State puts himself upon his country. "It is probably the rule of law in every civilized country that no insane man can be guilty of a crime and hence cannot be punished for what would otherwise be a crime. * * * Insanity when it is proven to have existed when the offense was committed constitutes a good defense, and the defendant is entitled to an acquittal. If the person is still insane, he can be confined in an asylum until his mental health is restored when he will be entitled to his release, like any other insane person." Tiedeman, 110. *Campbell,* J., in (420) *Underwood v. People,* 32 Mich., 1, 20 Am. Rep., 633, says:

"There can be no reason to doubt the propriety of making provision to secure such unfortunate persons protection and care in such a way as to prevent them from injuring or being injured if they are dangerous or in need of seclusion. The State has an ultimate guardianship over *non compotes* in cases where it is necessary. But inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance and one which especially involves judicial oversight. In this country, where all legislation must be within constitutional limits and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of his liberty without due process of law. * * * But a more serious difficulty is in the nature of the proceedings themselves. In the first place the prisoner is sent into confinement without any legal investigation into his mental condition at that time, when he may be perfectly safe and when, having been acquitted, he is entitled to all the privileges of an innocent man. * * * Neither Judge nor expert has any power under our Constitution to select his own means and process of inquiry and pass *ex parte* upon the liberty of citizens." *Dowdell, Petitioner,* 169 Mass., 387. *In re Lambert* (Cal.), 55 L. R. A., 856, 86 Am. St., 296, it is said: "An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle of English jurisprudence that before any judgment can be pronounced against a person there must have been a trial of the issue upon which the judgment is given." In *S. v. Billings,* 55 Minn., 467, 43 Am. St., 525, the Court says: "While the State should take charge of such unfortunates as are
(421) dangerous to themselves and to others, not only for the safety of the public but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future." The statute under which the defendant was committed to an asylum in that case was in several respects similar to ours. The Court declared it void. It is true that it is provided that the person acquitted is to be kept in "custody for treatment and cure." The fatal infirmity in the statute is that the power to commit is vested in the Court to be exercised "in its discretion." No provision is made for notifying the person whose liberty is in-

volved, nor is the Court required to make any investigation either by itself, by the examination of witnesses, by calling to its aid medical experts or otherwise. The order of his Honor expressly recites in the language of the act that, "It is therefore ordered and adjudged by the Court in the exercise of its discretion." We approve the language of the Court in *People v. Sanatorium,* 34 N. Y. App. Div., 363. "No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law or to protect the person from himself or the community from apprehended acts, such restraint cannot be made permanent or of long continuance unless by due process of law." It is not necessary to discuss the question what is "due process of law" or to adopt any of the various definitions thereof; there is here, in no possible aspect, anything approaching the essential requirements of due process of law. An examination of the testimony in the case sent up as a part of the record, and his Honor's remarks to the jury show that he strongly and properly disapproved of the verdict. We (422) are quite sure that his Honor, in strict compliance with the statute, exercised a sound discretion, but the difficulty lies in the fatal infirmity of the statute. As is well said, "The constitutional validity of law is to be tested not by what has been done under it, but by what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given but it cannot dispense with all notice." *Stuart v. Palmer,* 74 N. Y., 183, 30 Am. Rep., 289. Doubtless the Legislature in its effort to deal with a difficult and embarrassing condition existing in the State respecting the care for that class of persons called criminal insane, and looking to legislation in other States upon the subject, enacted the statute without due regard to the constitutional limitations upon its power. The Court, in *Underwood v. People, supra,* thus accounts for a similar statute enacted by the General Assembly of Michigan: "It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has been allowed to go under the fanciful theories of incompetent and dogmatic witnesses. * * * No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions and not by destroying the safeguards of private liberty." It may be that the wisdom of the Legislature will find, within constitutional limitations, a remedy for the objectionable features of the statute. We do not wish to be under-

stood as saying that a person acquitted of a grave crime upon the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may, either under the direction of the Judge presiding or some other judicial officer, or commission, be examined into for the purpose of ascertaining whether his own safety
(423) and that of other persons, or the public generally, requires that he be committed to the hospital for treatment and care. It is well settled that it is not necessary that a jury trial be had—it is sufficient if the inquiry be had in some way by some tribunal conforming to the constitutional requirement of due process of law. *Black Hawk v. Springer,* 58 Iowa, 417, 16 Am. & Eng. Ency., 599; *Nobles v. Georgia,* 168 U. S., 398. There is, however, another and equally fatal objection to the statute. Section 67 provides that a person acquitted of a capital felony and committed to the Hospital can not be released except by an act of the Legislature. It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government can not by any legislation be deprived of this power or relieved of this duty. It must afford to every citizen a prompt, complete and adequate remedy by due process for every unlawful injury to his person or property. This is absolutely essential to a constitutional government. The Legislature may make laws, prescribe rules of action and provide remedies not provided by the Constitution, the judiciary alone can administer the remedy. It is inconceivable to the mind of an American citizen at all familiar with the fundamental principles of our system of government how it can be possible that a person restrained of his liberty must await the action of the Legislature before he can have the cause thereof inquired into.

In *Doyle, Petitioner,* 16 R. I., 537, 5 L. R. A., 359, 27 Am. St., 759, the Court held that a statute which permitted a person to be committed to an insane asylum and detained until discharged by a commission appointed by a Justice of the Supreme Court was invalid. The principle upon which the decision is based is thus stated: "Such commission, however, is to be appointed not at the instance of the person confined but
(424) but only on application of some *other* person. * * * Inasmuch as the person confined cannot himself initiate the proceeding or take any part in it when initiated by another, 'the effect of the act is to deprive the person of his liberty without due process of law.' Notwithstanding the express provisions of the act, the Court granted the writ of *habeas corpus.*"

The Supreme Court of Michigan commenting upon a somewhat similar statute, says: "It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors." It will be observed that no duty is imposed upon the Legislature to inquire into the mental condition of persons confined under the statute, or to take any notice of or action in regard to them. While this provision is invalid, and does not prevent the application for or relieve the Judge of the duty to issue the writ of *habeas corpus* for the purpose of inquiring into the cause of the detention of the petitioner, it does not follow that he would be entitled to his discharge if committed in accordance with a valid law. Notwithstanding the invalidity of the statute under which the petitioner is committed, if it appeared from the return of the superintendent of the hospital, or the evidence before the Judge hearing the cause upon the return of the writ, that the petitioner was then insane and that he was a fit subject for restraint in the asylum or hospital, it would be his duty to direct his detention for a reasonable time to the end that proceedings should be had before the Clerk of the Superior Court as prescribed by sction 15, chap. 1, Laws 1899. Whatever power the courts may have possessed to deal with insane persons under their general chancery jurisdiction, is now regulated by statute, and we find no authority for the admission of insane persons into State hospitals otherwise than as prescribed by the statute. There can be no doubt of the duty and power of the Court to issue the writ of *habeas corpus* when applied for in accordance with statutory provisions. Buswell on Insanity, 30; *Palmer v. Judge,* 83 Mich., (425) 528; *Le Donne, Petitioner,* 173 Mass., 552. The Judge does not find any fact in regard to the mental condition of the petitioner at this time. He sends to this Court the affidavit of Dr. Rogers, the physician in charge of the Hospital for the Dangerous Insane, in which he says that he has made a careful study and examination of the petitioner, and that in his opinion he is now sane. In this condition of the record the cause should be remanded to his Honor Judge *Ferguson* with direction to ascertain the mental condition at this time of the petitioner. If he shall find upon an examination that his mental condition is such that he should be confined in the Hospital, he will certify the same to the Clerk of the Superior Court of Lenoir County, who will proceed, after notice to the petitioner and inquiry made as provided by section 15, chap. 1, Laws 1899, to make such orders as shall be proper in the premises. Buswell on Insanity says: "In case where a person, whether sane or insane, is detained or confined as a lunatic without authority of law, it

appears that such person is entitled to be brought into Court upon a writ of *habeas corpus* in order that the question of the legality of his detention may be inquired into. But it is necessary that the affidavit should show that the detained person is not a dangerous lunatic and that he is in a fit state to be removed and the Court may, if necessary, enlarge the time for making the return." If his Honor shall find it more convenient, he may transfer the cause to the Judge holding the courts of the district who will proceed in the cause as herein directed. Let this order be certified to Judge *Ferguson* and to J. S. Mann, Esq., superintendent of the Hospital for the Dangerous Insane.

Remanded to Judge for further findings.

---

(426)

AVERY v. STEWART.

(Filed 15 November, 1904.)

1. TRUSTS—*Evidence—Questions for Jury—The Code, sec. 413.*

   In an action to establish a parol trust whether the evidence is clear and satisfactory is for the jury.

2. PLEADINGS—*Trusts.*

   In an action to enforce a parol trust a denial on information and belief by one who has personal knowledge of the fact is not sufficient as an answer.

3. PLEADINGS—*Trusts—Evidence.*

   In an action to enforce a parol trust, the defendant having filed one answer denying the trust on information and belief and later filed another answer, the first answer may be introduced as evidence in the nature of confession and avoidance, without introducing the second answer.

4. EVIDENCE—*Trusts—Pleadings.*

   In an action to enforce a parol trust, an evasive reply by the defendant, upon being requested to execute the trust and his failure to deny the agreement, is evidence of the trust.

5. TRUSTS—*Evidence—Questions for Jury.*

   In this action to enforce a parol trust, there is sufficient evidence of said trust to be submitted to the jury.

6. TRUSTS—*Evidence.*

   That a beneficiary of a parol trust in land had agreed to pay the trustee more money than the latter had advanced in the purchase of the property does not affect the beneficiary's equity to compel performance of the trust.

7. TRUSTS—*Contracts—Husband and Wife.*

   Where the owner of land and his wife conveyed it to defendant, who had agreed to hold it for plaintiff, who had a contract for it from the owner, defendant was bound to perform, whether the owner's wife had joined in the contract with plaintiff or not.

AVERY *v.* STEWART.

ACTION by A. W. Avery against J. W. Stewart, heard by Judge *O. H. Allen* and a jury, at May Term, 1904, of (427) CRAVEN.

This action was brought to establish and enforce a parol trust. The plaintiff alleges in his complaint that John Humphrey and his wife, being the owners of a tract of land in Craven County containing about ninety-seven acres, contracted to sell the same to him at the sum of five hundred dollars and that he, not then being able to pay the stipulated price, informed the defendant Stewart of his contract with the Humphreys and requested the defendant to buy the land for him and allow him three years to pay the purchase money; that the defendant agreed to this proposal, with the proviso that plaintiff should pay him one hundred dolars for the "accommodation," and the plaintiff assented to this proviso, and thereupon promised and agreed to pay the defendant the one hundred dollars and the purchase money within three years at six per cent interest; that afterwards, on 28 October, 1901, Humphrey and his wife conveyed the land to the defendant, and on 10 December of the same year the defendant, in violation of his agreement with the plaintiff and of the trust assumed by him, conveyed the land to one W. J. Arnold, who has taken possession of the premises under his deed; that Arnold agreed to pay for the land much more than the defendant paid the Humphreys for the same, and more than the plaintiff was required to pay the defendant under their contract; and that Arnold has made certain payments upon the purchase money which he agreed to pay to the defendant, the amount of which payments is not set forth. The material allegations of the complaint are denied in the amended answer. The Court submitted to the jury two issues, as follows: 1. "Did John Humphrey and wife contract with plaintiff to sell him the land as alleged in the complaint?" 2. "Did the defendant, knowing that Humphrey and wife had contracted to sell the land to the plaintiff, and before contracting with Humphrey for the purchase of the land (428) and before receiving a deed therefor agree with the plaintiff to buy the land for him, as alleged in the complaint?"

As the case turns upon the question whether there was any proof of the trust, it is necessary to state the evidence. The plaintiff, in his own behalf, testified: "I live three miles from Cove Creek and know the defendant and John Humphrey. John Humphrey lives ten miles from me. I made a contract with Humphrey about August, 1901. I met him here and asked him what he would take for the land referred to in the complaint, and he said he would take five hundred dollars. I

told him I did not have that much money, but if I could get some one to take hold of it and help me out I would take the place and he could consider the place sold. The next day I saw the defendant and told him what I had done, and asked him if he would let me have the money to buy. He asked me what I would give him to get it for me. I told him I would give him one hundred dollars in addition to five hundred dollars payable in three years at six per cent. He said he would get it for me, and said 'you need not bother about it any further.' Then he called Wallace's attention (Wallace was his clerk and bookkeeper) and told him to write to Humphrey that he wanted to see him about the land when he came to town. He told me to go and look at the land. I looked at the land and reported to the defendant. I told him the land was run down to some extent but it was a good investment. I wrote Humphrey a letter; about a year later I inquired of Humphrey about the letter; he said he did not remember receiving it but got a postal card later. I notified him that he could sell the place to Stewart. I wrote Humphrey a letter telling him he could sell to Stewart. (Defendant objected to all evidence of the contents of the letter, objection sustained. Plaintiff excepted). I received a letter from Humphrey which is lost. I can not find it. I (429) have made a diligent search for it. I usually keep my papers in a trunk, as I am a farmer and do not keep many papers. I have looked through the trunk, looked through all my clothes and looked through my house and everywhere it could possibly be. I am sure it has been destroyed. Humphrey said in his letter (it might have been a card) that he wanted me to hurry the matter up, as he wished to complete the deal by a certain time in October—I do not remember the day. I came to New Bern a few days after that and the defendant was away, and I asked Wallace to call his attention to the land trade. I did not see the defendant any more until after he had bought the land. He bought it in October for five hundred dollars from Humphrey and his wife. After the defendant returned and had bought the place I had a conversation with him. I went into his office and asked him about the place and he told me that he had bought it. We talked a considerable time about it. I asked him about complying with our agreement about it, and about making our trade. I told him I would give him what I had promised him—six hundred dollars at six per cent interest. Then he said to me: 'I can get a heap more than that for it; I can not sell it for that.' I asked him if he was going to fly from our agreement. Then he said: 'You know I can't afford to sell it for that money when I can get a good deal more

for it.' This is about the end of our conversation. The defendant refused to convey the land to me, but conveyed it to Arnold, who is in possession.

The plaintiff offered paragraph three of the complaint, filed 5 February, 1903, together with paragraph three of the answer thereto, filed 25 April, 1903. The defendant objected for that the Court had allowed the defendant to amend his answer as filed 4 May, 1904. The Court refused to allow the evidence unless the plaintiff would also offer therewith paragraph three of the amended answer; to this the plaintiff excepted. Here the plaintiff rested. The defendant moved to dis- (430) miss and for judgment as in case of nonsuit under the act of 1897 and amendments thereto. Motion sustained. Plaintiff excepted and appealed.

D. L. Ward and *W. D. McIver,* for the plaintiff.
O. H. Guion, for the defendant.

WALKER, J., after stating the facts. This case was before us at the last term and is reported in 134 N. C., 287. We then ordered a new trial upon the ground of the admission of incompetent testimony, but at the same time it was distinctly intimated that there was evidence to sustain a finding for the plaintiff upon the issues in the case. Upon proof substantially the same as that at the former hearing the plaintiff was nonsuited at the last trial. Whether this action of the Court proceded upon the assumption that there was no evidence of the trust, or that the evidence was not clear, strong and convincing, or that there was no evidence of any fact *dehors* the deed inconsistent with the idea of an absolute purchase by Stewart, we we know not. If either of the last two propositions was the one upon which the decision rested, there was clearly error in the ruling. It is not for the Judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. The verdict may be set aside by the Court, if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury can not be denied or abridged, provided there is some evidence tending to establish the plaintiff's contention. The jury should be instructed, to be sure, that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for them to say whether the evidence is of that convincing character. *Berry v. Hall,* 105 N. C., 154; *Lehew v. Hewett,* 130 N. C., 22. The Judge is positively forbidden by our (431) statute "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and

province of the jury." The Code, sec. 413. He must not decide upon the weight of the evidence, as he is not a trier of facts but an expounder of the law. We doubt if the rule of the Court of Equity as to the intensity of the proof, which was adopted by the chancellors for their own guidance when they passed upon both the facts and the law, had been distinctly held by this Court to be applicable to cases of trusts since the ruling in *Shelton v. Shelton,* 58 N. C., 292, until *McNair v. Pope,* 100 N. C., 404, and *Hamilton v. Buchanan,* 112 N. C., 463, and finally *Kelly v. McNeill,* 118 N. C., 349, were decided, in the last of which cases the question was directly involved. Expressions had fallen from the judges in several cases which indicated a drift of sentiment towards the adoption of the rule, but no ruling had been made in any case, which we now recall, presenting the precise point for decision. The Court evidently intended to hold in *Shelton v. Shelton, supra,* and in *Shields v. Whitaker,* 82 N. C., 516, that the rule did not apply to the proof of trusts, as the deed is in no way altered or contradicted by the trust, "which is merely an incident attached to it in equity, as affecting the conscience of the party who holds the legal title"—in that respect differing from a condition which must be added to and constitute a part of the deed because it affects the legal estate, which may be defeated by the performance of the condition, as, in the case of a mortgage, by the payment of the money. The rule as to the intensity of proof is such a just and reasonable one, and the distinction made in *Shelton v. Shelton* appears to us to be so artificial and shadowy that we are not disposed to review and reverse the decision in *Kelly v. McNeill,* in which the rule, is held to apply to such cases, or to controvert what has been said in other decisions to the same effect. The deed itself, which is absolute in (432) form, raises a strong presumption against the existence of a trust, which should be overcome by a greater weight of evidence than a mere preponderance. *Kelly v. Bryan,* 41 N. C., at p. 286. He who must take the burden of establishing the trust cannot succeed except upon evidence which is clear and of the most persuasive character. Bispham Eq. (6 Ed.), sec. 83. The security of titles requires the adoption of the rule, while it cannot be said to impose any hardship upon him who alleges the existence of the trust, but who by his own inadvertence, if not by his negligence, has failed, when he had the opportunity, to have it plainly declared in the deed or in some written memorandum so as to be able to furnish indisputable evidence of it.

Whether it is necessary for the plaintiff in a case like this to

produce evidence of facts and circumstances *dehors* the deed inconsistent with the claim by the defendant of an absolute purchase for himself we need not decide (*Shelton v. Shelton* and *Shields v. Whitaker, supra*), as we are of the opinion there is proof of such a "fact or circumstance *dehors*" the deed in this case.

In the first place the plaintiff positively alleges, in the third section of his complaint, that the defendant had agreed to buy the land from Humphrey and to hold the title in trust for the plaintiff, with the understanding and agreement that he would convey it to him when he paid the stipulated amount. This allegation of a matter which was bound to be within the defendant's personal knowledge was not met by a square denial based upon that knowledge, as it should have been, but by a denial on information and belief. This was not a sufficient answer in law, as we adjudged at last term, nor was it a denial in fact. It was, to say the least, not responsive. When a party is charged with knowledge of a fact alleged in a pleading against him he should meet the allegation with frankness and candor, and any evasion in his answer to it may be taken as in the nature of an admission, or at least as evidence, of its truth. (433) The rule in equity is that if the defendant answers at all, he must answer fully all the material statements and charges of the bill and he must speak directly, without evasion, and not by way of implied denial or negative pregnant. A literal answer will not do, he is required to traverse the substance of each charge positively and with certainty. "Particular precise charges must be answered particularly, not in a general manner. When the facts are within the defendant's knowledge he must answer positively and not as to his information and belief." 1 Enc. Pl. & Pr., 876. A very clear exposition of the rules of pleading in equity relating to this subject will be found at the page of the book just cited. Tested by the said rules—and they are substantially the same as those prescribed by our Code—the first answer of the defendant was not only technically insufficient, but it was competent evidence in favor of the plaintiff and against defendant, as being in the nature of a confession, and should have been admitted by the Court. The ruling by which it was excluded was therefore erroneous. The plaintiff was not required to introduce the defendant's second answer in order to avail himself of the first as evidence. We know of no law imposing such a condition. The first answer is, therefore, one fact *dehors* the deed tending to corroborate the plaintiff's version of the transaction. *Cobb v. Edwards,* 117 N. C., 252; *Shields v. Whitaker,* 82 N. C., at p. 522. To what

extent it actually supports it, is a question solely for the jury to determine.

In the second place, the answer of the defendant to the plaintiff's inquiry about complying with their agreement, as stated by the plaitniff, was a tacit admission of the agreement, for while he refused to convey at the price named by the plaintiff as the one agreed upon, he did not deny the agreement, and again, when asked if he intended to "fly from the agree-
(434) ment," he replied: "You know I cannot afford to sell it for that money when I can get a good deal more for it." If there was not any agreement with the plaintiff to hold the title in trust for him, that was the time to deny it explicitly. But he did not do so. Can it be said that this is not a fact or circumstance *dehors* the deed sufficient to be considered by the jury? Is not a virtual admission, either in a formal pleading or *in pais,* just as strong corroboration for the purpose of testing its sufficiency as a fact *dehors* the deed, as the possession of the premises by the alleged *cestui que trust,* or as any other fact which has been adjudged to come within the rule? We think it is. *Cobb v. Edwards,* 117 N. C., at p. 250.

Having disposed of these preliminary matters, it remains for us to decide, as we clearly intended to do before, whether the plaintiff has offered evidence of a parol trust or any kind of trust which he can successfully invoke the aid of the Court to enforce. It is our opinion that he has done so, and that the evidence should be submitted to the jury if it is substantially the same at the next trial as it was at the last two had in the Court below.

A mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds. *Campbell v. Campbell,* 55 N. C., 364. Our case is not of that kind. There are other elements present which are of an equitable character and affect the conscience of the defendant. An express trust arises by agreement of the parties, but whether a trust so created is within the statute is a question not necessary to be decided, as upon the evidence in this case, if the jury find the facts in accordance therewith, a trust was raised by operation or construction of law. *Owens v. Williams,* 130 N. C., at p. 168. Implied trusts may arise either for the purpose of carrying out the presumed intention of the parties, or they may be entirely independent of or
(435) even contrary to such intention. Trusts of the first division are called resulting or presumptive trusts, as they result by operation or presumption of law and are of several classes: 1. Where a purchaser pays the purchase money but

takes the title in the name of another; 2. Where a trustee or other fiduciary buys the property in his own name but with trust funds; 3. Where the trusts of a conveyance are not declared, or are only partially declared, or fail; and 4. Where a conveyance is made without any consideration and it appears from circumstances that the grantee was not intended to take beneficially. Bispham Pr. of Eq. (6 Ed.), sec. 79. Trusts of the second class exist purely by construction of law, without reference to any actual or supposed intention to create a trust, for the purpose of asserting rights of parties or of frustrating fraud, and are therefore termed constructive trusts. More accurately considered, constructive trusts have no element of fraud in them, but the Court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and of working out the equity of the complainant. The party guilty of the fraud is said in such cases to be a trustee *ex maleficio* and will be decreed to hold the legal title for the use and benefit of the injured party and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means. The jurisdiction is exercised distinctly upon the ground of the fraud practiced by the party against whom relief is prayed. Bispham, *supra,* pp. 125, 126, 143; *Wood v. Cherry,* 73 N. C., 110. Such trusts are of course not affected by the statute of frauds. *Gorrell v. Alspaugh,* 120 N. C., 362. Where one party has by his promise to buy, hold or dispose of real property for the benefit of another induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced. Bispham, *supra,* sec. 218. The principle in its direct application (436) to our case has been thus stated: "Where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of said promise he had induced the transfer of the property to himself." *Glass v. Hulbert,* 102 Mass., 39, 2 Am. Rep., 418. See also, *Brown v. Lynch,* 1 Paige, 147; *Thynn v. Thynn,* 1 Vern., 296; *Oldham v. Litchfield,* 2 Vern., 506; *Devinish v. Barnes,* Pre. Ch., 3; 1 Story Eq., sec. 768. Where one person agrees before a sale to buy the property proposed to be sold for the use and benefit of another, although the former may advance all of the purchase money, it has been held that such a transaction is equivalent to a loan of the money and a taking of the title as security for its repayment,

even if there is no suppression of bidding or other equitable element, and the purchaser who has thus acquired the legal title will not be permitted to hold it and repudiate his promise. "It is not now an open question that when a party agrees before the sale to purchase property about to be sold under an execution against a party and to give such party the benefit of the purchase the agreement is binding and will be enforced. The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may therefore at his option decline a compliance with his agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted." *Sandfoss* (437) *v. Jones,* 35 Cal., 481; *Soggins v. Heard,* 31 Miss., 428; *Owens v. Williams, supra.* See also, *McBarney v. Wellman,* 42 Barb., 390. If the legal title is obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser and relying on his promise, is prevented from taking such action in his own behalf as would have secured the benefit of the property to himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances, to refuse to perform his solemn agreement and to commit so palpable a breach of faith. It would be strange indeed if such conduct is beyond the reach of a court of equity, and if the party who has been grossly deceived and injured by it is without a remedy. The fact that the defendant in this case paid the purchase price out of his own money should not alter the case to the prejudice of his victim. It but aggravates his offense against sound morality, as he not only repudiates his promise but takes advantage of the impecuniosity of the plaintiff to gain an advantage over the latter. He not only deceived him, but mocked at his poverty and his discomfiture by raising the price. A mere breach of a moral obligation is not of itself, we admit, sufficient ground for the intereference of the Court; but the evidence, if taken as true, shows that there was more than that in this instance, and that the defendant has acquired property which he would not have obtained but for the plaintiff's request that he furnish the money and take the title and his promise to do so. Besides, the plaintiff alleges that Humphrey had contracted to convey the title to him and that the defendant knew it before the time of the conveyance to him. The

plaintiff's equity seems to us to be plain. *Brown v. Lynch,* 1 Paige Ch., at pp. 152-154, and cases cited: *Jenkins v. Eldredge,* 3 Story 181; *Dodge v. Wellman,* 43 How. Pr., 430; *Young v. Peachey,* 2 Atkyns, 254; *Davis v. Hopkins,* 15 Ill., 519; *Ryan v. Dox,* 34 N. Y., 307, 90 Am. Dec., 696; (438) *Cipperly v. Cipperly,* 4 Thomp. (N. Y.), 342; *Carr v. Carr,* 52 N. Y., 251; *Doruff v. Hudson,* 138 Ind., 280; *Devinish v. Bains,* Pr. Ch., 3; S. c., 24 Eng. Rep. (Reprint), 2. The clear result of the decisions in the other States may be summed up in the terse and emphatic statement of the law by *Agnew,* J., for the Court in *Sechrist's Appeal,* 66 Pa. St., 237: "Although no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another which he could not have obtained except by a confidence reposed in him the case is different. There, if he abuse the confidence so reposed, he is converted into a trustee *ex maleficio.* The statute which was intended to prevent frauds turns against him as the perpetrator of a fraud. It is not, therefore, the fact that the bargain by which he was enabled to obtain the title is verbal which governs the case, but the fact that he procured the title to be made to him in confidence, the breach of which is fraudulent and in bad faith." Substantially to the same effect is the language of the Court in *Carr v. Carr,* 52 N. Y., at p. 260. Referring to the statute of frauds the Court in the case last cited says: "It bars no other equity, and precludes no one from asserting title against one who has thus taken a conveyance for a lawful and specific purpose, and attempts to retain the property in violation of the arrangement and agreement under which he has acquired the formal title in fraud of the real owner and against equity and good conscience." Manifestly such is the case now before us for adjudication, upon the judgment nonsuiting the plaintiff.

We have thus far cited and commented upon cases in other jurisdictions, as we found them more like the case at bar in all its essential features than any case decided by this Court. But we are not without expressions from this Court as to the law upon the same subject in cases so nearly analogous as to constitute those cases precedents for our guidance. (439) In *Mulholland v. York,* 82 N. C., 513, SMITH, C. J., speaking for the Court, and referring to the case of an attorney who bought land at public sale with his own money upon a promise to hold the title for his client and to convey it to him upon repayment of the amount advanced, says: "In our opinion a trust may be thus formed, and it will be enforced on the ground of fraud in the purchaser in obtaining the property of

another under a promise to allow him to redeem and attempting afterwards to appropriate it to his own use. The principle is illustrated in several cases in our own reports, which will be briefly adverted to." He then refers to the language of GASTON, J., in *Turner v. King,* 37 N. C., 132, 38 Am. Dec., 679, which is as follows: "The attempt of the defendant to set up an irredeemable title after the agreement he entered into, is such a fraud as this Court will relieve against." After referring to *Vannoy v. Martin,* 41 N. C., 169, and *Vestal v. Sloan,* 76 N. C., 127, which appear to us as authorities strongly supporting the views we have already stated, SMITH, C. J., proceeds: "These adjudications proceed upon the assumption that the debtor, trusting to the good faith of the party promising and lulled into a false security, may have desisted in consequence of the assurance from making other efforts to prevent the sale and sacrifice of his property, and it would be a fraud in the purchaser to take advantage of the confidence and hold it, thus acquired, for his own use and to the injury of the owner." In *Barnard v. Hawks,* 111 N. C., 338, SHEPHERD, C. J., who we know had a clear conception of the law of trusts and who always enlightened us when he wrote upon the subject, states the doctrine thus: "Even had this been land, and the defendants had paid the purchase money and taken the title under a parol agreement to hold it for the plaintiff, subject to his right to repay the purchase money, the Court upon sufficient testimony would have declared (440) them trustees. This was substantially decided in *Cohn v. Chapman,* 62 N. C., 92, 93 Am. Dec., 600, in which it was held, upon the principle of trust, that such an agreement was not within the statute of frauds." In *Cohn v. Chapman,* 62 N. C., 92, cited in *Barnhardt v. Hawks, supra,* the Court seems to put the very kind of case we are now deciding when it says: "A parol agreement between A and B that A will purchase land for B and take the title to himself, and hold it for B until the latter can pay for it, and, when paid for, will convey it to him, is such an agreement as equity will enforce. And such substantially is the agreement in this case." PEARSON, C. J., for the Court in *Hargrave v. King,* 40 N. C., 436, says: "When one by parol agrees to procure a lease for himself and others and does procure the lease in his own name, he is a trustee for those for whom he agreed to act, and the statutes referred to have no application." But more to the point than any other expression in the cases is the language of SMITH, C. J., speaking for the Court in *Cheek v. Watson,* 85 N. C., at p. 198: "Our conclusion upon the whole testimony is that the defendant has deceived an embarrassed man into an assent to the sale of

his land to the defendant, through the trustee, by taking advantage of his distress and exciting false hopes that the sale should not be pleaded as absolute, but that the land might be redeemed within a reasonable time. The trust would equally arise where the party relying upon the assurance is prevented from making arrangements with others by which he could have secured the same benefits promised by the purchaser." The last part of this quotation is especially applicable to our case. If the plaintiff had known that the defendant intended to betray him by a false promise, and thus to deceive him into the adoption of a course of action which otherwise he would not have taken, he would not have placed any trust in the defendant but would have arranged with some other and more reliable person in order to secure the same benefit. To permit the de- (441) fendant to profit by such a betrayal of confidence so implicitly reposed in him, would be not only inequitable but a reproach to the administration of justice. *Johnson v. Hauser,* 88 N. C., 388; *Shields v. Whitaker,* 82 N. C., 516; *Thompson v. Newlin,* 38 N. C., 338, 42 Am. Dec., 169; *Cook v. Redman,* 37 N. C., at p. 25; *Cobb v. Edwards,* 117 N. C., 244; *Williams v. Avery,* 131 N. C., 188.

We held in *Sykes v. Boone,* 132 N. C., 199, 95 Am. St., 619, that a trust declared, at the time the legal title passed, to the effect that the vendee should hold in trust for a third person and convey to her on receiving the amount of the purchase money paid by him, was not within the statute of frauds, and that the agreement of the vendee so to hold the land and upon the faith of which he acquired the legal title was valid and enforcible as a trust. We are unable to distinguish this case from *Sykes v. Boone,* and while the two cases are not precisely alike they are in principle the same. In *Cousins v. Wall* 56 N. C., at p. 45, it appeared that the defendant advanced his own money and took a title to the lot in question, upon a promise made to the plaintiff that he would convey to him whenever he should repay the purchase money with the interest accrued thereon, and this Court held that upon the facts thus established by the proof a parol trust was raised in favor of the plaintiff and would be enforced by compelling the defendant to keep his promise and convey the land according to his agreement. "By paying his money," says the Court by BATTLE, J., "and taking the legal title to himself, the defendant held the legal estate 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 the plaintiff; for at the time of the agreement he had no title or in-

(442) terest in the land, and it was only by 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." To the same effect is *Cloninger v. Summit*, 55 N. C., 513.

The mere non-performance of a beneficial parol agreement is not such fraud or bad faith as will induce a court of equity to compel performance. There must be a salutary and proper limitation of the doctrine of parol trusts, and it will be found, we think, in confining the equity to enforce trusts arising out of parol agreements to transactions involving some element of fraud or of bad faith apart from the mere breach of the agreement itself, which makes it inequitable that the vendee should hold the legal title absolutely or discharged of any trust. In this case, it is apparent that the defendant would never have acquired the legal title to the land if the plaintiff had not requested him to advance the money and take the title in trust for him, and if he had not solemnly promised to do so. If he had declined, the plaintiff no doubt would have made other arrangements to secure the title for himself.

We think the case is well within the limit of the doctrine of trusts as we have found that limit to be fixed by the law. The fact that the plaintiff agreed to pay one hundred dollars to the defendant in addition to the purchase price cannot affect his equity. *Owens v. Williams, supra.*

The issues refer to the contract as having been made with Humphrey and wife. When this Court suggested that the second issue be submitted, we were misled by the form of the first issue into assuming that the wife had some interest in the land other than her dower; but it appears that she did not have any such interest. We do not think it can make any difference whether Humphrey's wife joined in making the contract or not. If he made it, and afterwards he and his wife con-

(443) veyed the land to the defendant, that will be quite sufficient to bind the defendant, provided the other facts necessary to raise the trust in favor of the plaintiff are shown. There was error in the ruling of the Court by which the action was dismissed. The judgment will be set aside and a new trial awarded.

Error.

Cited: Lehew v. Hewett, 138 N. C., 10; *Millhiser v. Leatherwood,* 140 N. C., 235; *Davis v. Kerr,* 141 N. C., 17, 18, 19; *Faust v. Faust,* 144 N. C., 386; *Streator v. Streator,* 145 N. C., 338; *Russell v. Wade,* 146 N. C., 121; *Chappell v. White, Ib.,* 573; *Gaylord v. Gaylord,* 150 N. C., 227, 237; *Harrell v. Hagan, Ib.,* 244; *Jackson v. Farmer,* 151 N. C., 281; *Busbee v. Land Co., Ib.,* 514.

LEROY v. JACOBOSKY.

(Filed 15 November, 1904.)

1. GUARDIAN AND WARD—*Contracts.*

A guardian is not personally liable on a contract to convey the lands of his ward, the grantee knowing he was acting for his ward.

2. CONTRACTS—*Guardian and Ward—Damages—Assumpsit—Action on the Case.*

An agent, or one acting in a representative capacity, who fails to bind his principal, may be held liable in an action on the case, or on an assumpsit, or for damages, although not liable on the contract as made.

3. GUARDIAN AND WARD—*Contracts—Damages—Agency.*

In an action against a guardian who purported to make a contract which he had no authority to make, the measure of plaintiff's damages is what plaintiff lost by reason of the false assertion of authority.

4. ATTACHMENT—*Guardian and Ward—Clerks of Court.*

Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale.

5. RECORDATION—*Contracts—Probate—The Code, sec. 1246, subsec. 9.*

Where the parties to an instrument requiring registration are nonresidents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party.

6. VENDOR AND PURCHASER—*Contracts—Damages—Measure of.*

The measure of damages for failure to convey land under a written contract is the difference between the contract price and the market value thereof.

7. CONTRACTS—*Guardian and Ward.*

One who signed on April 28th a contract to convey land on April 23d of the same year is not bound because of the impossibility of performance of such contract.

8. GUARDIAN AND WARD—*Contracts.*

Where a guardian contracts to convey the land of his ward on or before a certain date, the signing of the contract after that date by the ward does not operate as a ratification of the agreement of the guardian.

ACTION by J. H. LeRoy against H. Jacobosky, S. H. Weisel and others, heard by Judge *W. A. Hoke* and a (444) jury, at March Term, 1904, of PASQUOTANK.

PLAINTIFF'S APPEAL.

The defendants H. Jacobosky, A. Jacobosky and S. H. Weisel were on 13 March, 1903, the owners as tenants in common with

Rebecca Weisel and Sadie Weisel, the last three being infants, the said H. Jacobosky being their general guardian, residing in the State of Virginia. On the said 13 March, 1903, the said H. and A. Jacobosky, under the firm name and style of Jacobosky Bros., and the said H. Jacobosky as guardian of the said wards, entered into a written agreement with the plaintiff as follows:

"Portsmouth, Va., 13 March, 1903.

(445) "In consideration of twenty-five dollars paid to us, we hereby agree to sell to J. H. LeRoy the property and wharf on Water Street in Elizabeth City, N. C., known as the 'Weisel property' for the sum of $22,500, leaving a balance due us of 22,475. This option holds good from this date until 13 April, 1903. Said property can not be delivered to purchaser until present leases expire, which are known to Mr. LeRoy.

"JACOBOSKY BROS.
"H. JACOBOSKY,
"Guardian of Simon, Fannie and Sadie Weisel.
"J. H. LEROY,
"S. H. WEISEL."

The said S. H. Weisel reached his majority prior to 23 April, 1903, on which day he signed the agreement. After the execution of the agreement the parties tenants in common, the adults in their own behalf and the infants appearing by their next friend, filed their petition in the Superior Court of Pasquotank County asking for an order for a sale of the property. After proper proceedings had in the premises the land was brought to public sale by the commissioner duly appointed, and bought by B. F. White and J. B. Flora at the price of $25,000. The sale was confirmed and title made to the purchasers. The defendants having refused to convey to the plaintiff, who duly tendered the amount of the contract price within the time named, he brought this action for the purpose of recovering damages for the breach of the contract. The Court submitted the following issues to the jury:

1. "Are the defendants H. and A. Jacobosky indebted to the plaintiff on breach of contract, and if so in what sum?"

2. "Is the defendant S. H. Weisel indebted to the (446) plaintiff, and if so in what amount?"

The plaintiff introduced the contract. He testified that he was present at the time the contract was signed, and that he knew nothing of the ages of the infants except that it was signed as guardian for them; that he gave a check for $25, and as he went out of the front door of the defendant's store

after the check was given, the defendant H. Jacobosky said that the Weisels were minors and it would be necessary to obtain an order of Court to make title and that he would get the order. He also said if any one raised the price he would buy it in and make the title. The plaintiff testified that he tendered the money. The defendants H. and A. Jacobosky said that they admitted that the witness had offered to comply with this contract, but that S. H. Weisel had since become of age and refused to carry it out. Certain letters were put in evidence tending to show a demand of the plaintiff and refusal of the defendants to comply with the contract. The Court charged the jury that if they believed the evidence they should answer the first issues "Yes, twelve twenty-sevenths of $25,000 and $25" (that being the interest of the defendants H. and A. Jacobosky). The plaintiff excepted, claiming the entire damage or difference in the contract price and the amount for which the property sold. From a judgment on the verdict the plaintiff appealed.

E. F. Aydlett, for the plaintiff.
Ward & Thompson, for the defendants.

CONNOR, J., after stating the facts. The only question presented upon the plaintiff's appeal is whether the defendant H. Jacobosky is personally liable on the contract in respect to the interests or shares of his wards, Sadie and Rebecca Weisel. It will be well to bear in mind the fact that the action is on the contract and for breach thereof; that the issue is directed to the inquiry of the indebtedness arising from a (447) breach of the contract. The brief of the plaintiff's counsel maintains and cites authorities to show that the defendant guardian is personally liable in the same manner and to the same extent as he is on the contract in respect to his own share or interest in the land. He concedes that there can be no decree for specific performance as against the infants. The defendant concedes that he had no authority as guardian to enter into any contract to sell the real estate of his wards. He says that this was well known to the plaintiff, and that by his signature as guardian the plaintiff knew that he was contracting only in his representative capacity and not personally. The plaintiff says that, conceding this to be true, the law, without regard to the intention of the parties, fixes the defendant with a personal liability; that some one was to be bound, and if the infants were not bound by the contract the guardian must be so personally or there was no contract.

It has been said by quite a number of judges that when by reason of the absence of authority the principal is not bound

upon the contract the agent must be. *Ellsworth,* J., in *Ogden v. Raymond,* 22 Conn., 379 (58 Am. Dec., 429), says: "We are aware that it is not unfrequently laid down as a rule of law that if the agent does not bind his principal he binds himself; but this rule needs qualification and can not be said to be universally true or correct." Mr. Meacham says: "The rule sometimes asserted that wherever the agent fails to create a right of action against his principal upon the contract he makes himself liable thereon can not be sustained as a general rule." Meacham on Agency, sec. 550. Referring to the cases holding this doctrine, *Selden,* J., says: "The authority of these cases has been somewhat shaken, and in England, as well as in several of the United States, the principle upon which they rested, if they are supposed to present the only ground of lia-
(448) bility of the agent, has been substantially repudiated. If it were necessary in disposing of the present case to decide the question whether, as a general principle, one entering into a contract in the name of another without authority is to be himself holden as a party to the contract, I should hesitate to affirm such a principle. By that rule courts would often make contracts for parties which they neither intended nor would have consented to make." *White v. Madison,* 26 N. Y., 117, approved in *Taylor v. Nostrand,* 134 N. Y., 108; *Wallace v. Bentley,* 77 Cal., 19, 11 Am. St., 231; *Ballou v. Talbot,* 16 Mass., 461, 8 Am. Dec., 146; *Duncan v. Niles,* 32 Ill., 532, 83 Am. Dec., 295; *Bartlett v. Tucker,* 104 Mass., 336, 6 Am. Rep., 240. Some of the authorities hold that in all written contracts, except specialties, if the pretended agent has so worded the instrument as to make it appear that he is acting for and on behalf of another and not himself—having no authority to do so—he binds himself personally and will be liable in an action on the contract itself, for the reason that he must have intended to bind some one; and if he was unauthorized to bind the principal he is estopped to deny that he intended to bind himself, as in that case no one whatever would be bound. But the objection to this doctrine is that it would require the Court to make a new contract for the parties or one into which they have not themselves entered, and the courts now generally repudiate it. While the decisions are not uniform, the great weight of modern authority is that the agent is not personally bound by the contract itself and can not be held liable in an action thereon." Reinhardt on Agency, sec. 307; Clark on Contracts, 274; *Hall v. Crandall,* 29 Cal., 567, 89 Am. Dec., 64. The same view has been held by this Court in *Delius v. Cawthorn,* 13 N. C., 90. The defendant executed a note payable to the plaintiff in the

name of one Johnson by himself as agent. The action was upon the bond. It was shown that the defendant had no authority to sign Johnson's name. The Court held that the (449) action could not be maintained; that it was not the bond of the agent. *Toomer,* J., says: "It is believed the elementary writers, in speaking of the personal liability of the agent because he has no responsible principal, do not mean to convey the idea that the instrument becomes the deed of the agent when it has been signed, sealed and delivered in the name of the principal, who was bound on its face, merely because the agent had exceeded his authority or had acted without authority. But they intend simply to declare his personal responsibility, which may be enforced by bill in equity on the ground of fraud, or by special action on the case." The learned Judge cites a number of cases to sustain the conclusion reached by him. Judges *Henderson* and *Hall* wrote concurring opinions. In *Ballou v. Talbot, supra,* the action was upon a promissory note signed by the defendant as "agent for David Perry," and the Court held that an action could not be maintained against him on the bond, but that he would be responsible in a special action on the case. This opinion was written by *Parker,* C. J., and has been followed by the Massachusetts Court. In *Russell v. Koonce,* 104 N. C., 237, SMITH, C. J., says: "The defendant does not become individually liable because his authority to bind his principal is disowned by the latter unless the consideration is received by the agent, out of which arises an implied promise to pay. In such case the agent may become personally answerable upon the contract, but otherwise the action must be for damages for his false assumption of his authority to act" —citing *Delius v. Cawthorn, supra.* The cases cited by the plaintiff in which the guardian has been held personally liable upon promissory notes executed by him in his representative capacity, show that he received the consideration, or that some service was renedered, as in *Fessenden v. Jones,* 52 N. C., 14, 75 Am. Dec., 445, where the plaintiff was a physician (450) and was called to attend the slaves of the defendant's ward, and the guardian was held personally liable in an action of assumpsit. Of course he could reimburse himself of the estate of his ward. In *Devane v. Royal,* 52 N. C., 426, the plaintiff rendered service to the executrix as attorney in the settlement of the estate. She was held personally liable, the Court saying: "If the disbursement be a proper one, she will be allowed a credit in the settlement of her account with the estate." *Kessler v. Hall,* 64 N. C., 61. In *McLean v. McLean,* 88 N. C., 394, ASHE, J., says: "It is well settled by the almost unvarying current of authority

that the promissory note of an administrator or an executor, founded upon the consideration of forbearance or the possession of assets, will be binding upon him in his individual capacity, although he should sign the note as 'administrator or executor.'" It will be observed that the note must be founded upon sufficient consideration "as of assets or forbearance." This Court in *Bank v. Morehead,* 122 N. C., 318, followed the early cases and held the executrix liable personally upon a note executed in her representative capacity in consideration of the surrender of a note against her testator and the extension of time for payment. The decision was put upon the fact that she had assets and obtained forbearance. The first case in our reports is *Sleighter v. Harrington,* 6 N. C., 332. RUFFIN, J., rests the decision of that case upon the fact that the executor had assets applicable to the payment of the debt surrendered, saying that the debt "must be such as the creditor would be entitled to recover if he were then suing the executor in his representative capacity for his debt. The executor is the mere holder, as it were, of money which is in justice and conscience the money of another person." The question was again before the Court in
(451) *Williams v. Chaffin,* 13 N. C., 333, when the same eminent Judge said that if there were no other consideration, and the executor had no assets applicable to the debt, the promise was void. How far the doctrine has been modified by the change in the law by which the status of the creditor of a deceased person is fixed in respect to assets it is not necessary to inquire. It must be conceded that the authorities are not uniform. In *Taylor v. Davis,* 110 U. S., 330, and *Mason v. Caldwell,* 5 *Gilmore,* 196, 48 Am. Dec., 330, it is held that the person making the contract in his representative capacity without authority is bound upon the contract. After reviewing the cases which had been then decided, *Ellsworth,* J., in *Ogden v. Raymond, supra,* says: "The question in these cases will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is. The cases are exceedingly conflicting and unsatisfactory, though they contain some general principles universally acquiesced in." All of the authorities concur in holding that the Court will ascertain the intention by reference to the written contract and the surrounding circumstances. Referring to those cases in which the Court have rejected the words showing that the contract is signed as agent, or as in this case "guardian of Simon, Sadie and Rebecca Weisel,"

and holding the agent liable personally upon the contract. Mr. Meacham says: "This, as has been well said, is rather to make a new contract for the parties than to construe the one which they have made for themselves. When, however, the agent is undertaking without authority to bind another, and has used apt words to bind himself, there is abundant reason and justice to hold him liable upon the contract itself as made. * * * The agent is only liable on the contract in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the cred- (452) it is given to him personally." Meacham on Agency, 550. We do not think that the words "guardian," etc., can be rejected as surplusage or treated as *descriptio personarum*.

It will be noted that the property belonged to the defendant and his wards as tenants in common. The contract was signed "Jacobosky Bros." first, and "H. Jacobosky, Guardian, etc.," next, and then by the plaintiff. He must have thereby known that the defendant was making the contract in a dual capacity. He accepted it with this knowledge. In a few moments after signing, and before he left the store, the defendant called his attention to the fact that as the Weisel children were infants it would be necessary to obtain an order of the Court to make a perfect title. The plaintiff certainly did not expect the defendant as guardian to make a deed. He would not have been under any obligation to accept such a deed. The conduct of the parties shows clearly that they expected and intended that an order of sale should be obtained. The defendant promptly employed learned and able counsel to procure the order. No other construction can be reasonably put upon the contract than that the defendant was acting, in respect to the interests of his wards, in his representative capacity. To do otherwise would be to misinterpret the language and conduct of the parties. The language of Judge *Toomer* is very much in point. In *Delius v. Cawthorn* he says: "The present action can only be sustained by making the instrument the deed of the defendant. Is there any principle of law which can so entirely defeat the intention of the parties and prevent the truth of the transaction as to change the nature and character of the instrument and make it the deed of the defendant?" RUFFIN, J., in *Fowle v. Kerchner*, 87 N. C., 49, says: "The legitimate aim of all interpretation is not to make a contract for the parties or to modify the one they have made for themselves, but simply to (453) ascertain their intentions and give them effect if not inconsistent with some policy of the law, and, in the effort to arrive at their intentions, it is always proper for the Court to con-

sider not only the precise terms of the instrument, but the circumstances under which it was made, the situation of the parties, and the manner in which they have borne themselves with reference to it." After citing authorities showing the trend of judicial opinion upon the subject, the learned Justice says: "In other words, the courts now regard the particular form of executing a contract, not under seal, by an agent as being wholly immaterial, provided the context of the instrument and the circumstances under which it was executed show that it was a ministerial act on his part."

We are of the opinion that the defendant H. Jacobosky is not personally liable on the contract in respect to the shares of his infant wards. It does not follow, however, that because an agent or one acting in a representative capacity is not liable on the contract as made, a party who is misled or who parts with something of value or otherwise acquires legal rights is without remedy. As is said by the Court in *Delius v. Cawthorn, supra,* in a special action on the case under the former system of pleading and practice, or under our present system in a civil action either upon an implied assumpsit, when he has received the consideration, or for damages, he has an ample remedy. *Selden,* J., in *White v. Madison, surpra,* says: "Whenever a person enters into a contract as agent for another, he warrants his own authority unless very special circumstances or express agreement relieve him from that responsibility. An action upon such warranty must always be appropriate when personal liability attaches to an agent in consequence of his contracting without authority." *Parker,* C. J., in *Taylor v. Nostrand, supra,* referring to this case, says: "In a carefully considered
(454) opinion by Judge *Selden,* in *White v. Madison,* the conclusion was reached that the liability of the agent rests on the ground that he warrants his authority, not that the contract is to be his own; and on the question of damages it was held that the agent's liability is not necessarily measured by the contract, but embraces all injury resulting from his want of power, which was held to include the costs of an unsuccessful action against the principal." *Russell v. Koonce, supra.* The measure of damages is what the plaintiff lost by reason of the false assertion of agency or of authority, or the amount of money paid out, or the value of the service rendered, or such special damages sustained by the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority. *Hare v. Crandall, supra.* If the plaintiff had set out in his complaint the contract with a statement of the facts out of which his cause of action accrued, he would have been

entitled to have had appropriate issues submitted to the jury presenting the several phases of his case, but he simply alleges that the defendants contracted with the plaintiff in writing to sell and convey to him that certain piece of property," etc. In making his proof he introduces the contract, by which it appears that, in respect to the shares of the infants, the defendant H. Jacobosky contracted as guardian. He did not ask permission to amend his complaint but rested his right to recover upon the theory that the entire contract was the personal obligation of the defendant. There was no allegation upon which he could recover damages of the defendant upon this view of the case. His measure of damages in the action upon the contract as against Jacobosky Bros. is the difference between the contract price and the market value of the land ascertained by a public sale. In an action against H. Jacobosky for representing himself as having authority to make the contract to sell the infants' share or interest entirely different questions in regard to damages were involved. The action in one respect was (455) for breach of contract, in the other for asserting that he had authority to make the contract for his wards. These separate and distinct actions could not be tried upon one issue and upon the pleadings, but one issue could have been submitted. This is not a mere matter of form, but of substance, affecting the substantive rights of both parties. We are, however, of the opinion that in any aspect of the case his Honor correctly instructed the jury. Mr. Reinhardt in his work on Agency, sec. 308, says: "If the party with whom the agent has contracted knew that the agent had no authority, or was cognizant of all the facts upon which the assumption of authority was based—as for example, when both parties labored under a mistake of law with reference to the liability of the principal—the agent is not liable either in tort or upon the contract." *Newport v. Smith,* 61 Minn., 277; *Baltzen v. McOlay,* 53 N. Y., 467. In *Michael v. Jones,* 84 Mo., 578, the Justice writing for the Court says: "But I am satisfied that under the best considered modern decisions the principle invoked by the plaintiff cannot be carried to such an extent. The true rule, I think, is that when all of the facts are known, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability." RUFFIN, J., in *Fowle v. Kerchner, supra,* says: "The general rule is that whenever a party assumes to act as agent for another, if he has no authority, or if he exceed his authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having

authority he misleads the other party into making the agreement. But the rule is founded upon the supposition * * * that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act, and when this want of authority is known, and it (456) is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound." Of course, for manifest reasons, there is no suggestion that the guardian undertook to guarantee the ratification of his wards. "In the absence of all agreement, express or implied, to be personally bound, there can be no case, we apprehend, in which an agent has been held responsible who has not been guilty of fraud either actual or constructive." *Fowle v. Kerchner, supra.* There can be no fraud when the person with whom the agent deals knows that he has no authority to bind his principal, or knows the character and extent of his agency. An examination of the many cases cited by the authors of works on agency discovers an absence of unformity upon this question. It may be traced to the effort of the judges to escape from the early decisions holding that the agent acting without or in excess of authority becomes liable upon the contract, discarding the intention of the parties and other considerations. The liability rests upon other and we think more scientific principles. The remedy for the injured party is ample.

The defendant also calls our attention to authorities holding that "a contract by a guardian to sell the ward's real estate in advance of legal authority, is contrary to public policy and void." 15 Am. & Eng. Ency. (2 Ed.), 57; *Zander v. Feely,* 47 Ill. App., 659. The law expressly provides the manner and purpose for which a guardian may sell his ward's real estate. The facts of this case show the danger of permitting a guardian to enter into a contract otherwise than as provided by law. After the defendant made this contract, it was to his interest to prevent the land bringing more than the contract price, and although he did not do so, and the commissioner obtained more than the price agreed upon, it may be easily seen how, if so disposed, he may have suppressed the bidding. We think the principle is founded upon reason and sound policy. Of (457) course if the contract was void for the reason assigned, the Court would not enforce or give damages for a breach of it but leave the parties as it found them. *York v. Merritt,* 77 N. C., 213. The judgment must be

Affirmed.

DEFENDANT JACOBOSKY'S APPEAL.

The main facts in this appeal are similar to those in that of

the plaintiff, and in addition thereto the following will be sufficient to show the grounds of the defendant's exceptions:

The defendants moved to dismiss the attachment proceedings upon the ground set out in their affidavits. Judge *Councill,* who presided at the previous term of the Court, found the facts in regard thereto and refused the motion, and the defendants entered their exception. They further contend that the attachment should not be levied upon the money in the hands of the Clerk of the Superior Court, and his Honor refused to dismiss for that reason. The defendants objected to the introduction of the contract for that the same had not been properly probated. The record shows that the execution of the contract was proved as to Jacobosky Bros. and H. Jacobosky, guardian for Simon, Fannie and Sadie Weisel, upon the oath and examination of J. H. LeRoy, one of the parties thereto, and as to him the execution thereof was acknowledged; that as to S. H. Weisel the execution was acknowledged before a notary public in Norfolk, Va., whose certificate was afterwards submitted to the Clerk of the Superior Court of Pasquotank County and the instrument ordered to be recorded. There also appears in the record an affidavit, bearing date 21 March, 1903, made by J. H. LeRoy before the Clerk of the Superior Court to the effect that he knew the handwriting of Jacobosky Bros. and H. Jacobosky, having often seen them write; and further that the name of Jacobosky Bros. and H. Jacobosky is in the handwriting of H. Jacobosky and A. Jacobosky Bros., and that both were (458) present when H. Jacobosky signed the same, and both adopted the signature. His Honor admitted the contract and the defendants excepted.

CONNOR, J., after stating the facts. We concur with Judge *Councill* in his conclusions both of law and fact upon the motion to dismiss. There were no antagonistic relations on the part of counsel. We also concur in the conclusion that the money proceeds of the sale of the land in the hands of the Clerk was subject to attachment. The sale had been confirmed and the cash payment made to the commissioner, who had paid it to the Clerk. He held it subject to the immediate demand of the defendant. The question is expressly so decided in *Gaither v. Ballew,* 49 N. C., 488, 69 Am. Dec., 763, and the authorities reviewed overruling *Alston v. Clay,* 3 N. C., 220, and *Overton v. Hill,* 5 N. C., 47; *Williamson v. Nealy,* 119 N. C., 341. We see no valid objection to the probate of the contract. There being no witness to the instrument, and the parties except LeRoy being non-residents, it was proved as prescribed by section 1246 (9) of The

Code. All the parties being alive, we can seen no good reason why this proof may not be made by LeRoy, a party to the instrument. *Clark v. Hodge,* 116 N. C., 761. We do not find any merit in either of the exceptions in regard to the admission of the contract. His Honor correctly held that the measure of the plaintiff's damage was the difference between the contract price and the value of the land. *Nichols v. Freeman,* 33 N. C., 99; Sedgwick on Damages, sec. 1006; 2 Warville on Vendors, p. 959; Joyce on Damages, sec. 1758. The defendants having sold the land at public auction and received the proceeds are liable for the difference between the contract price and the amount received by them. That the contract is enforcible and, therefore, that an action for damages for breach thereof
(459) may be maintained, is well established. *Rodman v. Robinson,* 134 N. C., 503. There is no error in the judgment against Jacobosky Bros.

Affirmed.

APPEAL OF DEFENDANT S. H. WEISEL.

CONNOR, J. The defendant S. H. Weisel insists that he was not a party to the contract when it was executed, and signed it without consideration after the option had expired, and that he is not bound thereby. It will be noted that the option expired 23 April, 1903, and the contract was signed by Weisel 28 April. As to him it is without any consideration; he promised on 28 April to convey to the plaintiff the land on 23 April of the same year, which is an impossibility. We cannot see how it is possible for him to commit a breach of such an agreement. The contract made by Weisel was impossible of performance, and of course there could never be a breach of it. "Physical impossibility means here practical impossibility according to the state of knowledge and of the day, as for example, a promise to go from New York to London in one day, or to discover treasure by magic, or to go around the world in a week." 9 Cyc., 326. "If one promise to do what cannot be done, and the impossibility is not only certain but perfectly obvious to the promisee, as if the promise were to build a common dwelling-house in one day, such a contract must be void for its inherent absurdity." 2 Parsons Cont., 673 (9 Ed.). "An agreement may be impossible of performance at the time it is made, and this in various ways. It may be impossible in itself, that is, the agreement itself may involve a contradiction, as if it contained promises inconsistent with one another, or with the date of the agreement." Pollock on Contracts, 348. "Obvious and ab-
(460) solute physical impossibility, apparent upon the face of

the promise and thus known to the parties, renders the promise void. Thus a charter party executed on the 15th of March covenanting that the ship would proceed from where she then lay on or before 12 February, was held void." Beach on Mod. Con., sec. 222.

The execution of the contract was not a ratification of his guardian's agreement and could not be, for the reason that the time within which the guardian had promised to sell was past, and for the further reason that his agreement, being against public policy, was void.

The exception of the defendant Weisel must be sustained and a new trial ordered as to him.

New trial.

Cited: Hicks v. Kenan, 139 N. C., 345.

WOOL v. FLEETWOOD.

(Filed 15 November, 1904.)

1. PERPETUITIES—*Wills—Alienation—Estates.*

   A will providing for a life estate in realty and that it shall not be sold during the life of the life tenant is void as against public policy.

2. WILLS—*Estates—Remainders—Descent and Distribution.*

   Where a testator devises land to a person for life and at her death to be managed for five years by an administrator, and at the expiration of the five years to go to the remaindermen, the remaindermen take a vested estate immediately on the death of the life tenant.

3. WILLS—*Remainders—The Code, sec. 1325.*

   Where land is devised to a person for life and at her death to vest in the children of the testator during their natural lives and at their death to vest in their lawful heirs, such children take a fee on the death of the life tenant.

4. SPECIFIC PERFORMANCE—*Wills—Estates—Remainders.*

   In this action for specific performance under a will herein set out the life tenant and the two remaindermen may convey a fee-simple estate.

ACTION by Elizabeth A. Wood and others against J. J. Fleetwood, heard by Judge *George H. Brown,* at March (461) Term, 1904, of PERQUIMANS.

This is a controversy submitted without action in which the plaintiffs seek specific performance of a contract with the de-

fendant by which they undertook and agreed to sell and the defendant to buy one hundred and twenty-five acres of land known as the "Saunders tract." The land originally belonged to Jacob Wool, who devised it to the plaintiffs in the manner set forth in his will, the material items of which are as follows:

3. "I give, devise and bequeath my estate and property, real and personal, unto my wife Elizabeth Arnold Wool, the same to be held by her during her natural life and the income from said property shall go to her for her support."

4. "I do hereby constitute and appoint my said wife Elizabeth Arnold Wool my sole executrix of this my last will and testament, without bond, to settle my estate."

5. "I order and direct that none of my real estate be sold by my wife or by my heirs or disposed of in any way during her natural life."

6. "I order and direct that my estate remain in the name of Jacob Wool's estate five years after the death of my wife Elizabeth A. Wool, and at her death the surviving heirs shall select an administrator who shall qualify according to law and shall manage the estate and make a settlement with the heirs, once a year, of all money he has on hand to their credit; upon a failure to do so the heirs may select another administrator if they deem it necessary."

7. "I order and direct that at the expiration of five years after the death of my wife Elizabeth A. Wool, my son Leonard Jackson Wool and Elizabeth shall select three commis-
(462) sioners and make an equal division of my estate between themselves, Leonard Jackson and Elizabeth Wool, who shall own and occupy said property during their natural lives, and at the death of Leonard Jackson and Elizabeth Wool the property shall go to their lawful heirs, and should they have no surviving heirs the property shall go to my lawful heirs."

8. "I order and direct that the administrator shall receive as compensation for his services one and one-fourth per cent for disbursing whatever money may come in hand belonging to my estate."

The devisees all survived the testator, are plaintiffs in this controversy and are of full age, unmarried and without any children. The executrix, Elizabeth A. Wool, qualified as such and has fully settled the estate of her testator. Prior to the 15th day of June the defendant duly contracted with the plaintiffs to purchase of them the tract of land herein first described in fee simple at the sum of $1,200 and the plaintiffs contracted to convey to him a good and indefeasible title in fee to the same, and before the commencement of this action the plaintiffs, Eliza-

beth A. Wool, Leonard J. Wool and Elizabeth Wool, executed and duly tendered to the defendant J. J. Fleetwood a deed in fee simple with warranty, conveying to him in terms the tract of land aforesaid, and demanded of him the purchase-money which he had agreed to pay for the same. The defendant Fleetwood refused to accept the deed or to pay the purchase-money, upon the ground only that by the terms of the will of Jacob Wool the plaintiffs could not convey a good and indefeasible title to the land.

It was agreed between the parties that if, under and by virtue of the will, the plaintiffs had the legal right to convey the land to the defendant, and did by the deed tendered convey a good and indefeasible estate in fee to him, then judgment (463) should be entered requiring him to comply with his said contract by accepting the said deed and by paying over the money which he had contracted to pay. But if the Court should be of the opinion that the plaintiffs are unable to convey, by virtue of the will and deed, a good and indefeasible fee simple title to the land in controversy, then the defendant should go without day. Upon consideration of the facts agreed the Court held that the plaintiffs had the legal right to convey and make a good and indefeasible title to the land described in the contract, and thereupon adjudged that, upon the plaintiffs tendering to the defendant a deed in due form with a covenant of warranty for the land and with proper probate, they recover of the defendant the amount of the purchase price ($1,200) and the costs. The defendant excepted to this judgment and appealed.

Pruden & Pruden, for the plaintiffs.
Charles Whedbee, for the defendant.

WALKER, J., after stating the facts. We do not see why the plaintiffs are not able by the deed which they have tendered to convey a good and indefeasible title to the defendant. The latter contends, as we understand, that the deed will not pass to him such a title for three reasons: (1) because by the fifth item of the will the widow and the heirs are forbidden to sell or dispose of any of the real estate during the life of the former; (2) because by the terms of the sixth item no estate vested in the plaintiffs, Leonard and Elizabeth Wool, either by descent or purchase, until the expiration of five years after the devisor's death, and (3) because by the seventh item the said Leonard and Elizabeth did not acquire the fee, but only a life estate, and word "lawful" which qualifies the word "heirs" having the effect in law of preventing the latter word from operating as one of (464)

limitation and of restricting the meaning of the words "lawful heirs" to that of "children" who will take, not by descent from their parents but by purchase directly from the devisor, and, therefore, that the rule in Shelley's case and The Code, sec. 1325, converting fees tail into fees simple, do not apply.

It is true that the testator places a positive restraint upon the alienation of the real property in the fifth item of his will, and the plaintiffs by reason of that restriction cannot convey a good title to the defendant if that provision of the will is valid. We entertain no doubt upon the question thus presented, as it is well settled that such a restraint upon the donee's right to dispose of the property is void as being contrary to a wise principle of the law which is based upon a sound public policy. As a general rule it may be conceded that every person may do with his own as he pleases; but this rule is not of universal application, but is subject to some exceptions made necessary by the interest of the public that the titles to land should be as little fettered and the power of alienation as little subject to restraint as possible and consistent with a reasonable enjoyment of the right of property and all of its incidents—it being, generally speaking, against public policy to allow restraints to be put upon transfers which that public policy does not forbid. Gray Restraint on Alienation (2 Ed.), sec. 3. Hence it has ever been the inclination of the courts in their decisions to remove old restraints and not only to discountenance but to disallow new ones, and to put all obstacles out of the way of a fair and reasonable exercise of this power of alienation, which is one of the most important and valuable incidents of the right of property. While limited restraints of a certain kind have been recognized as valid when the fee is conveyed, it must be conceded at this time to be well settled that a restraint upon the right of alienation even for a limited period of time is, as to such an
(465) estate, invalid—it being inconsistent with the nature of the grant or of the estate which is created by the latter. Gray, *supra*, 41. The elementary law writers (2 Blk., 157) lay down the rule generally that a condition of non-alienation annexed to a conveyance *inter vivos*, or to a devise of a fee, is void, because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies. *Twitty v. Camp*, 62 N. C., 61. "The doctrine," says RUFFIN, C. J., speaking for the Court, "rests upon these considerations that a gift of the legal property in a thing includes the *jus disponendi* and that a restriction on that right, as a condition, is repugnant to the grant and therefore void." *Mebane v. Mebane*, 39 N. C., 131, 44 Am. Dec., 102.

The statute, *Quia Emptores,* 18 Edw. I., chap. 1 (1290), abolished subinfeudation and by virtue of its provisions all persons, except the King's tenants *in capite,* were left at liberty to alien all or any part of their lands at their own pleasure and discretion (2 Blk., 289), and finally restrictions in cases of freehold tenure were entirely removed by 12 Car. II., chap. 34, and ever since those statutes were passed the right of free and unlimited alienation has been regarded as an inseparable incident to an estate in fee. 1 Wash. R. P. (5 Ed.), p. 83; *Hardy v. Galloway,* 111 N. C., 519, 32 Am. St., 828. It cannot be questioned that a condition of non-alienation annexed to the grant of an estate in fee is void, though confined in its operation to a limited period of time. Gray, sec. 54. "The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules, which have been prescribed by the supreme power as essential to the useful existence of property." *Dick v. Pitchford,* 21 N. C., 484; *Pritchard v. Bailey,* 113 N. C., 521; *Lattimer v. Waddell,* 119 N. C., 370; *School v. Kesler,* 67 N. C., at p. 447; Coke, sec. 362.

We think it is equally well settled, at least in this State, that such a condition annexed to the grant or devise of (466) an estate for life is also void, both as to legal and equitable estates. In *Dick v. Pitchford, supra,* GASTON, J., for the Court, says: "The deed does not provide that in the event of the life tenant attempting to sell or dispose of the (rents and profits) or otherwise to anticipate the receipt thereof, that they shall then go over and be paid to some other person; it secures to him, at all events, the enjoyment of the property for life, and prohibits him from transferring it or anticipating its profits. Now the general right of the giver of property to prescribe the modifications of his gift is subject to the condition that these modifications be not contrary to law nor repugnant to the nature of the conveyance, nor incompatible with the legal incidents belonging to the disposition he has made. The power of alienation is a legal incident to ownership. It is familiar doctrine that if a feoffment, grant, release, confirmation or devise be made upon condition not to alien the estate, or if a term for years or chattel personal be granted upon condition not to assign, such conditions are altogether nugatory. The doctrine obtains not less in courts of equity, acting upon those interests which are the proper subject-matter of their jurisdiction, than in courts of law adjudicating upon legal interest. A departure from it would introduce endless confusion and innumerable mischiefs." Gray, sec. 134; 24 A. & E. Ency., 870.

A distinction is sometimes to be found in the cases between

a condition against alienation or anticipation, coupled with a provision that the life tenant and his assigns shall lose the estate if the condition is broken and that it shall go over (which makes it a limitation), and one by which he is compelled to keep the property so that neither his grantees nor any third person can get hold of or enjoy it, the latter condition being declared (467) as void and the former as valid. We need not pass upon this distinction as there is no limitation over in this case.

The next objection to the title is equally untenable. It will be observed on reading the sixth item of the will that, while the testator provides that his surviving heirs shall appoint an administrator, he does not devise any estate to the appointee, but directs that the "estate" shall remain "in the name of Jacob Wool's estate." There can be no doubt that there is nothing in this item to interrupt the immediate descent of the land to the heirs and they consequently became seized by descent of an estate in remainder, which was vested in interest though not in possession—a vested remainder after the life estate of their mother. *Ferebee v. Proctor,* 19 N. C., 439; *Beam v. Jennings,* 89 N. C., 451; *Munds v. Cassidey,* 98 N. C., 558; *Gay v. Grant,* 101 N. C., 206. As the case shows that the executrix had fully administered and there was no necessity for the appointment of an administrator with the will annexed, and as an administrator has nothing to do with the land except for the purpose of selling it and paying debts under a power given by the will or by the statute, we do not see how this provision can be executed, and if we construe the item to mean that they shall select an administrator, or a trustee who is called an administrator, and that he shall take either a freehold or a chattel interest (*Trod v. Downs,* 2 Atkyn, 304; *Goodlittle v. Whitby,* 1 Burr, 288) for the purpose of performing the trust (Saunders on Uses and Trusts, 2 Am. Ed., pp. 253-257), which trust is special and therefore not executed by the statute of uses (Saunders, pp. 2-4), we yet do not see why, if the defendants accept the deed of the plaintiff, the latter will not be estopped by their deed or rebutted by their warranty to ever hereafter assert any right or title under that item of the will, or to avail themselves thereof in any way, and this will equally follow as a result if the (468) provision is regarded as one for the appointment of an administrator, and as such is valid. Especially will this be the case if the deed contains covenants of seizin, for quiet enjoyment and against incumbrances (*Hallyburton v. Slagle,* 132 N. C., 947; *Taylor v. Shuford,* 11 N. C., 116, 15 Am. Dec., 512; Bigelow on Estoppel (5 Ed.), pp. 440-446), and if in the premises and *habendum* the land, as well as its rents, issues and

profits, is conveyed. A copy of the deed should have been inserted in the transcript as we are asked to decide whether it will convey a good and indefeasible title, and we should see it before finally determining what its effect will be; but as there is no copy we must assume from what is said in the case that it is in proper form to transfer the land and everything connected therewith in which the plaintiffs have any interest under the will—the question submitted to us involving merely the ability of the plaintiffs to pass a good title by their deed to what they acquired by the will.

The third objection to the title of the plaintiffs cannot be sustained. By the sixth item of the will a life estate was given to the widow, and the remainder in fee descended to the heirs, Leonard and Elizabeth, who by the terms of the seventh item are to make partition of the land at the expiration of five years from the death of the life tenant. The provision in the seventh item that Leonard and Elizabeth shall own and occupy the property during their natural lives and at their death it shall go to their lawful heirs, and should they have no lawful surviving heirs it shall go to the testator's lawful heirs, does not change the quantity of their interests or convert their fee into an estate for their lives with remainder to their children. There can be no such thing as an unlawful heir. The term "lawful heirs" means the heirs designated by the law to take from their ancestor, and it cannot be construed as meaning the children of the first taker. It follows that by that item of the will an estate of freehold is given to the ancestors, Leon- (469) ard and Elizabeth, and afterwards by the same instrument there is a limitation by way of remainder to their heirs generally, as a class, to take in succession as heirs to them. The case therefore falls directly within the rule in Shelley's case, the word "heirs" being one of limitation, and the estate is vested absolutely in the ancestors. *Ham v. Ham,* 21 N. C., 598; *Donnell v. Mateer,* 40 N. C., 7; *Worrell v. Vinson,* 50 N. C., 91; *Sanderlin v. Deford,* 47 N. C., 74.

This rule is of very ancient origin and has always been considered as a rule of law or of property, and not merely as a rule of construction adopted for the purpose of ascertaining the actual intention of the testator. When the words employed bring the case within the rule, the intention of the testator is not to be considered, even though he should declare that the ancestor shall have only a life estate. The rule is imperative and must be enforced inflexibly in all cases to which by the term of the particular instrument it is applicable. 25 A. & E. Ency., 640. If there is anything in the instrument to indicate clearly

an intention not to use the words in their technical sense, but as *descriptio personarum,* as, for instance, that by the words "heirs of the body" the testator meant children, such an interpretation will be given to his language as will effectuate his intention. "As the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance the phrase 'heirs' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have of which it is the representative; there is not in fact a
(470) limitation to 'heirs' and of course there is no room for the application of the rule." *Allen v. Pass,* 20 N. C., 77.

This Court has said that the rule in Shelley's case applies only when the same persons will take the same estate whether they take by descent or purchase, in which case they are made to take by descent, as it is more favorable to the donee, to the feudal incidents of seignories, to the rights of creditors, and for other reasons, that the first taker should have an estate of inheritance, but when the persons taking by purchase would be different or have other estates than they would take by descent from the first taker the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, will take as purchasers. *Ward v. Jones,* 40 N. C., 400; *Mills v. Thorne,* 95 N. C., 362; *Howell v. Knight,* 100 N. C., 254. In *Allen v. Pass,* 20 N. C., at p. 81, the same idea is thus expressed: "Before the application of the rule in Shelley's case it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the heirs or to the heirs of the body of one to whom the precedent freehold is given—such limitation does exist when the gift is to them in the quality of heirs—embracing the same number in succession of objects and conferring the same extent of interest as would be embraced and conferred where the inheritance has been limited to the ancestor."

The word "lawful" is not sufficient *per se* to show an intention not to use the word "heirs" in its ordinary legal sense as a word of inheritance or of limitation, and we must therefore hold that Leonard and Elizabeth, under the seventh, if not under the sixth, item of the will, took an estate in fee. *Cooper, ex parte,* 136 N. C., 130, and *Britt v. Lumber Co.,* 136 N. C., 171.

The defendant's counsel in his brief contends that the
(471) rule in Shelley's case does not apply, and relies upon

Rollins v. Keel, 115 N. C., 68; *Knight v. Howell,* 100 N. C., 254; *Mills v. Thorne,* 95 N. C., 362, and *Bird v. Gillam,* 121 N. C., 326, but in each of those cases the language of the will was different from that used in this will, and there were special circumstances which prevented the application of the rule. The case of *Patrick v. Morehead,* 85 N. C., 62, 39 Am. Rep., 684, which is cited with approval by the Court in *Rollins v. Keel,* is a direct authority for the construction we have placed upon this item of the will with respect to the operation of the rule in Shelley's case. The subject is discussed by ASHE, J., at p. 67.

It is not suggested in the briefs of counsel that the limitation over to the "lawful heirs" of the testator upon the death of Leonard and Elizabeth without leaving heirs renders their estate a fee contingent or defeasible. We have, however, considered the question and have reached the conclusion that it does not. The heirs of Leonard and Elizabeth will not necessarily be the heirs of the testator, as they may have heirs on the maternal side; but the converse is not true, as the heirs of the testator must of necessity be the heirs of his children. It therefore follows that if at the death of Leonard and Elizabeth there be any persons living who are the heirs of the testator they will also be their heirs, and this will of course destroy the ulterior limitation, for it is not to take effect by the terms of the devise if Leonard and Elizabeth die leaving heirs.

If the parties were reversed and we were called upon to decide whether the defendants in this case are entitled to specific performance, the relief would be denied, as the granting it is a matter of sound judicial discretion, controlled, it is true, by established principles of equity, but exercised only upon a consideration of all the circumstances of each particular case (Pomeroy Contro., Spe. Perf., sec. 35), and, as a con- (472) veyance by the present plaintiffs, Leonard and Elizabeth, would tend to defeat the intention of the testator as manifested in item six of the will, this consideration alone would be sufficient to induce the Court to withhold its aid. And a like result would follow if the plaintiffs in this case were seeking to compel the defendants against their will to comply with the contract, for the same consideration would arise. The question, though, is not presented in either of these ways. The defendant is willing to take the title upon our declaration that it will at least be good in them by reason of the estoppel or rebutter arising out of the plaintiffs' deed or warranty, and we so decide. This affirms the judgment below.

Affirmed.

Cited: Pitchford v. Limer, 139 N. C., 15; *Buchanan v. Harrington,* 141 N. C., 41; *Perry v. Hackney,* 142 N. C., 375; *Harrell v. Hagan,* 147 N. C., 115; *Price v. Griffin,* 150 N. C., 524; *Foster v. Lee, Ib.,* 688.

BOTTOMS v. RAILROAD.

(Filed 13 September, 1904.)

RAILROADS—*Negligence.*

An instruction that a railroad company must equip its engines with the best approved devices and appliances and that the failure to do so is evidence of negligence, is erroneous.

ACTION by J. D. Bottoms against the Seaboard Air Line Railroad Company, heard by Judge *C. M. Cooke* and a jury, at November Term, 1903, of NORTHAMPTON. From a judgment for the plaintiff the defendant appealed.

Peebles & Harris and *Gay & Midyette,* for the plaintiff.
T. W. Mason, Day & Bell and *Murray Allen,* for the defendant.

CLARK, C. J. In this action for damages for destruc-
(473) tion of the plaintiff's store alleged to have been set on fire by sparks from the defendant's engine, the Court charged the jury that it was "the duty of railroad companies to equip their engines with the best approved devices and appliance for arresting sparks," * * * and that failure to do so was negligence, making the defendant liable for damages if the jury should find that the plaintiff's house was set on fire by sparks from the defendant's engine. The defendant excepted.

There is error. In *Witsell v. R. R.,* 120 N. C., 557, this Court said that it was not negligence to fail to adopt improved appliances merely because they are "known" and "approved"; that railroads were not to be held to so strict a rule that they must keep a lookout for improvements and inventions and buy all such as were approved, and held the correct rule to be thus: "It is negligence not to adopt and use all approved appliances *which are in general use.*" It added that to require the purchase of approved appliances before they had come into general use would be simply to hold that every railroad must have "the latest and best," which would be an unreasonable burden. This

ruling has been uniformly followed since. In *Greenlee v. R. R.*, 122 N. C., 979, 41 L. R. A., 399, 65 Am. St., 734, and *Troxler v. R. R.*, 124 N. C., 191, 44 L. R. A., 313, 70 Am. St., 580, the Court cites with approval from *Witsell v. R. R., supra,* that it was "not negligence to fail to provide the latest improved appliances" and that "a railroad company is liable for any injury caused by failure to use approved appliances *in general use.*" The same language is again quoted and approved in *Lloyd v. Hanes,* 126 N. C., 364; *Dorsett v. Mfg. Co.,* 131 N. C., 262, and other cases, and repeated as recently as *Marks v. Cotton Mills,* 135 N. C., 290. The rule laid down in *Aycock v. R. R.,* 89 N. C., 326, is *"usual and proper appliances"* to prevent injury by escaping sparks. This is about the same (474) ruling as in *Witsell v. R. R.*, in somewhat different language.

The learned counsel for the plaintiff contends that the defendant's witness testified that the engine had the best approved spark-arrester and no witness testified to the contrary, hence as the charge must be read in connection with the evidence, the error being as to a matter not in controversy, was harmless, and that the real point in this part of the charge was as to the continued keeping of the spark-arrester in good condition—as to which the Court charged correctly—and not as to the nature of the spark-arrester, which was not denied to be the "best approved." But Mr. Allen of counsel for the defendant pointed out that while no witness directly testified to the contrary, it was not admitted that it was a proper spark-arrester, the plaintiff's evidence of a shower of large sparks coming from the engine, if believed, tended to question the defendant's evidence of the spark-arrester being the "best approved" pattern, fully as much as it tended to controvert the evidence of its being kept in order.

Error.

Cited: Stewart v. R. R., 137 N. C., 695; *Stewart v. Carpet Co.,* 138 N. C., 63; *Horne v. Power Co.,* 141 N. C., 56; *Stewart v. R. R., Ib.,* 275.

(475)

OWEN v. MERONEY.

(Filed 15 November, 1904.)

PARTNERSHIP—*Actions—Damages—Accounts.*

An action may be brought by one partner against another partner for failure to comply with the articles of agreement.

ACTION by C. M. Owen against P. P. Meroney, heard by Judge *M. H. Justice,* at May Term, 1904, of ROWAN.

This was a civil action commenced by plaintiff against defendant to recover damages for defendant's failure to carry out and comply with his part of a contract as a condition precedent to the formation of a partnership. The complaint alleges that in 1900 plaintiff was engaged in running and operating a mill in Davidson County, and defendant owned a mill-site in Rowan County known as the St. John Mill property, and defendant realizing that plaintiff was an expert mill-man went to him and made him a proposition that if he would dispose of his mill property in Davidson County and go in with him and operate a mill in Rowan County that he (defendant) as a condition precedent, and an inducement for him to become his partner, would put in a dam and wire ferry across the river, repair the road leading to the mill and furnish all the necessary money, except $1,500, to equip said mill with up-to-date machinery and run it to its capacity, and buy and carry a complete stock of flour, meal, grain, etc. But that after defendant had gotten all of plaintiff's money he refused to comply with or carry out his part of said agreement. That after defendant had failed and refused to comply with his part of said agreement, the milling business they had anticipated doing and operating became a failure and plaintiff's $1,500 he invested therein became a loss, whereas if defendant had complied with his part of said

(476) agreement, as a condition precedent to the formation of the partnership, said milling business would have been a success and plaintiff would not have been damaged. Plaintiff appealed from the judgment rendered.

R. Lee Wright, Walser & Walser and *G. W. Garland,* for the plaintiff.

Overman & Gregory, T. F. Kluttz and *L. H. Clement,* for the defendant.

CLARK, C. J., after stating the facts. The record states that "the defendant moves to dismiss the action because he says that

this is an action at law by one partner against his copartner, as appears upon the face of the pleadings. The Court being of opinion that the action cannot be maintained in this form dismissed the action." The plaintiff appealed. It has been more than a generation since we abolished by constitutional provision (Article IV, sec. 1) "the distinctions between actions at law and suits in equity, and the forms of all such actions and suits," and it is a recurrence to a procedure familiar only to the lawyers of a former generation to hold that an action "cannot be maintained *in this form.*" There are but two grounds now known to dismiss at this stage, *i. e.*, either that the Court has no jurisdiction or that the complaint does not state a cause of action. We give the defendant the benefit of translating the ground of his motion into the latter objection, which is one "of substance and not of form," that an action cannot be maintained by one partner against another for a partial accounting, but he must either sue for a complete settlement and winding up of the partnership matters, or to recover a balance struck and agreed upon between them.

Thus understood, this is a correct statement of the general rule. 2 Lawson Rights and Remedies, sec. 681, cited by defendant; but it has no application to this case, which (477) comes within the exceptions stated in that section. This is not an action for a partial adjustment and statement of partnership dealings, but it is an action to recover damages because the defendant refused and failed to comply with his preliminary agreement and the terms upon which the partnership was to be formed; and if said partnership was formed, then for damages because the defendant failed to do and perform what he agreed to do before it was formed. An action "may be maintained by one partner against another partner in the same firm, upon the expressed promise made before the commencement of the partnership in respect to advances to be made to constitute the capital of the company for the purpose of carrying on the the partship." *Currier v. Webster,* 45 N. H., 226; *Hill v. Palmer,* 56 Wis., 123, 43 Am. Rep., 703; *Smith v. Kemp,* 92 Mich., 357; *Bull v. Coe,* 77 Cal., 54, 11 Am. St., 235; *Ellison v. Chapman,* 7 Blackf. (Ind.), 224; George on Partnership, pp. 320, 321. "A suit by a partner against his copartner upon a claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of agreement of copartnership, need not be delayed for the taking of an account of the partnership." George on Partnership, p. 322; and numerous cases cited in note 68.

The general rule that one partner cannot sue another except

to wind up the business or to recover a balance due by the settlement, with some of the exceptions to that rule, is stated in *Newby v. Harrell,* 99 N. C., 149, 6 Am. St., 503. This case presents another exception.

A cause of action for the recovery of damages is stated in the complaint. "When one violates his contract he is liable for such damages as are caused by its breach, or such as being incidental to the act of omission or commission, as a natural consequence thereof, as may reasonably be presumed to have
(478) been in the contemplation of the parties when the contract was made." *Spencer v. Hamilton,* 113 N. C., 50, 37 Am. St., 611. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Herring v. Armwood,* 130 N. C., 180, 57 L. R. A., 958; *Lumber Co. v. Iron Works,* 130 N. C., 587; *Mace v. Ramsey,* 74 N. C., 11. The application of these principles to the facts of this case, as they may prove to be, is a matter for consideration upon the trial.

The judgment dismissing the action is

Reversed.

---

(479)

LUMBER CO. v. RAILROAD—"RAILROAD DISCRIMINATION CASE."

(Filed 15 November, 1904.)

CARRIERS—*Freight—Laws 1899, ch. 164.*

A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured product by the same line less for the same service than it charges a shipper who makes no such agreement.

ACTION by the Hilton Lumber Company against the Atlantic Coast Line Railroad Company, heard by Judge *George H. Brown* and a jury, at Spring Term, 1904, of NEW HANOVER. From a judgment for the defendant the plaintiff appealed.

Rountree & Carr, for the plaintiff.
Junius Davis, for the defendant.

CLARK, C. J. The gist of this action is for discrimination by the defendant in charging the plaintiff a higher rate on logs to the plaintiff's mill in Wilmington than was charged others for like service, and to recover the overcharges which had been paid under protest. The point presented is not that the rate, $2.50 per thousand feet in carload lots charged the plaintiff, is *per se* unreasonable, but that the rate charged others for the same service for the same distance was $2.10, and this a serious discrimination which if continued will result in the crippling or destruction of the plaintiff's mill and the building up of other mills which are in competition with the plaintiff, for it has in five months amounted to $3,900, for the recovery of which this action is brought.

The Court charged the jury: "If you find that the rate of $2.10 per thousand feet was charged and collected by the defendant upon logs shipped over any part of its railroad to a mill or mills at which logs were manufactured into (480) lumber itself reshipped over the railroad of the defendant, or any part of it, and that the reduced rate of $2.10 per thousand feet was given to such mill in consideration of such fact that they would ship the lumber manufactured out of the said logs over the line of the defendant's road, which said agreement was open to all mills that wished to accept it, then it would not be an unjust or illegal discrimination to charge $2.50 per thousand feet, which it is not contested is a reasonable rate to mills which did not ship their manufactured lumber over the line of the defendant road."

The proposition herein stated is that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity, the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff. It is charged $2.50 while others are charged $2.10 for the same service. It is true if the plaintiff should choose to agree to ship its manufactured lumber out of Wilmington over the defendant's line it could get the same reduction of rate on its logs into Wilmington. On those conditions it could save itself from being discriminated against. But suppose the plaintiff should wish to sell its lumber in Wilmington, or can ship it at a lower rate by sea, or even by a competing railroad line out of Wilmington, has it not the right to do so? Should it see fit to exercise that right, has the com-

mon carrier the power to place a penalty of a 19 per cent higher rate on the plaintiff and to charge it $2.50 for bringing its logs to Wilmington when it charges others $2.10 for exactly
(481) the same service?

The principle involved is a vital one to the public at large, for upon this alleged right to discriminate by common carrier (exercised either openly or secretly by rebates), nearly all trusts, and especially the Standard Oil Company, have been built up to their present disquieting and menacing predominance, as has been fully shown by the investigation and report of the Industrial Commission and the Interstate Commerce Commission, both appointed by acts of Congress.

Under the same idea that the test was the fact that the railroad company would not lose by the favor (extended in the present case by charging certain shippers $2.10 while charging the plaintiff $2.50), another railroad company charged the Standard Oil Company 10 cents per barrel while charging its competitors 35 cents per barrel, and paying 25 cents of the 35 cents thus collected to the Standard Oil Company. *Handy v. R. R.*, 31 Fed., 689. The railroad company in that instance must have found *its* offset, its profit, somewhere or it would not have made that arrangement. But what became of the competitors of the Standard Oil Company?

Here, the railroad company will doubtless make up out of its forced monopoly of shipping out of Wilmington the lumber to be manufactured out of all the logs hauled in by it, the 40 cents which is deducted in favor of those who will give it that monopoly. But why should it discriminate by charging the plaintiff $2.50 instead of $2.10, *i. e.*, charge 19 per cent higher rates upon logs which when turned into lumber are sold in Wilmington, or shipped by sea, or shipped by a competing route? It cost no more to bring in the plaintiff's logs than the logs for whose hauling only $2.10 was charged. The shipment of logs to Wilmington is one transaction; the shipment of lumber out is another. The defendant cannot charge the plaintiff higher on the logs because it will not agree to ship its
(482) lumber by the defendant's line. It is no answer to say that if the plaintiff will come into the defendant's terms it will get the same discount. The defendant might as well say if you will carry your logs to a sawmill in which the railroad company is a large owner you will get 19 per cent reduction in freight on your logs, and there is no discrimination, for the same offer is open to you as to others.

If the plaintiff, like others, was shipping logs to Wilmington with the voluntary intention of shipping by the defendant's

road, say to New York, then certainly there would be no discrimination. But the plaintiff does not wish to ship to New York over the defendant's line, and the defendant proposes "to put the screws to the plaintiff" and make it do so whether it wishes to do so or not, and if the plaintiff does not do so, the defendant says the plaintiff cannot be treated as well as others as to the rates for hauling its logs, but must pay nearly one-fifth (19 per cent) higher rates on its logs. That is the very point at issue. Hauling its logs to Wilmington is the only service the plaintiff seeks at the defendant's hands. Why should it pay higher for that service than those who agree to carry their logs to the defendant's mill or to ship out their lumber by the defendant's road?

Discrimination is a more dangerous power than high rates—if the latter is charged impartially to all. Hence the statutes of Congress and of the State, while leaving the fixing of rates in the hands of commissions, have directly and strictly forbidden, under penalties, any discrimination. Common carriers are fixed with a public use. They exercise a branch of the public franchise. They can condemn rights of way solely because the land "is taken for a public use." They are subject to governmental supervision and to the reduction or regulation of their charges by the Legislature directly or by commissioners appointed by its authority. *Munn v. Illinois,* 94 U. S., 113, and citations to same; 9 Rose's Notes, 21-55. In (483) all the great countries of the world, except England and this country, the railroads are largely or altogether owned and operated directly by the government, as was formerly the case in North Carolina. In all countries alike it is recognized that it is of vital importance that corporations exercising such public use must be absolutely impartial and equal in their charges for the same service.

All the service the plaintiff asks of the defendant is to haul its logs to its sawmill in Wilmington. For this it charges the plaintiff $2.50; it charges others $2.10, *i. e.,* 19 per cent higher to the plaintiff than to others for exactly the same service. It costs the defendant no more to render that service to the plaintiff than to render the same service to others. It must charge all alike.

Could the defendant discriminate on shipment of logs to Wilmington—for a consideration of a subsequent benefit to itself by obtaining a monopoly of shipment of lumber out of Wilmington—it could seriously damage the business and prosperity of that city. At that point are steamships and sailing lines and other railroads, and this competition making the

town a distributing center is the source of its prosperity. If the terms upon which the defendant will haul logs into Wilmington are that it must haul the lumber out, then Wilmington ceases as to that business to be a competing point. The same discrimination could be made (if this were allowable) in freight on cotton or corn or rosin and other articles carried to Wilmington to be manufactured or put into other forms for use. Discriminating rates as in this case could be charged on the raw product which would permit of the manufactured article, cloths, yarn, meal, whiskey, turpentine and the like being shipper out only over the defendant's line. This is to place the prosperity of Wilmington, and also of the producers of raw material contiguous to that city along the lines of any of
(484) the defendant's roads or branches, in the control of the defendant.

The point here presented has been often decided and always, certainly at least in recent years, against the power claimed by the defendant. In *Baxendale v. R. R.*, 94 E. C. L., 308, after an elaborate argument, it was held by a very strong Court as to this very point: "It is not a legitimate ground for giving a preference to one of the customers of a railroad company that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business."

In *Monacho v. Ward*, 27 Fed., 529, where the Court was enlightened by the argument of Frederick Coudert and James C. Carter on opposing sides, it was held that "a common carrier can not charge a higher rate against shippers who refuse to patronize it exclusively." President Hadley, in his "Railroad Transportation," 108, a valuable work, by no means unfavorable to railroads, says: "A difference in rates, not based upon any corresponding difference in cost, constitutes a case of discrimination." In *R. R. v. Goodridge*, 149 U. S., 680, it is said: "It is no proper business of a railroad company as a common carrier to foster particular enterprises or to build up new industries; but deriving its franchises from the Legislature and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality." This would not be the case if a patron shipping logs to Wilmington must pay higher for that service than one who subse-
(485) quently ships lumber. 352

Among the numerous cases condemning discrimination, and holding that freight paid in excess of that charged others for the same service can be recovered back, are *Hays v. Penn. Co.*, 12 Fed., 309, and cases cited in note thereto; *Handy v. R. R.*, 31 Fed., 689, a spicy opinion by a justly indignant Judge. It was held that charging from New Orleans to San Francisco a lower rate on goods shipped to New Orleans from London than upon the same goods shipped from New York to New Orleans was an unjust discrimination, and illegal. *Commission v. R. R.*, 52 Fed., 187. It is not the question of profit to the carrier, so the Court holds, in attracting shipments which would not otherwise come to it, but the injustice of charging differing rates for the same service, and the Court quotes with approval the English decisions, *Harris v. R. R.*, 3 C. B. (N. S.), 693; *Evershed v. R. R.*, 2 Q. B. Div., 254, that "preferences given to shippers to induce them not to divert traffic from the carrier or to induce them to transfer traffic which otherwise would go to another carrier, are unlawful and cannot be justified upon the gound of profit to the carrier allowing them." To similar purport, *Wright v. U. S.*, 167 U. S., 512; *Packet Co. v. R. R.*, 60 Fed., 545; *R. R. v. Wilson*, 132 Ind., 517, 18 L. R. A., 105, and many others. Even when the discrimination is based on a larger quantity being shipped it is illegal, when the smaller quantity, as in carload lots, costs no more to handle in proportion to the quantity. *Kinsley v. R. R.*, 37 Fed. 181, approving *Hays v. Penn. Co., supra.*

The vice in the discrimination here shown is two-fold: (1) It necessarily tends, if allowable, to build up defendant's railroad and break down competing carriers, which is forbidden by public policy. Joint Traffic Case, 171 U. S., at p. 505. (2) The condition upon which the right to the lower rate was given was secret, not written on the face of the schedule (486) which, as reported to the railroad commission and printed for public information, was $2.50. A secret rebate is prohibited by statute and by all the decisions of the courts, yet this rebate of 40 cents not allowed the plaintiff has amounted to $3,900 in five months time.

The testimony of railroad officials in the report to Congress of the Industrial Commission, Vol. IV, p. 273, and IX, p. 131, shows that the methods of discrimination resorted to are many, and that manufacturers especially can be made or destroyed at the will of railroad managers unless there is the most absolute and exact equality to all in the same charge for the same service. Vol. IX, pp. 287, 289, Report of Industrial Commission. *Commission v. R. R.*, 128 Fed., 59, is one instance of an ingenious

discrimination. The present case is another. Discrimination is Protean in the divers forms it assumes. The argument in all countries in favor of governmental ownership of railroads is based upon the deadly effect of discrimination in rates under private ownership, and the difficulty in preventing it, rather than upon higher rates. The condition upon which private ownership of railroads can or will be maintained in England and this country (which alone retain it) is the strict and effective enforcement of equality in charges to all for the same service, under the same condition and at the same cost—as is required by the statutes both State and Federal.

The defendant can not justify under what is known as "Milling in Transit." Those are cases where freight is shipped a long distance and the carrier will, at his own cost, defray the expense of its change in form *en route* because of the easier handling in the more compact shape, as, for example, *Cowan v. Bond,* 39 Fed., 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had (487) it compressed *en route* at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way, the same privilege being open to all shippers. That has no analogy to this case, where the plaintiff is shipping logs to its mill in Wilmington and is charged nearly one-fifth more freight than others, unless it will agree to ship its lumber out of Wilmington over the defendant's road. Among other cases in point are Lumber Case, 9 I. C. C., 569, at pp. 572, 579, 580; the "Tap Lines" Cases, 10 I. C. C., 193; *Packet Co. v. R. R., supra.*

There are other errors assigned in the admission of evidence, in the charge, and in matters of practice, but in view of the error in this matter of vital interest to the public at large and especially to the business interests of the State, it will be unnecessary to consider them. The plaintiff had a right to have its logs carried to its mill at the same rate as others, without binding itself to ship its lumber by the defendant's line, or indeed to ship it at all.

But independent of any decisions, our statute (which nearly copies the English "Traffic Act" and the United States "Interstate Commerce Act" in this and many other respects) is too explicit to be misconstrued. The "Corporation Commission Act," Laws 1899, chap. 164, provides (sec. 13) that if any common carrier shall charge or collect "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

collects, 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, which is hereby prohibited and declared to be unlawful." (488)

Error.

MONTGOMERY, J. I concur in the result.

CONNOR, J., concurring. I concur in the conclusion reached by the Court in this case. I do not think that the defendant can make the attempted discrimination between its customers. I am further of opinion that upon the whole evidence it does not sufficiently appear that the plaintiff knew of the rebate allowed, or that it was given that publicity which the law requires to make it uniform and open to all persons engaged in shipping. There are views either expressed or intimated in the opinion in respect to questions which I do not feel called upon to express any opinion. They appropriately belong to another sphere of discussion. I simply concur in the decision of the question presented by the plaintiff's exceptions, and think there should be a new trial.

WALKER, J. I concur in this concurring opinion.

Cited: Lumber Co. v. R. R., 141 N. C., 176, 177.

---

(489)

GREEN v. TELEGRAPH CO.

(Filed 15 November, 1904.)

TELEGRAPHS—*Mental Anguish—Damages—Messages.*

In an action against a telegraph company to recover damages for failure to deliver a message, compensatory damages may be awarded though the message does not relate to sickness or death, mental anguish being shown.

ACTION by Willie H. Green against the Western Union Telegraph Company, heard by Judge *Frederick Moore*, at January Term, 1904, of HALIFAX.

The material facts are thus briefly stated by the defendant: This is the plaintiff's appeal from a judgment sustaining the

defendant's demurrer. The complaint states that the plaintiff was a girl of sixteen, living in Weldon, the daughter of Isaac E. Green; that the defendant telegraph company maintained offices at Weldon and Columbia, and on 23 September, 1903, she left Weldon to go to Spartanburg, S. C., via Columbia, and that it was necessary for her to remain over in Columbia during the night. That the agent of the defendant company at Weldon was acquainted with the young lady and her father, and the father informed the agent that he greatly desired some one to meet his daughter in Columbia. That immediately ofter the train on which the young lady was traveling left Weldon, her father, Dr. Green, delivered the following message to the defendant's agent in Weldon, directed to "Mrs. Jno. B. Lee, 2010 Main Street, Columbia, S. C."

"Willie leaves here on Coast Line train 39 today. Meet her.
"I. E. GREEN."

This message was taken as addressed to "Mrs. Knoblee,
(490) 2010 Main Street," and was not delivered until the next morning, when Mrs. John B. Lee inquired for it at the telegraph office at Columbia.

The plaintiff, Miss Willie Green, arrived in Columbia about 12 o'clock the same night, and found no one to meet her. She was naturally disturbed and anxious; the conductor put her in charge of the colored matron at the station in Columbia, the matron secured a hack, and after some delay she was driven to the house of her friend, Mrs. Lee; that by reason of this negligence upon the part of the defendant the plaintiff suffered mental anguish.

Upon this the defendant demurred to the complaint, for that it did not state facts sufficient to constitute the cause of action, which, under the circumstances set forth, entitled the plaintiff to recover damages for so-called mental anguish, and that the disappointment and annoyance which the plaintiff calls mental anguish, arising under the circumstances set out in the complaint, is not a legal ground for damages for mental anguish. His Honor sustained the demurrer, and the plaintiff appealed.

Day & Bell, Murray Allen and *W. E. Daniel,* for the plaintiff.

F. H. Busbee & Son and *R. C. Strong,* for the defendant.

DOUGLAS, J., after stating the facts. The defendant in its brief thus states the question intended to be presented: "This case baldly presents the question, which it has been apparent

would soon arise, whether the barriers are to be thrown down and every disappointment, annoyance or vexation which may arise from a delay or a misdirected telegram can be the subject of an action for mental anguish. In other words, whether any annoyance, disappointment, vexation or anxiety on account of a missing friend at the station, or from other cause, can be dignified by the name of mental anguish, and ad- (491) judged to rank in the same class with the poignant grief arising from a failure to reach the bedside of a dying wife in time to receive her last adieus."

We are fully aware of the importance of the question thus presented, and have given it the careful consideration which it deserves. We do not desire to impose any additional burdens upon telegraph companies or require any unnecessary restrictions; but we can not ignore the essential purposes of their creation. A telegraph company is a quasi public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession and freedom from individual liability; and possesses also in addition thereto, the extraordinary privileges which under our Constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English Judge: "A breach of this duty is a breach of the (492) law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." This has been expressly held by this Court in *Cashion v. Telegraph Co.*, 124 N. C., 459; *Laudie v. Telegraph Co.*, 124 N. C., 528; and *Cogdell v. Telegraph Co.*, 135 N. C.,

431. The demurrer admits all the facts alleged in the complaint construed in the light most favorable to the plaintiff. It is therefore admitted that the message was received by the defendant and not delivered until the following day when called for by the sendee. This of itself raises the presumption of negligence. *Sherrill v. Telegraph Co.,* 116 N. C., 655; *Hendricks v. Telegraph Co.,* 126 N. C., 304; *Laudie v. Telegraph Co.,* 126 N. C., 431; *Rosser v. Telegraph Co.,* 130 N. C., 251; *Hunter v. Telegraph Co.,* 130 N. C., 602; *Cogdell v. Telegraph Co.,* 135 N. C., 431. Aside from this presumption we think the facts alleged clearly tend to prove negligence on the part of the defendant. The telegram was addressed to Mrs. John B. Lee, 2010 Main Street. The name of the sendee was changed in transmission to Mrs. Knoblee. The defendant urges in excuse for such negligence the similarity between the telegraphic J and K. This is no legal excuse. *Cogdell v. Telegraph Co.,* 135 N. C., 431. If the defendant adopts a code intrinsically liable to such mistakes it should exercise the greater care in preventing them. The defendant's agents could at least have inquired at the street address given in the telegram. Such inquiry would doubtless have resulted in ascertaining the identity of the sendee. Such was the result when Mrs. Lee called for the telegram on the following day. The plaintiff alleges that she suffered mental anguish, and this is also admitted by the nonsuit. Aside from this, we think the circumstances in which she was placed may well have caused it. A girl sixteen years of age finds herself after midnight in a strange city, riding two
(493) miles in a carriage with an unknown driver. It is true she suffered no insult or physical injury, but the question is what would be the natural effect upon the mind and nervous system of a child of her age. Nature offers no flower more tender or more fair than budding womanhood, and around it every protection will be thrown by the hand of the law. The defendant was informed of the full purpose of the telegram and the importance of its immediate delivery. It, therefore, remains only to consider whether, under the admitted facts, the plaintiff is entitled to recover compensatory damages for the mental anguish she may have suffered as the direct result of the defendant's negligence. We see no reason why she can not, and we find no authority in this State to the contrary.

It is said by the defendant that "It does not require to be pointed out that if the barriers are once thrown down, and the disappointment, annoyance or unnecessary alarm occasioned by a delayed telegram shall be allowed to be the subject of damages, every barrier which the law has erected in the limitation

of actions for damages will be thrown down and the waters will be out in deluge." We do not think that any such result will follow our decision in this case; but such a possibility should not deter us from giving to the plaintiff the full measure of justice to which she is entitled. The defendant in its brief quotes the following extract from the decision of this Court in *Chappell v. Ellis,* 123 N. C., on page 263, which we may here repeat: "But it is urged that the principle of the Cashion case, if carried to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit in disregard of other essential principles. * * * We do not feel at liberty to adopt any one principle as the sole guide of our decisions and to carry it out to extreme and (494) dangerous limits, regardless of other great principles of justice and of law so firmly established by reason and precedent." As we have already said, we are now considering the question of damages resulting from the breach of a public duty by a quasi public corporation. How far this principle may in the future be extended to other corporations or to other circumstances we cannot tell; and in the absence of any matter before us involving its further consideration, we have neither the right nor the wish to limit or extend its application as a pure matter of legal speculation. As the cases come up we will decide them as best we may. In the meantime we will try to confine our opinion to the facts of this case and others identical therewith. We may, however, say that there seems a material difference between an incidental tort by an individual or a private corporation and the breach of a quasi public corporation of a public duty relating to the essential object of its creation. The exact nature of this difference it is difficult and at present unnecessary to determine.

It is true no case has been called to our attention in which this Court has allowed damages for mental anguish arising from the failure to deliver a telegram except in cases relating to sickness or death. On the other hand, we are not aware of any case in which this Court has drawn any such distinction either in the allowance or disallowance of damages. The nearest approach to any such limitation that the diligence of the learned counsel for the defense, aided by our own research, has been able to find is *Chappell v. Ellis,* 123 N. C., 259, in which a poor old woman, against whom a writ of possession had been issued, was thrown out upon the highway. In that case the eviction was lawful, and it was merely the unlawful taking of certain

personal property, nearly all of which was soon after returned, that could be considered in the assessment of damages.
(495) It is true this Court in distinguishing that case from Cashion's case, says: "The opinion in Cashion's case was hinged on the solemn fact of death, and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heartstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig." This language, correctly describing the facts in Cashion's case, was used to more fully and forcibly distinguish it from Chappell's case, and not as a limitation upon the general doctrine. Its purpose and application is apparent from the following language of the Court in the same case: "The doctrine of mental suffering or 'mental anguish,' as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive or vindictive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendant, can be allowed only where there is shown, on the part of the defendant, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud. * * * We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter and with but little to eat, but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforcible in a court of law."

Both before and since that opinion was rendered this Court has recognized the doctrine in cases merely of sickness.
(496) While one may lead to the other there is a vast difference between sickness and death, and there seems no reason why principles recognized in the former should not apply to kindred cases of equal strength and importance. While we find no direct decision of the question in any of our cases, we think that their line of reasoning tends to recognize the legal existence of mental suffering apart from sickness and death. This is especially so in *Young v. Telegraph Co.*, 107 N. C., 370, 9 L. R. A., 669 22 Am. St., 883; *Morton v. Tele-*

graph Co., 130 N. C., 299; *Bright v. Telegraph Co.*, 132 N. C., 317; and *Bryan v. Telegraph Co.*, 133 N. C., 603. In *Cashion v. Telegraph Co.*, 123 N. C., 259, this Court quotes as follows from Shearman & Redfield on Negligence, sec. 605. "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." This same language is quoted with approval in *Young v. Telegraph Co.*, 107 N. C., on page 373.

In neither Bright's nor Cashion's case was the plaintiff the sendee of the message, nor was she deprived of the satisfaction of attending the death or burial of the deceased. In both cases she sued on account of the absence of a relative to whom she looked for consolation and assistance. The death of the deceased was the occasion rather than the cause of the anguish for which she recovered. In cases where great stress is laid upon the fact of sickness or death, it is with the view of fixing the defendant with notice of the importance of the message where it has received no special information, like those cases where near relationship is relied on simply to raise (497) the presumption of suffering. In *Lyne v. Telegraph Co.*, 123 N. C., 129, this Court says, on page 133: "The same contention (that the relation of the parties was not disclosed) was made in that case that the defendant makes in this, and the Court says, among other things, 'that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. * * * When such communications relate to sickness and death, there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.'" In *Cashion v. Telegraph Co.*, 124 N. C., 459 (second appeal), this Court says, on page 464: "The telegram in question stated that Mr. Cashion had been killed while at work, and on its face suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair, that some one the lonely death-watch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another."

Another significant fact is the growing tendency of judicial

opinion to allow compensatory damages for mental suffering even when not connected with any physical suffering. This is forcibly illustrated in the case of *Osborn v. Leach,* 135 N. C., 628, where this Court holds that in cases of libel, where the statute forbids punitive damages *actual* damages may be allowed for mental suffering alone. This Court says, on page 633: "This being an action upon libel *per se* the plaintiff has a right to recover *compensatory* damages. Newell on S. & L., 43, Hale, *supra,* page 99. Compensatory damages include all other damages than punitive, thus embracing not only special damages as direct pecuniary loss, but injury to feelings, mental anguish and damages to character or reputation. 18 Am. & Eng. Ency. (2 Ed.), 1082, *et seq.;* Hale, *supra,* 106 and
(498) 99. Actual damages are synonymous with compensatory damages. Newell, *supra,* 839; 18 Am. & Eng. Ency. (2 Ed.), 1081, *et seq.* Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Ency. (2 Ed.), 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character."

Of course, in cases merely of slander or libel there could be no physical pain except as the reaction of mental suffering. The mere fact that shock to the feelings which goes directly to the mind without ever touching the body may produce such reaction upon the physical system as even to endanger life itself is *per se* the surest proof of the existence of actual suffering and the strongest argument for the allowance of compensatory damages. If such suffering actually results directly from the wrongful act of the defendant, it would seem to make but little difference what were the collateral circumstances.

The case at bar was ably and elaborately argued, orally and by brief, on both sides; and in the end we find ourselves compelled to decide the question upon the reason of the thing rather than any weight of decided authority. Of course we could not look for precendents where the doctrine of mental anguish is not recognized; and even where it is, the facts of the respective cases generally fall short of direct application. With few exceptions, as in our own State, the element of death or sickness appears directly or indirectly in the case; but, as with us, we find no decision containing any such limitation of the
(499) doctrine. The cases most nearly in point are those of *Telegraph Co. v Procter,* 6 Tex. Civ. App. 300; and *Tel. Co. v. Taylor,* 81 S. W., 69. In the latter case, filed 3 April,

1904, and reaffirmed by the denial of a rehearing on 1 June, 1904, it was held, quoting the head-note, that: "Where a wife telegraphed to her husband to meet her, but, owing to the telegraph company's negligence, the message was not delivered, and she arrived at the railroad station at night and went to a hotel where she failed to secure lodging owing to its crowded condition and from which, after a delay, she voluntarily went, escorted by a stranger who treated her with courtesy in search for her husband, to a second hotel where she found him, she was not entitled to damages from the telegraph company for mental suffering accruing from the time she reached the first hotel until she found her husband." We do not very clearly understand the reasoning of this case, nor do we see the force of the apparently arbitrary distinction between the mental suffering incurred between the depot and the first hotel, and that between the first hotel and the second. The latter seems to have been based upon the belief of the appellate court that in fact there was no such suffering. The point pertinent to the case at bar is that the plaintiff was allowed to recover compensatory damages for mental suffering disconnected from any physical pain or attending circumstances of sickness or death.

In Proctor's case the Court held, quoting head-note, that: "R eloped with plaintiff's daughter, aged fifteen years, going towards the county seat to procure license and be married. Plaintiff at once telegraphed the County Clerk, stating the girl's age and forbidding the issuance of license, but through negligent delay in the delivery of the message it did not reach the clerk until after the license had been issued and the parties married: *Held,* that plaintiff was entitled to recover of the telegraph company damages for the loss of his daughter's services up to the age of eighteen, and also for the mental distress involved." In that case the Court, on page 304, says: "We think, also, that he was entitled to recover for the mental distress involved.
We can not distinguish this case, in principle, from (500) *Telegraph Company v. Stuart,* 66 Texas, 584 (relating to sickness and death), and that line of decisions. The solicitude of a parent for the welfare of an only daughter of tender years, committed to his care both by nature and law, is certainly not less substantial than the affection of one brother for another."

Although not a telegraph case, we are much impressed with the reasoning of the Court in *R. R. v. Kaiser,* 82 Tex., 144, 305, where a girl sixteen years of age, accompanied only by a girl companion, was ejected from the train at a small town

where she was a stranger and where she remained an hour before she was discovered by friends. The Court therein says: "It is contended that the Court erred in refusing a special charge asked by the defendant to the effect that plaintiff could not recover for mental suffering arising from any supposed or anticipated danger, because there was no aggravation attending her leaving the train nor in the action of the conductor, and, such being the case, she could only recover for inconvenience, loss of time, labor, and expense of reaching her destination. We do not think that this charge should have been given. We do not think that the mental condition of the plaintiff can properly be considered as arising 'from a supposed or anticipated danger.' The circumstances of two inexperienced girls, unaccustomed to traveling, suddenly ejected from a train at a small railroad station, where they were entire strangers, and contrary to provisions made for their safety by their careful parents, were well calculated to arouse in their minds feelings of insecurity and danger that would not have been properly characterized by referring to them in a charge as merely 'supposed or anticipated.'" This language singularly fits the case at bar.

In the recent case of *Gillespie v. R. R.*, 178 N. Y., 347, (501) decided 26 April, 1904, the Court of Appeals of New York in an able and learned opinion held that a passenger on a street car can recover from the company for injuries to her feeling caused by the insulting language of the conductor, and that such damages are compensatory and not exemplary. The opinion quotes with approval the following language from Thompson on Negligence, sec. 3288: "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not, and generally does not, depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice." Further on in the opinion the Court uses the following language: "Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake." The Court also says: "The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect

is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of the contract."

We have quoted from this opinion because it unequivocally asserts the principle that a plaintiff can recover in tort compensatory damages for purely mental suffering, without any physical pain whatever, resulting from the breach of public duty by a common carrier. Telegraph and railroad companies are in their nature essentially similar as being quasi-public corporations organized for a public purpose and fixed with a public use. For the breach of a public duty they (502) are both liable in tort, and we see no reason why similar injuries arising from such breach of duty should not be governed by similar principles. That it is well settled in railroad cases is abundantly shown by the authorities cited in the last named case; and we think that those authorities are applicable by analogy to the case at bar. For this reason we have not deemed it necessary to cite the decisions allowing compensatory damages for mental suffering, without any physical pain, in such cases as seduction, breach of promise, slander and libel, malicious arrest and prosecution, false imprisonment, criminal conversation, and kissing a female gainst her will.

The defendant apparently relies upon *McAllen v. Telegraph Co.*, 70 Texas, 243, where the plaintiff sent a telegram to his father, who lived seventy-five miles from a railroad, to send the family carriage to take him home. The message was not delivered and the carriage was not sent; whereupon the plaintiff took up the idea that "some dreadful calamity had befallen his father." He thereupon took passage in a "jerkey" and on a buckboard, and subsequently sued the telegraph company for mental anguish as well as physical suffering. The Court held that neither the imaginary death of his father nor the bouncing of the buckboard was within the contemplation of the parties. The case has no application to the one at bar, coming clearly within the rule laid down in *Bowers v. Telegraph Co.*, 135 N. C., 504.

We are struck with the phrase so often used, notably by Joyce on Electric Law, "Telegrams as to sickness, death, *or the like.*" The meaning of the last three words is not defined; but there is an unwelcome suggestion upon which the mind refuses to dwell, of what might happen to a defenseless girl in the deserted streets of a city at midnight that may well be likened to death itself. (503)

In this connection we have endeavored to ascertain the latest decisions of the courts of the different States upon this subject. When we remember that this doctrine of mental

anguish in telegraph cases is of recent origin, having theretofore been deemed contrary to the principles of the common law, and has made constant progress in opposition to the preconceived ideas of courts and jurists, it seems that it must possess much inherent strength and merit. This is especially evident from the actions of certain courts, some of them of the highest reputation, which, while denying the doctrine in telegraph cases that damages for mental suffering may be recovered in the absence of physical pain or injury, allow it in cases of a kindred nature such, for instance, as insulting or humiliating a passenger.

The following is the present status of the doctrine in the different States as far as we have been able to ascertain. Its history in the State of Texas, where it was first specially announced, may be briefly stated as follows: The first case in that court is the celebrated one of *So Relle v. Telegraph Company,* 55 Texas, 308. There it was held that there could be a recovery in such cases. The next cases were *Levy v. R. R.,* 59 Texas, 542, and *Levy v. Same,* in same volume, on page 563. These cases were construed by the profession as in some respects modifying the doctrine in the first case. The question again arose in *Telegraph Company v. Stuart,* 66 Texas, 580, and the rule announced in So Relle's case was followed. That case was very thoroughly considered, and the decision then made has settled the law in that State upon the main question. Its reports show some fifty cases since in which the doctrine has been followed without question.

In Tennessee the doctrine was first announced in *Wadsworth v. Telegraph Company,* 2 Pickle, 695, and has been re-
(504) affirmed in *Telegraph Company v. Mellen,* 96 Tenn., 72, and *Telegraph Company v. Gray,* 108 Tenn., 39.

In Alabama the doctrine was expressly recognized in *Telegraph Company v. Henderson,* 89 Ala., 510; but seems to have been somewhat modified in the more recent case of *Telegraph Company v. Crumpton,* 138 Ala., 632, which appears to be the latest decision upon the subject.

In Kentucky the leading case, in which such damages are allowed, is *Chapman v. Telegraph Company,* 90 Ky., 266. The doctrine is affirmed in the later cases of *Telegraph Company v. Van Cleave,* 107 Ky., 464, and *Telegraph Company v. Fisher, Ib.,* 513.

In Iowa damages for mental anguish unaccompanied by physical pain are allowed. The leading case is *Mentzer v. Telegraph Company,* 93 Iowa, 752, a carefully considered case which has been widely cited. This case stood as the only expression

of that court upon the subject until the recent case of *Cowan v. Telegraph Company,* 122 Iowa, 379.

In Louisiana such damages are allowed. The leading and most recent case is *Graham v. Telegraph Company,* 109 La., 1069.

In Nevada the doctrine has been recently adopted in the case of *Barnes v. Telegraph Company,* 27 Nev., 488, in an able and learned opinion by *Fitzgerald,* J.

In South Carolina they are also allowed. At first the doctrine was denied in *Lewis v. Telegraph Company,* 57 S. C., 325. This case was followed by an act of the Legislature (23 Stat., 748; Code (1902), Vol. I, sec. 2223), permitting damages in such cases. This statute was held to be constitutional in *Simmons v. Telegraph Company,* 63 S. C., 429, which has subsequently been uniformly followed.

In Washington there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in *Davis v. R. R.,* 35 Wash., 203, in which telegraph cases are cited with approval. (505)

The doctrine is denied in the following States, as is shown by the most recent cases:

Florida: *Telegraph Company v. Saunders,* 32 Fla., 434, apparently the only case upon the subject in that State.

Georgia: *Chapman v. Telegraph Company,* 88 Ga., 763; *Giddens v. Telegraph Company,* 111 Ga., 824.

Illinois: *Telegraph Company v. Halton,* 71 Ill. App., 63. The question does not appear to have come before the Supreme Court of the State.

Indiana: *Telegraph Company v. Ferguson,* 157 Ind., 64.

Kansas: *West v. Telegraph Company,* 39 Kansas, 93, appears to be the latest telegraph case in that State involving the question; but that case has been reaffirmed in *Railway Company v. Dalton,* 65 Kansas, 161.

Minnesota: *Francis v. Telegraph Company,* 58 Minn., 252, which is the only case in that State.

Mississippi: *Rogers v. Telegraph Company,* 68 Miss., 748. This case has apparently been doubted in one or two subsequent cases, which, however, are not directly in point.

Ohio: *Morton v. Telegraph Company,* 53 Ohio St., 431, seems to be the only case in that State involving the question.

West Virginia: *Davis v. Telegraph Company,* 46 W. Va., 48.

Wisconsin: *Summerfield v. Telegraph Company,* 87 Wis., 1.

Virginia: *Connelly v. Telegraph Company,* 100 Va., 51. In this State a statute was passed upon the subject, which apparently failed of its purpose.

In the following States there have been no decisions in telegraph cases upon the question so far as we have been able to ascertain: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Maine, Maryland, Massachusetts, Michigan,
(506) Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Wyoming.

As the primary doctrine of mental anguish in telegraph cases has been too long and firmly settled by this Court to be now called in question, if decided cases stand for aught; and we feel impelled by both reason and authority to apply these principles to the case at bar, the judgment of the Court below is reversed and the demurrer overruled.

Reversed.

CONNOR, J., concurs in result.

Cited: Dayvis v. Tel. Co., 139 N. C., 83; *Harrison v. Tel. Co.*, 143 N. C., 151; *Helms v. Tel. Co., Ib.*, 392; *Woods v. Tel. Co.*, 148 N. C., 7; *Cordell v. Tel. Co.*, 149 N. C., 408; *Shaw v. Tel. Co.*, 151 N. C., 642.

GREEN v. TELEGRAPH CO.

(Filed 15 November, 1904.)

TELEGRAPHS—*Damages—Mental Anguish.*

The sender of a telegram is entitled to damages for mental anguish occasioned by the negligent failure of the telegraph company to deliver the same, though the suffering would not have occurred had the company not informed him of the nondelivery.

ACTION by I. E. Green against the Western Union Telegraph Company, heard by Judge *Frederick Moore,* at June Term, 1904, of HALIFAX. From a judgment for the defendant the plaintiff appealed.

Day & Bell, Murray Allen and *W. E. Daniel,* for the plaintiff.
F. H. Busbee & Son and *R. C. Strong,* for the defendant.

DOUGLAS, J. This case is the correlative of that of
(507) Willie H. Green against the same defendant, which we have fully discussed and decided. That discussion set-

tling the underlying principles in this case it is unnecessary to repeat. The transaction was the same, and the negligent failure of the defendant to deliver the telegram was as much a breach of public duty towards the father as it was towards the daughter. The injury being the same, it would follow that the right of recovery would be equal, provided the mental suffering complained of was the direct and natural result of the defendant's wrong. The disturbing element in the case at bar, which we frankly confess gave us some trouble in the beginning, is the fact that the plaintiff would apparently have suffered no mental anxiety had he not been informed by the defendant on the following day that the message had not been delivered. The defendant claims that it was its duty under the repeated decisions of this Court to inform the plaintiff of the non-delivery of the message, and that it should not be held liable for damages resulting from the performance of a legal duty. At first blush this seems a plausible defense; but it will not stand the test of investigation when applied to the facts of this case. The rule as laid down in *Hendricks v. Telegraph Co.*, 126 N. C., 304, 78 Am. St., 658, is as follows: "We think that it is the duty of the company in all cases where it is practicable to do so to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se,* it is clearly evidence of negligence. In many instances, by such a course, the damage could 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 from the great anxiety, and would know what to expect." Here the spirit as well as the letter of the rule is clearly set forth. The company must *promptly* notify the sender of the non-delivery of the message in order that he may take (508) such steps as may be within his power to avoid or mitigate the effects of the company's negligence. The contention of the defendant comes neither within the letter nor spirit of the rule. The message was sent shortly after twelve o'clock midday on the 23d, and the sender was not notified of its non-delivery until the next morning. The company could have found out within two hours whether the message could be delivered, if indeed it ever made any effort to deliver it, and could have notified the sender of its non-delivery by two or three o'clock in the afternon. He could then have sent other telegram to the same party, or to different parties, or even to his daughter on the train. But when the defendant not only failed to promptly deliver the telegram, but further negligently failed to notify the

sender until the following morning, seven or eight hours after the arrival of the train in Columbia, it deprived the plaintiff of any opportunity of making any further provision for the safety and comfort of his daughter. This purely colorable compliance with the rule was of no benefit to the plaintiff, and should afford no protection to the defendant.

We do not mean to say that even if the defendant had complied with the rule in good faith, by promptly notifying the sender of the non-delivery of the message, it would have been relieved from all liability. Here the cause of action was the negligent failure of the company to deliver the message, which fixed its liability. Any further action on its part would merely go in mitigation of damages. If in fact the subsequent act of the defendant prevents the occurrence of any substantial damage, it might diminish the plaintiff's legal claim to nominal damages; but the effect is the reverse in the case at bar. In any event he would be entitled to nominal damages. The de-

(509) fendant earnestly contends that the plaintiff ought not to recover as his suffering was purely imaginary, and relies on *McAllen v. Telegraph Co.*, 70 Tex., 243. We fail to see the pertinency of the citation. As the case before us stands on demurrer, we have no hesitation in saying, for the purposes of its present decision, that the mental suffering of the plaintiff was the direct result of the negligence of the defendant. To what degree he suffered, and whether a man of reasonable firmness should have suffered at all under such circumstances, are questions for the jury. Of course upon the trial of the case, the evidence may not sustain the plaintiff's contention; but taking the allegation of the complaint as admitted by the demurrer, we must hold that they present facts sufficient to constitute a cause of action. The demurrer should have been overruled in the Court below, and its judgment is therefore

Reversed.

CONNOR, J., concurring. I concur in the result but do not concur in the reasons assigned by the majority of the Court. The plaintiff had a cause of action against the defendant company for negligently failing to send and deliver the message. If the facts are found upon the trial as alleged, he is entitled to punitive damages. The complaint sets out a case of gross and inexcusable negligence. I prefer not to discuss or express any opinion in the present condition of the case upon the other questions decided by the Court. I do not think that the tender of

the amount paid for the telegram defeated the cause of action. The plaintiff was entitled to go to the jury on the question of damages.

Cited: Carter v. Tel. Co., 141 N. C., 378.

---

(510)

HEDRICK v. RAILROAD.

(Filed 22 November, 1904.)

1. EVIDENCE—*Pleadings.*

In an action against a railroad company for the death of an employee, a part of the answer, admitting the killing of the intestate, is competent, without the introduction of the remainder of the paragraph which denies the negligence of the defendant.

2. RAILROADS—*Negligence—Bridges.*

Where an employee of a railroad company is killed by an overhead bridge, in the discharge of his duty, the company is guilty of negligence unless it had warning ropes so placed as to be a sufficient warning to an ordinarily careful and prudent man in the same position of the deceased.

3. NEGLIGENCE—*Damages—Railroad.*

Under the statute of Virginia, the knowledge of an employee of an overhead bridge does not defeat a recovery for his death caused thereby, though it is his duty to exercise reasonable care.

ACTION by C. F. Hedrick against the Southern Railroad Company, heard by Judge *O. H. Allen* and a jury, at February Term, 1904, of DAVIDSON. From a judgment for the plaintiff the defendant appealed.

Emery E. Raper, for the plaintiff.

Glenn, Manly & Hendren, Walser & Walser and *F. H. Busbee,* for the defendant.

MONTGOMERY, J. The plaintiff brought this action to recover damages for the killing of his intestate through the negligence of the defendant. In the complaint it is alleged that the intestate, a brakeman on a freight train of the defendant, while on a run between Spencer in North Caro- (511) lina and Monroe in Virginia, was required to be upon the top of the freight cars, and while engaged in his work, at a point about two miles south of the city of Danville, Virginia,

was struck on the head and face by the timbers of a bridge which the defendant negligently maintained across a cut on the roadbed and was so badly injured and hurt that he died a week thereafter. It was further alleged that the bridge was negligently constructed and maintained, because it was at such a low elevation as to render it dangerous and unsafe for its brakemen to discharge their duties at the point where the bridge crossed the track; that the night on which the intestate was injured was a very dark and rainy one and that the defendant had negligently failed to take proper precaution to warn their brakemen of approaching danger, when nearing the bridge, by placing lights or other sufficient precautions at the approach to the bridge. There was a further allegation in the complaint that, by the laws and statutes of the State of Virginia, it is provided that in case of the death of a person caused by the wrongful act, neglect or default of another, the administrator of such person shall have a right of action therefor against the person or corporation whose wrongful act, neglect or default caused such death. And it was further alleged that by act of the General Assembly of Virginia knowledge of any employee injured by defective ways, appliances and construction of such corporation shall not of itself be a bar to the recovery of damages for the injury and death caused thereby, and that the personal representative of such employee shall have a right of action therefor. The defendant in its answer denied that it had been negligent, and set up as a further defense the plea of contributory negligence on the part of the intestate.

There was evidence on the trial tending to show that the intestate was killed by being struck by the timbers of the bridge and that the bridge was not high enough so a man stand-
(512) ing on a box car could be carried under it in safety; that if a man was standing on an ordinary box car the bridge would strike him on the breast; or if on the highest car, on the stomach; or on the lowest car, on the head. It was further in evidence that there were warning ropes suspended above the track on each approach to the bridge and twenty-five or thirty yards off, called "tell-tales." Those ropes were intended to notify brakemen to stoop, and they were suspended at such a distance as to strike the heads of the brakemen as they passed. One witness, who had been in the employment of the defendant, said that those warning ropes could not be trusted as they sometimes got tangled and "kicked up." The plaintiff in the course of the trial offered in evidence a part of paragraph 1 of the answer, viz., "that while the plaintiff was acting as flagman of defendant company he was killed, and defendant is informed

and believe by reason of his head coming in contact with an overhead bridge at some point south of the city of Danville, Virginia." The defendant objected because the part introduced was only a part of a sentence and the entire sentence was not offered. The remainder of the sentence, after a comma, was "but defendant alleges that the bridge was properly constructed across the track, and that before reaching said bridge on either side, for the purpose of warning the employees of it, on the trains approaching the bridge, there is constructed what is known as 'tell-tales' or ropes properly adjusted." * * *

The evidence was received as it was offered, and we think properly. It is true that the part of the paragraph offered in evidence was only the half of the paragraph and a half of the sentence, but it was a complete admission that the intestate had been killed and that his death was caused by contact with the bridge. That part of the sentence not offered in evidence did not in the least retract that admission. It only had reference to whether he was killed through the negligence (513) of the defendant. It was not averred in the latter part of the sentence that the intestate was not killed by being stricken on the head by the timbers of the bridge, but it contained a matter of defense on the part of the defendant against its alleged negligence. *Lewis v. R. R.*, 132 N. C., 382, is in point.

The same point of evidence was raised in *Stewart v. R. R., ante,* 385. In that case the plaintiff offered in evidence a part of the first paragraph of the defendant's answer, viz.: "That the plaintiff's intestate was struck by the engine pulling train 34 at the time alleged; that no one saw him struck or ever heard him say anything about how he was struck, but the defendant alleges that the said deceased, J. R. Reaves, was upon the track, and that the engineer of train 34 did not see him until he saw him fall." That part of the sentence was objected to by the defendant because the whole paragraph was not offered. The omitted part of the paragraph was separated from the other by a colon, and was in these words: "That the engineer and firemen were keeping a lookout and in no way upon said occasion was the defendant negligent in its conduct against the said deceased." * * * The objection was sustained in the lower Court and the evidence offered excluded, but this Court held that that was error, and said: "It was competent to show the killing of the intestate by the defendant and also to show its negligence. It was an admission complete in itself, and that plaintiff was not compelled to put in matter of explanation or exculpation on the part of the defendant. The defendant would have that privilege itself. 1 Greenleaf Ev. (16 Ed.), sec. 201."

In that case the sentence was connected by a colon; in this, by a comma. Marks of punctuation are useful in the construction of sentences and to give each part its force and meaning; but in the pleadings in a law suit the difference between a (514) colon and a comma will make no difference where the parts of a sentence show that there is a matter in one clause full and complete in itself, establishing an affirmative fact, and which is not denied in the other clause, but only its consequences attempted to be explained or avoided. But if the evidence offered had not been competent, it would have been in real fact harmless in this case, for there was an abundance of evidence going to show that the intestate was killed by a blow on the head through contact with the bridge timbers; and his Honor told the jury, when he reviewed the evidence and also in his instruction to them, that they should not consider it as evidence of negligence on the part of the defendant, but only as evidence that the intestate was killed by the bridge.

The exception was made by the defendant to that part of his Honor's charge to the jury, in substance, that if the defendant allowed an overhead bridge to remain across its track so low that the intestate, while standing on top of a car in the place of his duty, was stricken by the timbers of the bridge and killed, the first issue (on the defendant's negligence) should be answered "Yes," unless it should be found that the defendant had warning ropes before the approach to the bridge "so arranged and at a sufficient distance as to be sufficient protection to warn an ordinarily careful and prudent man in the position of the deceased under the same conditions and circumstances, and if the jury find that the defendant had such 'tell-tales' or warning ropes, they should answer on the first issue 'No.'"

The defendant contends that the latter branch of the instruction was not pertinent to the facts, and that the first clause was erroneous. The argument was that the only evidence offered was that the "tell-tales" or ropes were twenty-five or thirty yards on either side of the bridge and were for the pur- (515) pose of notifying brakemen of the approach to the bridge, and that the law presumed that the "tell-tales" were arranged as such warnings are usually arranged, and that there was no evidence that they were not so arranged and not at a safe and proper distance. It does not need any citation of authority for the position that under the law the master is compelled to provide a reasonably safe place in which his employee is to do his work, and that the failure to perform this duty is negligence. In this case the defendant permitted its bridge to be over its railroad not of sufficient height above the

track so that a brakeman standing on top of its cars could pass thereunder in safety. The night on which he was hurt was dark and rainy. Surely this was evidence of negligence, unless the nature of the surroundings made it impossible for the defendant company to have erected a higher bridge, and in that event such warnings and signals as might operate to prevent injury should have been adopted and put in use. 1 Am. & Eng. Ency. (2 Ed.), 936; Bailey's Master's Liability for Injury to Servant, p. 41. If it were the fact—which was not proved—that the defendant company could not have built a higher bridge, did they adopt such warnings and signals as would operate to prevent injury to its brakemen? If they intended the "tell-tale" ropes for that purpose, who are the better judges of the sufficiency and the reasonableness of those precautions than the jury? Was it not for them, upon the evidence, to say whether dangling ropes twenty-five or thirty yards from the approach to the bridge were of proper distance to give warning? Was it not for them to say whether they were sufficient notice to brakemen, considering the evidence of one of the witnesses who said that they sometimes got tangled and would "kick up?" Was it not for them to say whether or not "tell tale" ropes were long enough to strike a brakeman if he should be in a stooping position at his work? We see no error in that instruction. (516)

The plaintiff requested the Court to instruct the jury that if they found from the evidence that the defendant allowed a low bridge to remain across its track so that a brakeman on top of the cars could not while standing thereon pass under the bridge in safety, mere knowledge of the existence of the bridge so constructed, if the intestate had such knowledge, would not make him guilty of contributory negligence, and the jury should answer the second issue (as to contributory negligence) "No." The Court gave that instruction, except that part of it in these words, "that they should answer the second issue 'No,'" and added that "it was the duty of the plaintiff's intestate to exercise ordinary care with reference to the danger, the surroundings, the situation, and in considering whether he contributed to his injury the jury can consider the fact that he had been running on this road for three or four months, and as to whether he knew the situation and condition of the bridge, its structure and height. It was his duty to exercise reasonable care with reference to the situation, the more danger the more careful he should be."

We see no error in the instruction as given. The statute on this subject of the State of Virginia, set out in the complaint

contains this provision: "Knowledge of any employee of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such corporation, shall not of itself be a bar to recovery for any injury or death caused thereby." So that prayer was framed in accordance with the law of the State of Virginia, where the intestate was killed, and the addition to the instruction asked by the plaintiff was almost in the language of the defendant's third prayer for instruction, and we think, in all and its every part, that it fairly and properly presented that phase of the case to the jury. His Honor gave the defendant's third prayer for instructions to the (517) jury and declined the other three.

We need not discuss them because they are embraced in our consideration of the plaintiff's prayers.

The exceptions of the defendant to the evidence are without merit.

Affirmed.

Cited: Sawyer v. R. R., 145 N. C., 30; *Rushing v. R. R.*, 149 N. C., 160.

DANIEL v. RAILROAD.

(Filed 22 November, 1904.)

1. MALICIOUS PROSECUTION—*False Imprisonment—Principal and Agent—Railroads.*

   The cashier in the local office of a railroad is without authority to cause the arrest of a person whom he suspects of having stolen money from the office and the railroad company is not liable therefor, there being no proof of its previous authority or subsequent ratification.

2. PRINCIPAL AND AGENT—*Evidence—Declarations.*

   The authority of an agent to bind his principal cannot be shown by the acts or declarations of the agent.

ACTION by S. M. Daniel against the Atlantic Coast Line Railroad Company, heard by Judge *M. H. Justice*, at March Term, 1904, of PITT.

This is an action for malicious prosecution and false arrest and imprisonment. The plaintiff was accused and prosecuted by the agent of the defendant at Greenville of stealing money from its office at that place of which the agent had charge. The testimony necessary to be stated was in substance as follows:

The plaintiff is a young man thirty years of age, a native of Pitt County and now a resident of Goldsboro. On the day of his arrest, but prior thereto, he went to the depot of the defendant company in Greenville to take the train for Goldsboro via Kinston, and finding the passenger depot closed (518) he went to the freight depot, inquired about his train and was invited into the office by Atkinson, the agent of defendant. Plaintiff went behind the rail and sat by the stove. Three or four people came in and then went out. Atkinson was counting money and putting it in a package. He got another man to count it and he put it in an envelope and then put it in a drawer, locked the drawer and went to supper. Plaintiff went out behind him in about three minutes, leaving several white people and one colored man in the office. Defendant's train was late, and when it came the plaintiff boarded it and went to Kinston, where he missed connection with the Atlantic and North Carolina train and was forced to spend the night at Kinston. During the night a call came from the depot at Greenville for the depot at Kinston by phone—agent at Greenville calling agent at Kinston; connection was made and immediately after this the agent of defendant at Kinston went to the hotel, called for a policeman and told him he had orders to arrest Daniel, and then with the policeman the agent went to his room at the hotel, demanded admission, and on being admitted to the room the agent of defendant company directed his search and also his arrest until the agent at Greenville could be communicated with, the agent at Kinston stating that the arrest was for larceny of money from the company in Greenville. No warrant was sworn out for the arrest, and all was done by agents of defendant company and the policeman at their instance. The agent at Greenville came down town, saw the chief of police at Greenville and asked him to go to the phone office with him; they went to the phone office and the agent (Atkinson) called for the policeman in Kinston, and at his request the Greenville policeman did the talking. Atkinson was notified that no warrant being at that time sworn out for plaintiff's arrest the policeman declined to order his arrest, but afterwards the chief of police of Greenville, at Atkinson's re- (519) quest, called up the policeman at Kinston over the phone and requested him to arrest plaintiff, which he did, being assisted by the defendant's agent at Kinston, as above stated. The arrest was made in plaintiff's room in the hotel late at night after he had retired, and he was subjected to the most thorough search and also his room, Meacham, the defendant's agent at Kinston, and several policemen being present and taking part

in the search. Plaintiff was taken through the hotel office and down the public street to the guard house where he was detained a half or three-quarters of an hour. No evidence of plaintiff's guilt being discovered he was released, after a policeman had communicated with the agent at Greenville and had been told to let him go. On Sunday morning following the arrest and search, the agent at Greenville applied to the mayor of Greenville, who was local counsel for defendant company, for a warrant for the plaintiff, charging him with the larceny of defendant company's money from the possession of the agent; the warrant was issued and plaintiff arrested under it on his return to Greenville next day; this was done after he had once been arrested and searched by direction of agent at Greenville, and at his direction released. On application, the case was removed for trial to another justice. At the trial delay was caused by the failure of the agent to appear. He was afterwards seen coming out of the office of the local attorney of defendant company and soon appeared at the trial. After hearing all the evidence the justice dismissed the warrant, finding no probable cause. Atkinson, at whose instance and request plaintiff was arrested at Kinston and afterwards in Greenville, was cashier in the defendant's office in the latter place. His duties were to collect money for freight, give receipts therefor, sell tickets to passengers, take care of the money received by
(520) him and forward the same to the treasurer of the defendant company at Wilmington. Plaintiff testified that he did not take the money or voucher. Money to the amount of $132.45 and a railroad voucher for $37.50 were stolen from the cash drawer in the railroad office the night the plaintiff was there.

At the close of the testimony for the plaintiff, the defendant moved to dismiss the action under the statute. The motion was granted and judgment rendered accordingly. Plaintiff excepted and appealed.

Fleming & Moore, for the plaintiff.
Skinner & Whedbee and *Pou & Fuller,* for the defendant.

WALKER, J., after stating the facts. The foregoing statement of the testimony is sufficient to present the point upon which the case turns, namely, the authority of the agent of the defendant to cause the arrest to be made. We are not concerned so much with the manner in which the arrest of the plaintiff was made as we are with the question whether the defendant, who was the principal of Atkinson and Meacham, is to be charged with

liability for their tortious acts. That their conduct towards the plaintiff was inexcusable, if not criminal, and justly provokes the resentment of every good and law-abiding citizen against them, may be freely admitted. The circumstances under which they pursued this man, without the warrant of the law, even to his bed chamber and at the silent hour of midnight arousing him from his peaceful slumbers, invading the sanctity and privacy of his room, which the law surrounded with its protection as much so as if it had been his home or his castle—subjecting him to such indignities as no self respecting man could submit to, even under compulsion, without feeling that he had been humiliated if not degraded by them; marching him through the office of the hotel and down a public street where any (521) and all might see the infamy and disgrace which they had fastened upon him—all these things and more they did which made their offense against him, if the evidence be true, a very serious one, and to him they and all who participated in causing his arrest are responsible before the law, and they must reckon with him if he sees fit to call them to account. But we must not allow any feeling of indignation at the grievous wrong inflicted upon the plaintiff (which can not be too severely condemned, if, as we must assume, he is an innocent man) to withdraw our attention from those principles of that same law by which the defendant's rights are guarded. The excesses of Atkinson and Meacham do not establish the defendant's liability. That can be shown only by proof that the defendant authorized the acts to be done or that, after they were done, it ratified them. An agent's authority to bind his principal can not be shown by the agent's acts or declarations. *Francis v. Edwards,* 77 N. C., 271; *Gilbert v. James,* 86 N. C., 244; *Taylor v. Hunt,* 118 N. C., 168; *Willis v. R. R.,* 120 N. C., 508. The authority must first be shown before the acts done or declarations made in pursuance of the authority can bind the principal or impose any liability whatever upon him. It is not pretended in this case that there was any express authority or that there was any ratification of the acts of the alleged agents. The plaintiff's sole contention is that what Atkinson did at Greenville and Meacham at Kinston was within the line of their duty and the scope of their employment, and therefore they had implied authority from the defendant to do what they did, upon the theory, we suppose, that every authority carries with it, or includes in it, as an incident, all the powers which are necessary, proper or usual as means to effectuate the purposes for which it was conferred, and that, consequently, when an agency is created for a specified purpose or in order

(522) to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given but such as is necessarily implied from the nature of the employment. Story on Agency (9 Ed.), sec. 97. This is the general rule and the doctrine of *respondeat superior* is a familiar one. But in our opinion it has no application to the facts of this case. If we should hold that it is so broad in its scope as to include a case like this one, it would lead to most dangerous consequences. For us to say that an agent can by his acts subject his principal to liability in damages to any one injured by his said acts done when he was not about his master's business and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of *respondeat superior* far beyond its acknowledged limits. A servant entrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but when the property has been taken from his custody or stolen and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency and can not possibly be brought within the limits of the implied authority of the agent. It would seem that so plain a proposition should need neither argument nor authority to support it, but we are abundantly supplied with both in the cases upon the subject. It is not intended to assert that a principal can not be held responsible for the willful or malicious acts of the (523) agent when done within the scope of his authority, but that he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity or to give vent to some private feeling of his own (*McManus v. Crickett,* 1 East., 106) and, as is forcibly stated by Lord *Kenyon* in the case cited, quoting in part from Lord *Holt:* "No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now when a servant quits sight of the object for which he is employed, and without having in view his master's

orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him and his master will not be answerable for his acts."

A very able and learned discussion of the question in this case will be found in *Allen v. R. R.*, L. R. 6 Q. B., 65, by *Blackburn*, J., one of the most eminent of the English Judges of his time. The case was apparently well argued on both sides. The Judges delivered separate opinions. We quote so much of the leading opinion by Justice *Blackburn* as will show the full result of the decision: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back and an act done for the purpose of punishing the offender for that which has already been done. There is *no implied authority* in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual; if the law were that the defendants are re- (524) sponsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." *Allen v. R. R.*, was cited with approval and reviewed at some length in *Carter v. Machine Co.*, 51 Md., 290, 34 Am. Rep., 311 (opinion by *Alvey* C. J.), and the doctrine thus summed up: "From these authorities it is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant entrusted with the custody of the company's money or goods; and before the corporation can be made liable for such an act it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified

and adopted by the corporation." That case was cited and followed in several other decisions in the same Court to the like effect. *Improvement Co. v. Steinmer,* 72 Md., 316, 8 L. R. A., 846; *R. R. v. Brewer,* 78 Md., 406, 27 L. R. A., 63; *Kirk v. Garrett,* 84 Md., 385; *R. R. v. Greene,* 86 Md., 161. The following cases presented the same question precisely as we now have under consideration and were decided in the same way as those already cited. *Stevens v. R. R.,* 10 Exc., 351; *Pressley*
(525) *v. R. R.,* 15 Fed., 199; *Mali v. Lord,* 39 N. Y., 381, 100 Am. Dec., 448; *S. E. T. Co. v. Green,* 25 Ill. App., 106; *Croasdale v. Von Boyneburgh,* 206 Pa., 15; *Hershey v. O'Neill,* 36 Fed., 168. In *Dally v. Young,* 3 Ill. App., 38, the plaintiffs in error were sued for malicious prosecution by Young, in that Dally, a subagent of Lathrop who was agent for the Remington Machine Company, had, at the instigation of Lathrop and the company, prosecuted him criminally for embezzlement of the funds of the company, of which charge he was acquitted. There was no evidence that the prosecution had, previous to its institution, been expressly authorized or afterwards adopted or ratified by Lathrop or the company. The Court thus referred to the principle governing the case: "It is true, Lathrop was the general agent of the company at Chicago and that Dally was a subagent at Bloomington, and subject to his jurisdiction in all matters pertaining to the business of the company, but this circumstance of itself would not make him liable for a criminal prosecution commenced by Dally without his knowledge or consent. Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts and continues the same with knowledge of all the circumstances." And in *Edwards v. R. R.,* L. R. 5 C. P., 446, the Court took the same view of the law upon facts substantially similar. "A servant of a railway company has no implied authority as such to give a person into custody on a charge of felony. It is the duty of any one who sees a person committing a felony to give him into custody, and it can not be assumed that Holmes was acting in this matter as the company's servant, and not in accordance with that general duty. If the defendants are held liable here, it will follow that every servant has authority to act in this way for his master, and to render him liable should he arrest a man wrongfully. It is said that
(526) Holmes was in charge of the property which he believed was being stolen, and from that fact it may be inferred that he had authority to act as he did, but the same would apply to a shopman in charge of a shop or a servant in

charge of the house, and yet it has never been suggested that if such a servant gave a person in charge for felony the master would be liable." See also, Pollock on Torts (6 Ed.), pp. 89, 90.

The principle we have stated as applicable to the facts in this record and as established by the authorities cited, has met with the approval of this Court in cases closely resembling the one in hand, and in other cases where it was adopted by analogy. Quoting from Wood on Master and Servant, 546, the Court in *Willis v. R. R.,* 120 N. C., 508, says: "In the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment. For illustration, a clerk to sell goods suspects that goods have been stolen and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied."

In a case where the agent of the defendant company had slandered the plaintiff, the Court stated the principle as follows: "In a vast majority of the cases, the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegation or any proof of authority or ratification." *Redditt v. Manufacturing Company,* 124 N. C., 100. Where the defendants had placed a claim against the plaintiff in the hands of their attorney for collection and the attorney caused the plaintiff to be arrested, the Court held that the defendants were not liable to the plaintiff in an action for malicious (527) prosecution and false arrest, as the act of their attorney was not within the general course and scope of his employment and therefore he had no implied authority to do the act, and as the defendants had not expressly authorized the act to be done or in any way ratified it. *Moore v. Cohen,* 128 N. C., 345. That case would seem to be decisive of this one, and it is fully sustained by the decision in *Burna v. Albert,* 4 Fed. Cases, No. 2170, in which Chief Justice *Taney* delivered the opinion. The cases cited in the brief of plaintiff's counsel may, we think, be distinguished from our case. The Court was influenced in the decision of them by their peculiar facts, which do not exist in the case at bar. It is not necessary for us to review or comment upon them, except to say that the Court thought there was in each of them some evidence tending to show authority from the company for the commission of the wrongful act.

It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do does something else which he is not employed to do at all, the master can not be said to do it by his servant and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. *Mitchell v. Crasweller,* 76 E. C. L., 246; *Limpus v. L. G. O. Co.,* 32 L. J. (Exch.), 34. Nor does the question of liability depend on the quality of the act but rather upon the other question, whether it has been performed in the line of duty and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle. There is no ground for saying that what was done by the agent was in the ordinary course of the business of the company, nor that it was (528) for its benefit, except in so far as it is for the benefit of all the citizens of the State that a criminal should be prosecuted, convicted and punished. If the agent acted from a sense of the duty which rests on every one to give in charge a person who he thinks has committed a felony, his conduct, while commendable, would in no way be connected with the defendant so as to fasten liability upon it. *Edwards v. R. R.,* L. R. 5 C. P., 448.

In *Croasdale v. Von Boyneburgh, supra,* the Court says: "The purpose of a criminal prosecution is to punish the offender for violating the laws of the Commonwealth and not to enforce the payment of money, nor, as in civil proceedings, to restore to the owner the property of which he has been defrauded. The criminal process of the Court should not be invoked for any such purpose. While the appellant, like any other person, could have instituted the prosecution against Stotsenberg, it was clearly not his duty as managing owner to do so." The Court in *Pressley v. R. R., supra,* states the principle with equal emphasis: "The question is, can such action on his part be held to be within the scope of his agency and in the course of his employment? There may be, and the books recognize some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency and in the course of his employment is a proposition which in the light of the decided cases can not be maintained."

There can be no doubt that the plaintiff has been very ill used and grievously wronged, as he was most improperly arrested, but, unfortunately, he has sued an innocent party instead of suing those who were the real authors and perpetrators of the wrong done to him. We have assumed of course that they did the wrong to him, as we are required by (529) an imperative rule, upon a motion to nonsuit or a demurrer to evidence, to take as true not only every fact which there is evidence tending to establish, but also to consider all such fair and reasonable inferences of fact as the jury, if trying the case, might properly have drawn from the evidence. It may be that those parties, if they had been sued, would have been able to show quite a different state of facts from the one with which we have now to deal, and therefore what we have said must be taken as based entirely upon the hypothesis that the facts are correctly given in the testimony introduced by the plaintiff.

Since this opinion was written we have examined a case recently decided by the Supreme Court of Pennsylvania, in which we find that Court reached the same conclusion we have in this case upon facts substantially similar, and supported its decision by cogent reasoning and by the citation of many and weighty authorities. *Markley v. Snow,* 207 Pa., 447, 64 L. R. A., 685.

Finding no error in the ruling of the Court upon the law, the judgment of nonsuit must stand.

No error.

Cited: Brittain v. Westall, 137 N. C., 35; *Jackson v. Tel. Co.,* 139 N. C., 352, 4, 5; *Stewart v. Lumber Co.,* 146 N. C., 68, 90, 112, 114; *Jones v. R. R.,* 150 N. C., 476.

---

(530)

PLUMBING CO. v. HALL.

(Filed 22 November, 1904.)

1. CONTRACTS—*Damages—Evidence—Harmless Error.*

On an issue as to failure to properly perform a contract to install a water system in defendant's house the admission of evidence concerning a dam built by plaintiff to collect the water was, if erroneous, harmless, where there was nothing to show that the defective condition of the dam caused the failure of the water supply.

2. CONTRACTS—*Evidence.*

Where a company contracts to place a water system in a residence, evidence by an expert that sickness was caused by defects in the construction thereof is competent on the question of the failure of the company to properly perform the contract.

ACTION by the Carolina Plumbing and Heating Company against Saidy Hall, heard by Judge *W. R. Allen* and a jury, at October Term, 1904, of MECKLENBURG. From a judgment for the defendant the plaintiff appealed.

W. F. Harding, for the plaintiff.
Osborne, Maxwell & Keerans, for the defendant.

MONTGOMERY, J. This action was brought to recover a balance alleged to be due by the plaintiff for installing a cold and hot water system in the house of the defendant. It is alleged in the complaint that the contract between the parties was that the plaintiff was to install a cold and hot water system, including bath and bath room fixtures, and also to install a hydraulic ram for the purpose of forcing water into the tank at the house; that the plaintiff was to furnish material for installing the water system and for installing the hydraulic ram, all to be done in a workmanlike manner, and that the plaintiff performed
(531) well its part of the contract. The defendant denied that the contract was properly performed on the part of the plaintiff, and she set up in her answer a counter claim against the plaintiff for damages by reason of its failure to comply with the contract.

Two points only are raised on the appeal, and they apparently concern questions of evidence; but one of them goes to the nature of the contract itself. The witness, Toomey, who was the plaintiff's agent, on cross-examination testified that he built the dam to be used in collecting the water for the purpose of supplying and running the ram, the ram furnishing the power to drive the water into the house, with trees, rock and dirt. The defendant objected to any evidence about the dam. Her position was that the contract made no mention of the dam, that it was no part of the contract that the plaintiff was to build a dam, and that therefore all evidence concerning the dam was irrelevant and incompetent. So far as it appears to us from the case on appeal, the evidence was not injurious to the plaintiff, even if it had been irrelevant. There was nothing going to show that the dam, even if it was in a faulty condition, caused the failure of the water supply. But if it had appeared that a defect in the construction of the dam was the cause of the failure of the plant to supply water to the house the evidence was competent. The contract was that the water system should be installed. The system was to produce a flow of water into the house. The installation of the water system included the apparatus and accessories after the same had been constructed

and arranged for practical working. When the plaintiff agreed to install the water system and also to install a hydraulic ram for the purpose of forcing water into the tank, it in substance and in effect agreed to put to a practical test the furnishing of water to the ram in order that results might be shown. It was not bound to keep the dam in good condition and repair. But, besides, the proper construction of a contract is very (532) often aided by the interpretation the parties themselves put upon it. The plaintiff here construed the contract between it and the defendant to mean that it was its duty to build a dam to collect the water to be used by the ram, and went to work and built the dam.

The second assignment of error related to the admission of the evidence of Dr. Thompson, an expert witness. There was evidence in the case that several persons living in the house with the defendant, but not of her immediate family, had suffered with malarial disorders. Dr. Thompson testified that he noticed odors from the bath room, that there was dampness in the house, that there were mosquitoes, and that in his opinion that caused the sickness. The plaintiff insisted that that evidence was incompetent because the defendant was not entitled to recover damages on account of the sickness of persons who were not of her immediate family, and not even parties to the suit. But the evidence was not offered or received for that purpose. The testimony of the witness Thompson was substantive evidence going to prove that the construction of the water system was defective. It was competent for the purpose.

No error.

(533)

LEE v. RAILROAD.

(Filed 22 November, 1904.)

1. CARRIERS—*Damages.*

In this action against a railroad company for delay in the shipment of goods the plaintiff cannot recover freight paid a steamship company for "dead freight room" for which it had contracted, the railroad not having had notice thereof.

2. CARRIERS—*Damages—Measure of.*

Where a carrier had no notice that a delay in the delivery of the goods shipped by plaintiff to his order would result in any unusual or special damage, the measure of damages for the delay was the difference between the market value when the goods should have been delivered and when they were delivered.

3. DAMAGES—*Carriers.*

In an action for failure to deliver freight within a reasonable time the measure of damages is the interest on the amount invested during the delay, there being no evidence of a difference of price in the freight when it was delivered and when it should have been delivered.

ACTION by R. A. Lee & Co. against the St. Louis, Iron Mountain and Southern Railway Company, heard by Judge *M. H. Justice* and a jury, at May Term, 1904 of MECKLENBURG.

This action was prosecuted by the plaintiffs for the recovery of damages incurred by the failure of the defendant to deliver a lot of cotton in a reasonable time. The defendant company issued to the plaintiffs its bill of lading at Little Rock, Arkansas, for a hundred bales of cotton to be shipped to New Orleans, La., "shipside," consigned to the order of R. A. Lee & Co. The jury under the instruction of the Court found that the defendant negligently failed to deliver the cotton at New Orleans within a reasonable time. On the question of damages the plaintiffs proposed to show that by reason of the failure to deliver the
(534) cotton "shipside" at New Orleans within a reasonable time, they were unable to get the cotton loaded on a certain ship, and that the steamship company owning the ship required the plaintiffs to pay for dead freight room to the amount of $83.30 between New Orleans and Genoa, Italy, to which place the plaintiffs intended to ship the cotton. The defendant objected, the testimony was excluded and the plaintiffs excepted.

The plaintiffs proposed to show that they were, by reason of the delay in shipping the cotton, compelled to pay to their customer, to whom they had sold the cotton for late shipment, $86.23. This testimny was excluded upon defendant's objection and plaintiffs excepted.

It appeared that the plaintiffs had invested in the cotton $4,387.88; that the delay in shipping, after allowing a reasonable time, from Little Rock to New Orleans was thirty-five days. The Court instructed the jury that the plaintiffs were entitled to recover interest on the amount invested for the time of the delay. From a judgment for this amount, the plaintiffs, having excepted, appealed.

Thomas W. Alexander, for the plaintiff.
Burwell & Cansler, for the defendant.

CONNOR, J., after stating the facts. There was no evidence dence tending to show that the term "shipside" had any special

or peculiar meaning when used in a bill of lading other than that which was usually and generally given to it. It would seem, giving the word its ordinary signification, that it was a direction to the carrier to deliver the cotton at some wharf accessible to its track in New Orleans to which a ship could come. In the absence of anything on the bill of lading to signify what ship was to receive the cotton, the consignee would have to notify the carrier. The cotton was shipped to the plaintiff's order. We can see nothing in the bill of lading in- (535) dicating to the defendant that the plaintiffs had contracted with any ship to carry the cotton or had become liable for the freight room, and in the absence of such notice the carrier is not liable for such damages as accrued by reason of a special contract made by the plaintiffs with the shipowners, and they can not be said to have been within the contemplation of the parties. It is immaterial whether we treat the cause of action as for a breach of contract or for a negligent omission to perform a public duty arising out of a contract. The damages in either case are confined to such as were reasonably within the contemplation of the parties when the contract was made by which the duty to the plaintiffs was assumed.

This Court, in *Lindley v. R. R.*, 88 N. C., 547, held that for failure to deliver freight, when the carrier is not informed of the special circumstances causing the loss of the plaintiffs' contract with other persons, the measure of damage is the difference between the market value of the article at the time it ought to have been delivered and the time it was in fact delivered. Joyce on Damages, sec. 1956, thus states the rule: "Where the delivery of freight is negligently delayed by a carrier, there may be in an action for the breach of the contract recovery of such damages as are the natural and proximate result of its act, and for such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract, as the probable result of a breach. When the carrier has notice of the fact that a delay in the delivery of the goods will result in an unusual loss or some special damage to the shipper, there may be a recovery for the actual damages sustained, when the notice is of such a character that it will be presumed that the carrier contracted with reference thereto." *Swift River Co. v. R. R.*, 169 Mass., 326, 61 Am. St., 288.

The word "shipside," in the absence of any evidence giv- (536) ing it other than a general meaning, did not give to the defendant notice that the plaintiffs had made a special contract with a steamship company in regard to carrying the cotton to Genoa. There is not the slightest indication in the bill of lad-

ing as to what place or in what ship the cotton was to be carried. The exception can not be sustained.

What we have said disposes of the second exception. In the absence of any notice to the carrier that the plaintiffs had made a special contract for the sale of the cotton, and would sustain a special loss for failure to deliver it within a reasonable time, the measure of damages is the difference in the value of the cotton at the time it should have been and the time it was delivered. There being no evidence of any such difference, the Court below correctly instructed the jury to award the plaintiffs the interest on the amount invested during the time the cotton was negligenly delayed. *Cotton Mills v. R. R.*, 119 N. C., 693, 56 Am. St., 682. The principle is stated with great clearness in 5 Am. & Eng. Ency., 384, and sustained by a large array of cases cited from English and American Courts. Negligence of Imposed Duties (Ray), 343. The ruling of his Honor was correct, and the judgment must be

Affirmed.

DOUGLAS, J., dissenting.

---

(537)

TILLERY v. LAND.

(Filed 22 November, 1904.)

1. SPECIFIC PERFORMANCE—*Agency.*

Specific performance will not be decreed as to land agreed to be conveyed by a person as agent, such agent having no authority to make the contract.

2. SPECIFIC PERFORMANCE—*Infants.*

Specific performance will not be decreed as to the lands of infants unless the contract is ratified after they become of age.

3. SPECIFIC PERFORMANCE—*Married Women—Husband and Wife—The Code, sec. 1256.*

Specific performance of the realty of a married woman will not be decreed when the contract is executed in compliance with the statute.

4. SPECIFIC PERFORMANCE—*Tenancy in Common.*

Where tenants in common contract to convey land, specific performance will be decreed against those whose contract is binding, though no conveyance of the others can be had.

5. SPECIFIC PERFORMANCE—*Vendor and Purchaser.*

Specific performance against a vendor denied, where it was intended to convey the interests of all owners in the premises, and a conveyance by the other owners could not be obtained.

TILLERY *v.* LAND.

ACTION by L. F. Tillery and another against E. M. Land, John H. Taylor and others, heard by Judge *C. M. Cooke* and a jury at May Term, 1904, of NASH. From the judgment rendered the plaintiffs and defendants Land and Taylor appealed.

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

Jacob Battle, for the defendant Taylor.

G. V. Cowper and *N. J. Rouse,* for the defendant Land.

MONTGOMERY, J. This action was brought by the (538) plaintiffs to compel the specific performance by the defendants of a contract in the following words: "This contract, made this 27 October, 1902, by and between E. M. Land for himself and as agent for the other owners, of the first part, and L. F. Tillery, of the second part, shows that the party of the first part agrees to sell to the party of the second part the tract of land in Nash County, near the town of Rocky Mount, adjoining the lands of L. F. Tillery, J. R. Green and others, known as the 'Taylor and Land tract,' containing about 577 acres, for which the party of the second part agrees to pay the sum of $6,500 or pro rata according to a new survey to be made at the expense of the first part; said purchase money to be paid one-half cash on the execution and delivery of complete title to the premises, and balance to be paid in three years from delivery of the deed, with 6 per cent interest from date of delivery." (Signed and sealed by E. M. Land, agent, and L. F. Tillery).

After the issues were submitted, it was agreed by the parties that the jury should be discharged and that his Honor should try the case both as to the facts and the law. His Honor found as follows: "1. That the contract referred to was executed by L. F. Tillery and E. M. Land, agent. 2. That at the time of the execution of the contract E. M. Land was authorized to contract to sell his own undivided interest in said land, which I find to be one-sixth of same. 3. That he had authority to contract to sell John H. Taylor's interest in the land, which is admitted to be one-tenth, at the rate of $6,500 for the whole tract, which was to be net to him, subject only to his pro rata part of the charge of executing and registering a conveyance, which by consent of parties is fixed at $20, making his part thereof $2, and that said Land had no authority to contract to sell the interests of the other defendants. 4. That at the time of the execution of the contract Land contracted as agent of Taylor (539) to sell the entire tract for $6,500, subject only to a charge against his share of the cost of executing and registering the con-

veyance, and that for himself alone he (Land) contracted to have a new survey made of the land and to pay the cost thereof, and that the price should be determined by the result of the new survey, and should be in the same proportion, in respect to price named, as the quantity discovered by the new survey should bear to 577 acres. 5. That Tillery, on 28 October, 1902, assigned to his co-plaintiff, W. L. Groom, one-half of all the rights and interests vesting in him by virtue of the said contract of 27 October, 1902." Upon the foregoing findings the Court adjudged that John H. Taylor recover of the plaintiff, L. F. Tillery, $650 upon the execution by him, the said Taylor, of a deed conveying his interest in the land to the plaintiff, Tillery and Groom, in fee, and that if said Taylor refuse to receive said money and to execute said deed on or before the first day of September next, then the said plaintiffs may pay the said sum into the Clerk's office, and upon its payment therein the Clerk of this Court, who is hereby appointed a commissioner for that purpose, shall execute a deed to the plaintiffs conveying to them the said Taylor's one-tenth interest in the land, and shall have the same proved and registered, the expense of which shall be paid out of said fund. (The plaintiffs waived the time unelapsed for the payment of one-half of the price under the contract). It is further adjudged that Land is entitled to recover of the plaintiff, Tillery, $1,083.33, to be reduced if the new survey hereinafter ordered shall discover that the number of acres is less than 577, by the proportion of said difference, and if the new survey shall discover that there is a greater quantity than 577 acres this recovery shall be increased accordingly, and this shall apply to the share of said Taylor as well as his own—Land alone being responsible for this part of the contract. It is further adjudged that John C. Beall be appointed to survey the land and make three plots of the
(540) survey, one to be filed with the Clerk, one to be delivered to the plaintiff, and one to the defendant Land, and that the surveyor make report to this Court—the survey to be made in the next sixty days. As to all the other defendants, except Land and Taylor, this action stands dismissed. And further, that the defendants Land and Taylor, as to the costs incurred up to the filing of this judgment and the enrolling of the same, pay the same in equal proportion; and upon the payment of the amount ascertained to be due Land, as provided above, after deducting any costs against him, he shall execute a deed to the plaintiffs conveying his share of the land to them in fee.

After his Honor had announced his finding of the facts the plaintiffs moved the Court for a decree of specific performance

against all the defendants, and upon that motion being overruled they then asked for a decree against E. M. Land, Edward Perry and wife, and E. M. Land, guardian of Annie Land, and John H. Taylor. That motion was refused except as to E. M. Land and John H. Taylor. The plaintiffs and the defendants, Land and Taylor, excepted to the judgment and appealed.

At the time of the contract two of the defendants, Annie Land and James Taylor, were infants, and Lucy Perry was a married woman, and there was no evidence that either one of the defendants, except Taylor, ever authorized the defendant Land to contract to sell his or her interest in the land described in the contract. His Honor therefore properly refused to have a decree entered against the infants or Mrs. Perry, or against either one of the adult defendants who had not authorized the defendant Land to contract to sell their interests in the land. However, in the oral argument here, as well as in the brief of the plaintiffs, it was contended that upon the face of the contract, as a matter of legal construction, Land had obligated himself personally to see to it that a proper deed should be executed by himself and the defendants for the entire (541) interest and estate in the land, and that therefore specific performance should be decreed against him, he not having shown on the trial that he could not procure the other defendants to join him in such conveyance. It will be seen, though, that the defendant Land not only did not claim the whole of the property, but distinctly declared that there were others who owned interests in the land, and that he was acting for them as their agent and signed the contract as their agent. So this is not a contract such as where one had made an agreement to convey land generally without disclosing the ownership and where the Court might grant a decree *in personam* against the vendor for specific performance, although he did not own the land at the time of the contract. The plaintiffs here knew that Land had only a fractional interest in the property and that he was acting as agent for the other owners; and therefore as a matter of law the plaintiffs could not have specific performance against Land for the interests of his principals. The plaintiffs could only have specific performance against such of the defendants as authorized the defendant Land to contract for them, and as we have seen there was no evidence tending to show that either one of them, except Taylor, gave him such authority. If the infant defendants and Mrs. Perry had authorized the defendant Land to convey their interests in the property, specific performance could not be enforced as to them. The contracts of infants to sell their real estate may be ratified after they become of

full age, and the courts might, and would in proper cases, compel them to specifically perform their contracts. But as long as they remain infants they could not be made to execute such contracts. As to married women, there is but one way in which their real estate or any interest therein can be conveyed under an executory contract to convey the same, and that is
(542) under the provisions and authority of section 1256 of The Code.

No Error.

DEFENDANT E. M. LAND'S APPEAL.

It was argued here that the contract was an indivisble one and had reference to the tract of land as a whole and not to the separate share of either one of the tenants in common, and therefore that no decree could be entered ordering specific performance as to the separate share of Taylor. There is nothing in the case going to show that it was the purpose or desire on the part of the defendant, Taylor, or Land, that the tract of land should be sold as a whole. In fact, Taylor's letter to his agent (Land) showed that he was only concerned in the sale of his interest and that of his brothers and sisters. While the plaintiffs in the case would not be compelled to take a part of the land if they could not get title to the whole, they could nevertheless compel either party to the contract to convey his interest in the premises. In Fry on Specific Performances, at section 1222, it is said: "Although as a general rule where the vendor has not substantially the whole interest he has contracted to sell, he, as we have seen, cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference." The same principle has been decided in our own Court in *Swepson v. Johnston,* 84 N. C., 449.

There was no error in any of the rulings of his Honor, and the judgment is

Affirmed.

DOUGLAS, J., dissents from the above opinion in Land's appeal.

TAYLOR'S APPEAL.

(543) CONNOR, J. The facts as gathered from the record are: The land in controversy, containing about 577 acres, belonged to E. M. Land, Lucy Perry and Annie Land, the last named an infant, all residing in this State, owning one-sixth each; and John H. Taylor, W. D. Taylor, James J.

Taylor and Margaret and Mary Taylor, the last named an infant without general guardian, residing in the State of Florida, owning one-tenth each. The land is situate near the town of Rocky Mount. The plaintiff, Tillery, residing in the said town, began some time in September, 1902, a correspondence with E. M. Land, residing at Kinston, N. C., in regard to purchasing the land. Thereupon, E. M. Land wrote John H. Taylor in regard to Tillery's offer. On 7 September Taylor writes: "We will sell the interest we have in the Rocky Mount farm. But am not especially anxious to do so, as I consider it a good investment. Ask Mr. Tillery to make us an offer for it and we will consider it." Land, two days thereafter, writes Tillery, quoting Taylor's letter and saying that he can make an offer through him. On the 17th Tillery writes Land, saying that he could handle the land at six or seven dollars per acre, asking him to write Taylor. Land does so, suggesting a sale of "the whole tract" at $6,000—saying, however, that he had not advised with his sisters, as "I thought he only wanted half interest." On the 18th Taylor writes, "I think we would sell our interest, provided we could get $6,000—that is, $3,000 for our interest"; adding a postscript, "I think it would simplify the matter if you all would join us and dispose of your interest at the same time, then one deed could be made to cover all." On 9 October Tillery writes Land, making a proposition to pay ten dollars per acre, provided they would include about two acres of the land. On the 10th Land writes Taylor that he has offered Tillery the farm for $6,500, enclosing Tillery's reply. He says: "I have written him that we would have the farm surveyed (544) if he accepts this offer of $6,500, but could not include the two acres. * * * If you do not approve entirely of this offer of $6,500 please wire me at once on receipt of this letter." On 15 October Taylor writes Land, acknowledging receipt of letter and saying, "I do not think that there is any necessity of having the farm surveyed," giving as his reason that it had been recently surveyed and a plot should be among the papers, and saying, "We are willing to take $3,250 for our share, and if there is any expense of making transfer of title, of course we will pay our share." October 27 the plaintiff and defendant E. M. Land signed the contract set out in the opinion of the Court. On the 28th Land wrote Taylor, notifying him of the execution of the contract and saying: "I hope this will meet the approbation of all of you concerned. This is substantially the offer I wrote you that I had made Mr. T. If there is any cause of complaint I wish you would advise me at once and I will try to adjust the same. I've made a contract with Mr. T.,

yet I might induce him to surrender same if your heirs are not satisfied." He concludes by asking Taylor to wire at his expense concerning the trade. The record shows that on 3 November Taylor wires Land, "Do not act for us until you hear further." The record in regard to the date of this telegram is evidently wrong, because on 2 November Taylor writes Land: "I wired you this A. M. not to act for us until you hear further from us. I do not want to be hasty in selling our interest in the farm until I learn its value. We might regret it at our leisure. We have suffered too many privations to pay the interest on the debt ever to throw it away. I will write you later on." Land, on 10 November, writes Taylor that he was trying to get Tillery to cancel the contract, and regretting that he had not submitted the final propostion to him for final decision. Taylor on the next day writes Land, saying:
(545) "We are sorry that you made any contract to sell the farm when you were not authorized to act or sign anything for us." It was admitted that Land had no other authority from Taylor than is contained in the correspondence. The only oral testimony heard by his Honor was that of Mr. Thomas H. Battle, who said he saw the contract of 27 October, 1902; that Land said to Mr. Tillery that he had received a letter from John H. Taylor (or one of the Taylors, he had forgotten which), and that he was authorized by Taylor to sell the land for $6,500, but was not authorized to make any survey at their cost or to make any abatement of the price if the survey should show that there were less than 577 acres, but that he (Land) would include in the contract the provisions as to those matters and in some way arrange that; that he was not authorized by John H. Taylor to make any agreement that would charge against him or the Taylor heirs any expense for those provisions, but that the land had been so recently surveyed that he was not afraid to run the risk.

His Honor refused a decree against any of the Taylor heirs except John H. Taylor, and as to him directed a conveyance of his one-tenth interest. He made the same decree against Land, with the additional provision that a survey be made and the amount due Land be reduced if it be discovered by the survey that the number of acres is less than 577, by the proportion of said difference, and if said survey shall discover that there is a greater number of acres the amount to be paid be increased accordingly. The last provision is made to apply to defendant Taylor. A survey is ordered, etc.

There are certain well-settled principles by which courts of equity are governed in suits for specific performance which

must be kept constantly in view. In discussing the appeal we wish to say that we are entirely satisfied there was no misrepresentation or suppression of facts, or purpose to mislead in the negotiations which led up to, or in the execution of the contract of 27 October, 1902. We are sure that all of (546) the parties were acting in perfect good faith and with full knowledge of the status of the title. We shall therefore omit in citing authorities any reference to such well-known grounds for refusing specific performance as fraud, misrepresentation, concealment, etc. The other equally well-known requirement, which is not to be found in this case, is that there shall be a contract the terms of which are clear, plain and well understood by and between the parties. It is apparent from the language used by defendant Taylor that he never contemplated a sale of his undivided interest in the land. Assuming, for the purpose of the argument, that he authorized the defendant Land to execute a contract for the sale of any interest, it is to my mind clear that representing his brothers and sisters and speaking for himself, it was his and *their* interest which he was willing to sell and not *his alone*. The language used shows this—"We are willing to sell the interest we have." "I think we would sell our interest in the place." "We are willing to take $3,250 for our share." There is no intimation of a purpose to sell otherwise than the entire interest of the Taylor children. It is conceded that when one representing himself to be the owner of the entire estate and title contracts to sell the land, he may, at the option of the vendee, be compelled to convey such interest as he has, with reduction of price. The principle is thus stated by Mr. Pomeroy: "When the vendor's title proves to be defective in some particular, or his estate is different from that which he agreed to convey, * * * it is plain that the contract cannot be specifically performed according to its exact terms at the suit of either party. In such case the Court will decree a conveyance of the vendor's actual interest and allow to the vendee a pecuniary compensation or abatement from the price," etc. Pomeroy Specific Per., sec. 434. It is conceded that this case does not fall within that class. Taylor has never, at any time, or in any manner, pro- (547) posed or suggested that *he* would sell the interest of his brothers and sisters. He at all times says, "*We* will sell *our* interest." Mr. Tillery does not in his complaint, or in any testimony, suggest that he was contracting for John H. Taylor's interest. The entire correspondence negatives such a suggestion. It is the *land* which he wishes to buy—knowing perfectly well the condition of the title. It is true that the Court will not

permit the right to have specific performance evaded or denied by a mere technical or immaterial objection. It will rather look to the real, substantial terms of the contract and decree its performance with such variations as will effectuate the intention of the parties. In this case the difference between the contract as made and as enforced is material. There has not been the *aggregatio mentium* which is essential to the completion of an enforcible contract. It is difficult to cite cases directly in point, because in suits for specific performance the peculiar features of each case vary so much. In *Jackson v. Torrence,* 85 Cal., 521, the defendant, together with his wife, entered into a written contract to sell a hotel and furniture which belonged to them jointly. The contract was not executed by the wife in accordance with the laws of the State. She refused to convey. The Court below decreed specific performance by the husband. The Supreme Court upon appeal by the husband, said: "He contends that the Superior Court erred in compelling him to convey his interest in the property on receipt of its proportion of the agreed price. He says that in so decreeing the Court compelled him to perform a contract which he never made or intended to make, and in this position we think he is sustained by the facts above stated." * * * The only contract he executed, or intended to execute, was a contract in which his wife was to join for the conveyance of the whole property for a round sum. Until the contract was completed by the accession of the wife there was no con-
(548) tract of which there could be any breach or failure to perform. The fact that the contract was made by husband and wife is noticed and emphasized by the Court as an additional reason why specific performance by one should not be decreed—but the point upon which the case rests is set forth in the extract cited. The question again came before the Court in *Olson v. Lovell,* 91 Cal., 506, wherein one of two tenants in common entered into a written contract in behalf of both to convey the common tenement, signing his own and his co-tenant's name without any authority. It is stated in the opinion that plaintiff did not rely upon any legal authority of defendant to bind Judson, but upon the probability that the latter would agree to whatever defendant might promise. *McFarland,* J., said: "The case at bar cannot be distinguished in principle from *Jackson v. Torrence.*" He notices the language of the Court in regard to the relation between husband and wife, and says: "But the ground upon which the decision rested was that to force a specific performance upon Torrence would be to compel him to perform a contract which he never made or intended

to make." It seems to us that these cases rest upon the correct principle. Taylor has by decree been compelled to do that which neither he nor the plaintiff ever expected him to do, or supposed that he was contracting to do. It is exceedingly doubtful upon a fair view of the entire correspondence whether Taylor ever constituted Land his agent to conclude a contract. It would seem rather that the correspondence was still in the nature of a negotiation. Conceding, however, that the contract is complete, and that the construction put upon it by the Court is correct, we are of the opinion that in view of all the circumstances the doubt as to the real intention of Taylor—the fact that immediately upon being notified that Land had made the written contract he promptly disaffirmed it—asserting, before there was any change in conditions or offer of higher, price, etc., that Land "was not authorized by us to act (549) or sign anything for us," the Court should not decree, with modifications, the conveyance of his one-tenth undivided interest. It is elementary learning in equity jurisprudence that the right to demand specific performance is not an absolute perfect right, but one resting in the sound discretion of the Court. To sustain the proposition it would seem unnecessary to do more than refer to the most approved works on Equity Jurisprudence. They all state the principle, and the Chancery Reports from the earliest time in England and this country contain numerous decisions declaring and enforcing it. GASTON, J., in *Leigh v. Crump,* 36 N. C., 299, thus states the doctrine: "The specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the Court. An agreement to be carried into execution then must be certain, fair and just in all its parts. Although it be valid at law, and if it had been executed by the parties could not be set aside because of any vice in its nature, yet, if its strict performance be under the circumstances harsh and inequitable a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." *Herren v. Rich,* 95 N. C., 500. The doctrine is stated clearly by Mr. Bispham: "While equity will grant specific performance in all cases where the dispensation of exact justice would seem to require it, yet on the other hand it has been found necessary to circumscribe the exercise of this delicate and effective power by limitations. Specific performance is usually said to rest in the discretion of the Chancellor. This discretion, however, is a judicial discretion. It is not a mere arbitrary will, but is subject to certain definite and well ascertained rules within which its play is confined." Bispham Eq., 494 (6 Ed.). Among the reasons which will induce the Court

to refuse the decree is, "that it is not clear that the minds
(550) of the parties have come together." This is illustrated by the case of *Chute v. Quincy,* 156 Mass., 189. If the specific enforcement of the contract "would operate in a manner different from that which was in contemplation of the parties when it was executed," it will not be so decreed. *Shaw,* C. J., in *R. R. v. Babcock,* 6 Met., 346. "The bargain must have been completely determined between the parties, and its terms definitely ascertained." So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed." *Brown v. Brown,* 33 N. J. Eq., 650. "Nor will the Court interfere when the evidence leaves the agreement as to any of its terms in uncertainty." *Ib.* "No rule is better established than that every agreement, to merit the interposition of a court of equity in its favor, must be fair, just, reasonable, *bona fide, certain in all its parts, mutual,* etc. If any of these ingredients are wanting, courts of equity will not decree a specific performance." *Stoddert v. Bowie,* 5 Md., 35. That certainty in its terms is required by the Court before specific performance is decreed is laid down in Story Eq., 769-770; *Tyson v. Watts,* 1 Md. Ch., 13; *Mills v. Van Voorhies,* 20 N. Y., 413. "A court of equity is always chary of its power to decree specific performance and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity." *Morrison v. Rossignol,* 5 Cal., 62. In *Trigg v. Read* (Tenn.), 42 Am. Dec., 447, the Court adopted Judge Story's statement that "It requires much less strength of case on the part of the defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill for specific performance." It is said that as the de-
(551) fendant was willing to sell his own and his brothers' and sisters' interest for $3,250, no harm comes to him by compelling him to take his proportion of the amount and convey his interest in the land. I do not conceive this to be an answer to his objection to the decree. In the first place, he never contracted to sell *his interest.* The Court may not make a contract for him. We can well understand how he, as is indicated by the correspondence, being the oldest of his brothers and sisters, is in some measure their natural guardian. That from considerations, which may well be urged in a court of equity, he does not wish and never intended to sever his interest from theirs. That his obligation to them by reason of his relationship has con-

trolled him in carefully guarding his written words, so that no one would understand that he was proposing to do so. There is an expression in his letter of 11 November, in which he speaks of privations suffered to pay the interest on the debt over the land showing that was in his mind. Again, his perfect frankness in writing Mr. Land shows that he was acting in good faith. The plaintiff has not paid out one cent for the contract nor in any manner changed his position. He has doubtless made a good bargain—which he had a perfect right to do—but as it is evident that the defendant did not intend to sell otherwise than his letters so clearly express, we do not think, in the light of the well-settled doctrine of equity and the many decided cases, the defendant should be held to convey his undivided interest in the land.

Error.

CLARK, C. J., and MONTGOMERY, J., dissent.

DOUGLAS, J., concurring as to Taylor and dissenting as to Land. I concur in the opinion of the Court that in the exercise of a sound legal discretion we should not compel Taylor to sell his individual interest separate and apart from (552) that of his brothers and sisters when no such result was in contemplation of either party when the contract was made. Both parties evidently contemplated a conveyance of the entire tract of land. I agree with the Court that specific performance is largely within the discretion of the Court, to be exercised indeed within certain well-defined limits, but none the less equitable in its nature and its application. Unknown to the common law, it is not an absolute right, and is never enforcible when inequitable in its character and oppressive in its results.

It is true that this Court has said in *Stamper v. Stamper*, 121 N. C., 251: "While it is universally conceded that specific performance is a matter of discretion, the best authorities agree that where a contract relating to land is not objectionable legally, it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for a breach thereof." We were then speaking of a contract that could be enforced in its entirety, and the land itself could be conveyed. In the case at bar the contract itself cannot be enforced as made, but only *pro tanto;* while the land itself cannot be conveyed, but only an undivided interest therein. The plaintiff could not be put in exclusive possession of any part of the land, and could enforce his undivided ownership only by compelling a division of the land or a sale thereof, perhaps greatly to the injury of his co-tenants. Therefore I concur in

the opinion of the Court as to Taylor; and for identically the same reasons I dissent therefrom in its holding that Land must convey his individual interest. Why should not the same equitable principles apply to Land? The same equitable discretion exists as to both, why should it not be equally exercised? Taylor did not contract to sell his individual interest; neither did Land.

Taylor said "*we* will take $3,250 for our half; Land said
(553) "*we* will take $6,500 for the entire tract." It is said that Land was authorized to sell his individual interest; it was found as a fact that he was also authorized to sell Taylor's interest. He did not agree to sell either separately, but only in so far as they were included in the entire tract. Of course both Land and Taylor could have sold and conveyed their individual interests, but they have not done so. They have only *contracted* to convey, even if we assume that a joint agreement to sell the entire tract was in legal effect an individual agreement to sell their separate interests. At best, the contract is therefore executory and is specifically enforcible only in a court of equity and in accordance with equitable principles. Under the facts found by the Court below, I do not see that Taylor stands in any better position than Land; and I see no reason why the plaintiff should not be relegated to his legal right of action in both cases. There is a material difference between the case at bar and those cases where the land itself can be conveyed with a diminution of price on account of existing encumbrances or failure in the stipulated acreage.

The fundamental principle of specific performance—that which brought it into existence—is that there is no adequate remedy in an action at law; that the thing bargained for is of such a nature, either intrinsically or from association, that mere money damages cannot afford complete compensation. For instance, a family portrait of small intrinsic value would afford no basis for damages at law. The same was held as to slaves whose individual characters and associations were so different that one might not be able to take the place of another. Land also has distinctive characteristics that might give it a special value and find just relief only in specific performance. But one dollar is like another dollar. All dollars are alike that have the same purchasing value, and therefore find their fullest compensation in pecuniary damages. As in the case at bar, the
(554) plaintiff could not recover any specific part of the land. I do not see why he has not an adequate remedy in an action for breach of contract.

Cited: Lumber Co. v. Leonard, 145 N. C., 351.

MOORE v. ELECTRIC CO.

(Filed 22 November, 1904.)

1. STREET RAILROADS—*Animals—Negligence—The Code, sec. 2326.*

The killing of a dog by a street railway is not *prima facie* evidence of negligence.

2. ANIMALS—*Damages.*

An action may be brought for an injury to a dog.

3. STREET RAILROADS—*Damages.*

In an action against a street railway for killing a dog, the motorman is warranted in acting on the belief that the dog on the track apparently in the possession of his faculties will avoid danger.

4. STREET RAILROADS—*Damages.*

A street railway company, when its cars are properly equipped, is not liable in damages for the killing of a dog by one of the cars, unless the killing was done under such circumstances as to justify the conclusion that it was either willful, wanton, or reckless.

5. STREET RAILROADS—*Damages—Evidence.*

In an action for the killing of a dog by a street car, it is not competent to show the condition of the fenders on particular cars other than the one by which the dog was killed, it being shown that the fenders were different on different cars.

ACTION by W. J. Moore against the Charlotte Electric Railway, Light and Power Company, heard by Judge *Thomas A. McNeill* and a jury, at March Term, 1904, of MECKLENBURG. From a judgment for the plaintiff the defendant appealed.

T. G. McMichael, for the plaintiff. (555)
Burwell & Cansler, for the defendant.

MONTGOMERY, J. This action was commenced in a court of a justice of the peace for the recovery of fifty dollars for the killing of the plaintiff's dog by the alleged negligent operation by the defendant of one of its street cars. There were no written pleadings in the case, but upon a reading of the evidence it would appear that the plaintiff on a trial in the Superior Court relied upon four alleged acts of negligence: First, excessive speed of the car; second, permitting high weeds to grow upon the sides and near the track; third, the failure to stop the car in time to avoid the collision, and fourth, failure to equip the car with a proper fender.

We have no case in our Reports where the injury to or the killing of a dog by a railroad or street car company is made the subject of a civil action for the recovery of damages by its owner. Our statute, sec. 2326 of The Code, makes it *prima*

facie evidence of negligence on the part of a railroad company, in an action for damages against the company, whenever it appears that any cattle or other live stick shall be killed by the engines or cars running upon the railroad. The statute does not give the right, in case of injury or killing of cattle or other live stock, to the owner thereof to bring an action for his loss of property. That right the owner had before. The statute made the killing *prima facie* evidence of negligence. The dog is not included of course in the category of cattle or live stock, but is a species or subject of property recognized as such by the law, and for an injury to which an action at law may be sustained. *S. v. Latham,* 35 N. C., 33. There would be no presumption of negligence, however, by the mere fact of killing or injury being shown. In numerous cases this Court has
(556) laid down the law concerning the duties of engineers in charge of moving railroad locomotives in regard to cattle and live stock on and in near proximity to the railroad track and in front of the moving cars. In *Wilson v. R. R.,* 90 N. C., 69, the Court said: "If the mule ran off the road quietly and manifested by its acts no great alarm, but a disposition to get away from the road, or if at first it stood still, off the road, until the near approach of the train, then it suddenly ran back on the road a short distance ahead of the engine and was killed, the engineer being unable to stop the train, in such case there would not be negligence and the defendant would not be liable. But in another view, if the mule was greatly frightened at the whistle and the train, was panicstricken, ran about wildly and recklessly in the immediate neighborhood of the road, and would as likely in its fright run on as from it, and the engineer failed to slacken the speed of the train, and the mule suddenly dashed back on the road and was killed by the engine, this would be negligence and the defendant would be liable for damages. It may be conceded that where cattle are quietly grazing, resting or moving near the road—not on it, and manifesting no disposition to go on it—the speed of the train need not be checked; but the rule is different where the cow or mule is near the road and runs on, then off, along, near to, and back upon it. In such a case, reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, stop it until the danger shall be out of the way."

That case is cited and approved by this Court in *Snowden v. R. R.,* 95 N. C., 93, and *Ward v. R. R.,* 109 N. C., 358.

And in *Doster v. R. R.,* 117 N. C., 651, 34 L. R. A., 481, the Court said: "Where a horse is being driven or is run-

ning uncontrolled along a highway parallel to a railway (557) of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it so as to cause a collision."

We think that the dog is not entitled to the same consideration at the hands of an engineer in charge of a moving locomotive that cattle or live stock are, and that the engineer is not, therefore, compelled to keep either as vigilant lookout for dogs or as great care in the management of his engine or train so as to prevent their injury as he is for cattle or live stock. However, the dog in the case before us suddenly appeared on or near the track and manifested no fear or excitement. It is not hazarding too much to say that it is a matter of common knowledge that in the classification of animal life (not including man) the dog occupies a position in point of intelligence, fidelity and affection superior probably to all of the others. He is known to have been for ages not only an animal of prey but wonderfully acquainted with the habits and ways of both man and beast and birds, keenly sensitive as to sight, hearing and smell, and remarkably agile in all of his movements. He can, by training and association with man, become adept in many useful employments and can be taught to do almost anything except to speak. They are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies the dog would extricate himself with safety.

In a line with the foregoing observations is one in the opinion in the case of *Jones v. Bond,* 40 Fed., 281, where the Court, in denying the right of recovery for the negligent (558) killing of a dog, said: "I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to divert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment or escape from dangerous places where a horse or cow would be altogether helpless; hence, the same care to avoid injuries to an intelligent dog on a railroad is not required of those operating the trains that it required in regard to other animals. The presumption is that such dog has the instinct and ability to get out

of the way of danger, and will do so unless its freedom of action is interfered with by other circumstances at the time and place."

We think, therefore, that the dog, on account of his superior intelligence and possession of the other traits which we have mentioned in respect to the diligence and care which locomotive engineers owe to their owners and to them, must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger and would get out of the way in time to avoid the injury. As the engineer would be negligent if he ran over and injured or killed a man on the track who was apparently helpless, so he would be if he killed or injured a dog near or upon the track in a position which showed that he was helpless or totally oblivious of his surroundings.

In *Rapid Transit Co. v. Dew,* 100 Tenn., 317, 40 L. R. A., 518, 66 Am. St., 755, the Court allowed a recovery because it appeared that the dog which was killed was standing upon the track of the street railway, engaged in pointing some birds, which fact the motorman saw for a considerable distance (559) before the car ran over the dog. Besides, we know of common knowledge that within this jurisdiction, at least, there is scarcely a household without a dog or dogs; that they are found in every street and public place, no limitation being put upon their free movements, and by the hundreds they daily pass in our cities and towns over the street railway track, where and as often as they please. If, therefore, it should be required that motormen in charge of these cars should exercise the same degree of care to avoid running over a dog that the law requires them to avoid injury to other animals, the public convenience of rapid transit in populous communities would be seriously impaired and all business interests made to suffer. As the defendant's counsel say in their brief, "the dog would be absolute master of the situation and would force the electric cars out of business."

The true rule, we are satisfied, should be that street railway companies, when their cars are properly equipped, should not be held liable in damages for the killing of a dog by one of the street cars in motion, unless it was done under such circumstances as to justify the conclusion that the killing was done either willfully, wantonly or recklessly.

The undisputed evidence in this case renders it unnecessary to discuss, according to the view of the law which we have announced, either of the alleged acts of negligence except the last

one, to wit, the failure to properly equip the cars with fenders. The plaintiff, in his examination in chief, had testified as to the killing of his dog and its value. He was afterwards recalled, and then testified, over the defendant's objection, that he had measured one of the fenders on one of the cars and found that it was twenty-five inches from the track on one side and twenty-three inches from the track on the other side; and further, that he saw several fenders that were about the same height from the track, and that there were three or four different kinds of fenders on the cars, and that the defendant used (560) on the big cars a very different fender from that used on the little cars, and that it was a little car that ran over his dog. That evidence ought not to have been received. It was offered, of course, to prove that the fender upon the car that killed the dog was either improperly constructed or had been permitted to become defective, and the jury might draw the inference that if the fender had been of standard make or in good condition the dog would not have been killed. But it was not competent to show that the fender on the car which killed the dog was defective by evidence to the effect that a fender on one of many cars was defective or out of repair. The evidence would be too highly conjectural. Especially is this so in this case, as it appears from all the evidence that the plaintiff would have had no difficulty in identifying the car which killed the dog. The statement of the plaintiff, too, that there were several different kinds of fenders on the different cars, and that those on the big cars were very different from those on the little cars, and that one of the latter killed the dog, did not amount to evidence of any kind pertinent to the case. It did not tend to show which were the superior fenders or which were defective fenders, those on the big cars or those on the little cars. The evidence was misleading. And, besides, the very fact, if it existed, that the defendant had three or four different kinds of fenders would make it quite clear that evidence of one kind of fender on one of the cars should not be used to show how another car was equipped as to the fenders. The motorman testified that the fender on the car which killed the dog was in good condition and would do its work well, and there was no evidence to the contrary.

The motion of the defendant to nonsuit the plaintiff because there was no evidence tending to show negligence (561) on the part of the defendant ought to have been allowed.

Error.

DOUGLAS, J., concurs in result.

Cited: Stewart v. Lumber Co., 146 N. C., 65.

PATTERSON v. RAMSEY.

(Filed 22 November, 1904.)

COSTS—*Ejectment—The Code, secs. 525, 526, 527.*

In ejectment, where the defendant denies the right to possession and denies that plaintiff holds title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant.

ACTION by J. M. Patterson against R. A. Ramsey, heard by Judge *O. H. Allen* and a jury, at February Term, 1904, of IREDELL.

This action was brought to recover possession of a tract of land. Defendant set up in defense a parol trust, as follows: That the plaintiff bought the lands at a public sale made by the trustee under a power contained in a deed of trust executed by the defendant to S. J. Brawley to secure a debt due him, and that prior to the sale he promised and agreed to hold it in trust for the defendant until he could pay the amount of the purchase-money advanced by the plaintiff, which was $3,995. That defendant remained in possession of the land after the sale, upon an agreement to pay the plaintiff out of the rents and profits a sufficient amount each year to keep down the interest, with which agreement he complied. That defendant offered to settle with the plaintiff upon the basis of $3,995 and interest
(562) thereon if plaintiff would account for the rents and profits received by him, but he declined the offer and insisted upon receiving $6,000 as the price of the land, and would agree to settle only on that basis. Defendant, in his answer (section 6), avers his willingness to settle with the plaintiff and to pay him any amount found due according to their contract or agreement. Although no reply was filed by the plaintiff to the answer, he seems to have denied the trust, as an issue was submitted to the jury, based upon the averment in the answer of a trust, which was found in favor of defendant. Upon this finding of the jury the Court, at November Term, 1902 (Judge *Neal* presiding), adjudged that the plaintiff was not the owner of the land, but that he held the legal title in trust for the defendant, and directed a conveyance of the title to be made by the plaintiff to the defendant upon the payment by the latter of the sum found due to the former, which sum, until it should be paid, was declared a lien upon the land. A reference was then ordered to state an account. The referees reported to November Term,

1903, finding that the defendant owed plaintiff $3,327.61, and exceptions were filed to the report by both parties. At February Term, 1904 (Judge *O. H. Allen* presiding), counsel for the respective parties agreed in writing as to the rulings upon the exceptions which increased the amount which was found by the referees to be due to $3,558.61, and it was then further agreed by them that judgment should be entered therefor. The Court thereupon adjudged that the plaintiff convey the land to the defendant upon the payment of the debt thus ascertained, and that "all the costs incurred before the referees, including witnesses both for the plaintiff and defendant, be taxed by the Clerk of the Court against the defendant." There were other costs taxed against the defendant, but he took no exception thereto. Costs accrued to the time of making the order of reference were taxed against the plaintiff. The Court provided for a (563) sale of the land if defendant failed to pay the debt and costs taxed against him by the day named in the judgment. Defendant excepted to that part of the judgment taxing against him the costs of the reference as above set forth, and appealed.

Armfield & Turner, for the plaintiff.

L. C. Caldwell, W. G. Lewis and *H. P. Grier,* for the defendant.

WALKER, J., after stating the case. Upon the foregoing statement of facts taken from the record, we think his Honor erred in taxing the defendant with any part of the costs covered by his exception. The taxation and payment of costs are now regulated by statute (*Clerk v. Comrs.,* 121 N. C., 29), and the courts have no power, of course, to adjudge costs against any of the parties to an action otherwise than is indicated in the statute, save perhaps in some cases where the Court may exercise its discretion, but this case is not within any such exception. It is provided by the statute that "costs shall be allowed, of course, to the plaintiff upon a recovery in the following cases: (1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings or is certified by the Court to have come in question at the trial. (2) In an action to recover the possession of personal property. (3) In actions of which a court of a justice of the peace has no jurisdiction. "The Code, sec. 525. "Costs shall be allowed, of course, to the defendant in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein." Section 526. "In other actions costs may be allowed or not, in the discretion of the Court." Section 527. This is an action for the

recovery of real property, and the plaintiff has not only
(564) not recovered it, but the legal title which he holds has been decreed to be conveyed by him to the defendant upon compliance by the latter with a certain condition—the payment of the sum due to the plaintiff. So that, the plaintiff has not "recovered" in the case within the meaning of the statute. He sought to recover the land in violation of a parol trust which affected his conscience and required him to surrender the possession of the land and the title upon the defendant's paying the money due. He denied the trust, and upon the issue raised by this denial he was defeated before the jury. It then became necessary to ascertain the amount due by the defendant, the parties having disagreed as to what it was. For this purpose a reference was ordered, to which order no exception was taken by either party. The bare fact that the referees found that defendant was indebted to the plaintiff in the amount mentioned in their report did not of itself subject the defendant to the payment of any costs—not even to the costs of the reference. In order to determine who should pay the costs, we must consider the general result and inquire as to who has, in the view of the law, succeeded in the action. When a plaintiff sues to recover land and the defendant denies the allegations of ownership and right to the possession and avers that plaintiff holds the land in trust for him, which trust the plaintiff denies, if the trust is established and plaintiff loses what he sued for, can it be said that he has recovered merely because, upon a reference to ascertain the amount due, the referees report a balance against the defendant? If so, he recovers something that he did not sue for, and which he denied when he brought the action and up to the time of the adverse verdict of the jury belonged to him. A recovery within the meaning of The Code cannot be predicated of anything coming to him which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title.
(565) The reference and report of the referees were necessary to determine the extent of the defendant's equity, as the payment of the amount found to be due by him is the condition upon which only the Court will enforce that equity. Instead of the plaintiff having recovered in the action, the defendant has done so, because the plaintiff has failed to get the specific relief he demanded or anything akin to it, and the defendant has been awarded that for which he prayed, although he is required to pay money to the plaintiff, as in the case of a mortgagor redeeming his property. The equity arose out of the promise of the plaintiff to buy and hold the land for the defendant's use

and benefit and to convey it to him when he paid the purchase-money or any balance due thereon, so that the obligation to pay the money was an inherent part of the equity.

In *Vestal v. Sloan,* 83 N. C., 555 (S. C., 76 N. C., 127), we find a case essentially like ours in its facts. The plaintiff brought suit to recover land and the defendant set up a parol trust, which was denied by the plaintiff. The jury found against the plaintiff and an order was made for an account, as the parties differed in respect to the amount due by the defendant. The referee's report showed that the defendant owed the plaintiff. Exceptions were filed by defendant and overruled, and the plaintiff was adjudged to make title to the defendant upon payment of the balance due. Costs were taxed against the defendant and he excepted. In this connection the Court said: "The object of the action instituted was the recovery of possession of the land and the establishment of the plaintiff's legal title in fee thereto. The defense set up was a trust attaching to the legal estate and the right to redeem upon payment of the residue of the debt with which the land was charged. Most of the costs were incurred in determining this controversy and the sum to (566) be paid in redeeming, and in this the defendants prevailed and they are allowed to redeem upon payment of what is due. The plaintiff has not recovered the real property claimed in the action, so as to entitle him to recover his costs (The Code, sec. 525, C. C. P., sec. 276), while the defendants have sustained their counter claim and equity, which is but a reversed action between the same parties in which relief is at once afforded instead of the defendants being forced to seek it in a new suit before another tribunal." And, quoting from the opinion of TAYLOR, C. J., in *Price v. Sykes,* 8 N. C., 87, it is further said: "With respect to costs, they ought to be paid by the defendants (the plaintiffs in the action), since they prosecuted an unjust claim at law and have set up an inequitable defense in this Court." The Court finally held that the plaintiff had failed in his action and should pay the costs. To the same effect is *Currie v. Clark,* 101 N. C., 321, where the same questions precisely were involved. The Court in that case sums up the matter in these words: "We think the third exception as to the costs in the Court below must be sustained. The plaintiff failed to recover the land, to recover which alone the action was brought. The defendants alleged and established an equitable defense, which rendered it expedient and just to administer certain equitable rights of the plaintiff, but the latter failed wholly to maintain the action as to the purpose for which it was brought."

But the plaintiff's counsel contend that, as the defendant denied that anything was due, he thereby made an accounting necessary and should therefore be taxed with the costs of the reference. The record tends to show that the plaintiff himself did not know what was due, or, if he did, he did not disclose it or claim any particular sum. For this reason a reference was necessary. But it seems to us the cases above
(567) cited furnish an answer to the contention, and further that *Bruner v. Threadgill,* 93 N. C., 225, is decisive of this case. There a mortgagor brought an action to redeem, and the mortgagee resisted his right and lost. A reference was ordered for an accounting, and in order to ascertain the balance due by the mortgagor. A balance was reported in favor of the mortgagee and the usual judgment rendered for the payment of the amount due, and, in default of payment by a certain day, for a sale of the land. The mortgagee was adjudged to be taxed with all the costs. He excepted and appealed. This Court held that a judgment decreeing a sale and allowing the plaintiff in that way to redeem was one in favor of the plaintiff, within the meaning of the law, and affirmed the decision of the Court below.

There is error in the ruling of the Court, and the defendant's exception is sustained.

Error.

Cited: Williams v. Hughes, 139 N. C., 20.

---

(568)

STATE v. DAVIS.

(Filed 17 December, 1904.)

1. TRIAL—*Judge—Opinion Evidence.*

   An expression by a trial judge that a witness had fully explained for an hour to the jury and to the satisfaction of the court certain facts, is erroneous.

2. TRIAL—*Judge—Opinion Evidence.*

   Where a trial judge presents the argument of the solicitor he should caution the jury not to convict the defendant until his guilt had been shown beyond a reasonable doubt.

INDICTMENT against E. J. Davis and others, heard by Judge *R. B. Peebles* and a jury, at March Term, 1904, of BLADEN. From a judgment on a verdict of guilty the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

McLean, McLean & McCormick, for the defendant.

S. *v.* DAVIS.

MONTGOMERY, J. The bill of indictment against the defendants for an assault with a deadly weapon upon D. A. Singletary seems to be, from certain parts of the evidence offered by the State, a very mild charge of the real offense committed against the peace of the State. In the night time several persons were discovered on or in the road at the prosecutor's premises, and on his opening his door to learn what he could of the matter he was fired at by one or two of these persons and wounded so as to lose the sight of one of his eyes. There was evidence tending to connect the defendants with the crime; but, for errors which occurred in the trial below, and which will be presently pointed out, there must be a new trial. The new trial is granted to the defendant Freeman because of certain remarks made by his Honor upon the examination of the witness Kerr, and to the other defendants because of error in his instructions (569) to the jury.

It seems that on the morning next after the wounding of Singletary there was found stuck up on Singletary's stables an unsigned writing in these words: "Mr. Singletary—You better put up fence as soon as you can, and if have to come after any more hogs you will find yourself in hell some morning." The evidence had disclosed that Singletary had impounded, under the stock law in force in that section, some hogs of the other defendants than Freeman; that Freeman lived with the Davises, and that Freeman and E. J. Davis, on the day before the night of the shooting, had demanded of Singletary the release of the hogs and had gone off, saying they did not intend to pay damages, and that on the night of Singletary's injury his hog pen had been torn down and Davis' hogs carried off. The State insisted on the trial below that the paper writing found posted near the hog pen was in the handwriting of Freeman, and to prove that fact it offered as a standard of comparison a certain affidavit which he had made before a registrar of election in his county in order that he might be enrolled as a permanent voter under Laws 1901, chap. 555. The contention of the State was that as that affidavit had been found in the office of the Clerk of the Superior Court, witnessed by the registrar of election, it was therefore equivalent to and of the same dignity as an affidavit made in the trial of a civil action, and in law furnished a sufficient standard of comparison. That insistence of the State raises a most important question of evidence, and as the State on the next trial may prove the handwriting of Freeman by other means, it is not necessary to decide it here.

Kerr, an expert witness on handwriting, was being examined as a witness for the State, and after he had been examined and

cross-examined at length was asked by the defendant's
(570) counsel to explain to the jury the similarity in the hand-
writing of these papers. The witness said: "I will not go over to the jury and point out this similarity unless his Honor instructs me to do so." It is stated in the record that just then his Honor, declining to allow the witness to further testify as to this matter, said in the presence and hearing of the jury "The witness has explained for at least an hour to the jury and the *satisfaction of the court* (italics ours) the similarity of the writing in these papers." No doubt the Judge and the witness were tired out with the protracted cross-examination of the witness, but his Honor ought not to have expressed himself in the presence of the jury as to the effect the evidence of the witness had produced on his mind. What he said was equivalent to instructing the jury that the witness had proved the similarity of the writings to his satisfaction. That he had no right to say.

His Honor, in giving the contention of the State, and to which the eighteenth exception was filed, was in error. Instead of presenting it as he did, it seems to us that he should have cautioned the jury against the spirit of its conclusion. The language of his Honor was as follows: "The State further insists that the circumstances and facts detailed by the witnesses point to the guilt of the defendants; that the State has shown that a crime was committed under such circumstances that no eye-witnesses could be had; that it has shown you a motive for the crime; that all the defendants were living on the land of E. J. Davis, whose hogs were shut up, and connected with him by blood or marriage; that the number of persons engaged in the crime was from six to ten—more than enough to include all the defendants; that only one other man lived in the locality where the tracks were traced, and that while it was impossible to get all the guilty ones, there is no danger of getting too many." As long as he saw fit to present
the argument of the Solicitor, he should have cautioned
(571) the jury to have convicted neither one of the defendants
until his guilt had been shown beyond a reasonable doubt.

NEW TRIAL.

STATE v. DANIEL.

(Filed 20 September, 1904.)

ASSAULT.

The cursing of a person and ordering him to come to the defendant, and he obeying through fear, is not an assault.

INDICTMENT against Richard Daniel, heard before Judge *C. M. Cooke* and a jury, at November Term, 1903, of HALIFAX.

Indictment for assault with a deadly weapon.

Edgar Alston, a witness for the State, testified: "I went to my hog-pen one Sunday at Littleton, about two months ago, taking them slops. Just below the hog-pen, when I got there, was the defendant and his brother-in-law, Mr. Burton. After I fed the hogs and started towards the house the defendant called me to come to him. I told him I was in a hurry to get back home to dress and go to preaching. He called me again, and said 'You come here.' I replied, 'Yes, boss man, of course if you order me to come I'll come.' I pulled off my hat and went on to him, and he cursed me and said 'Why can't you come to me when I call you?' I told him I did. I always obey a white man when he calls me, and I knew he meant for me to come. Just about that time he snatched a knife out of his right hand coat pocket that was open and put the blade right up against my throat and told me if I moved my hands he would cut my damned throat, and then he tapped me on the head with the handle of it. I stood there with my hands right down by my sides until he told me to put my hat on and go to the house. Mr. Burton was standing near there, (572) but did not try to stop him. I think the defendant was kind of intoxicated. I do not think if he had been sober he would have done so." On cross-examination the witness stated: "It was between eleven and twelve o'clock. I pulled my hat off as I started to him, and just as I got up to him I put my hat on, and he asked me why I did not come up to him when he called, and told me to take off my hat like a damn negro ought when he came up to talk to him, and then drew his knife and pulled off my hat."

The defendant, in his testimony, denied that he had used a knife, but admitted that he cursed the prosecutor, and stated that he had merely asked him to bring him a match and when he came told him he was too damned slow.

J. H. Burton, a witness for the defendant, testified that he is a brother-in-law of the defendant, and that the latter merely asked the prosecutor to bring him a match, and as the prosecutor started back to get it the defendant cursed him several times.

The witness was with Daniel at the time, but saw no knife, though he may have had one without the witness seeing it. The prosecutor took off his hat after he came up to the defendant. The witness admitted that he did not say anything about a match at the trial before the magistrate.

There was evidence tending to show that the defendant was under the influence of liquor at the time of the alleged assault, and also at the trial before the magistrate, when he drew a stick back at his own father.

The prosecutor was recalled and testified that the defendant did not ask him for a match and did not state at the magistrate's trial that he had done so. The defendant was convicted of a simple assault, and appealed from the judgment rendered upon the verdict.

(573) *Robert D. Gilmer, Attorney General,* for the State.
E. L. Travis, for the defendant.

WALKER, J. We must consider this case as if the Court below had given only the first instruction to the jury as to what would be sufficient to convict the defendant of a simple assault, because the jury were told that if they found the facts to be as stated in either one of the three instructions they should return a verdict of guilty, and we are unable to determine by which of the instructions the jury were influenced in coming to their verdict. We think that the second and third instructions were correct in law; and if we could see clearly and with absolute certainty that the jury acted solely under them, or either one of them, there would be no error and we would so declare; but as the jury may have acted solely under the first instruction, we must assume in this appeal, and in testing the correctness of the Judge's charge, that they did so act.

The first instruction was that if the defendant cursed the prosecutor, Alston, and ordered him to come to him, and Alston obeyed through fear, the defendant was guilty of an assault. Before the prosecutor reached the place near the hog pen where the defendant was standing, the latter had made no threat nor had he offered or attempted any violence to the person of the prosecutor, nor was there any display or exhibition of force of any kind, so far as the evidence here shows. In this state of the case we are unable to sustain this instruction as a correct statement of the law of assault. It would seem, says READE, J., that there ought to be no difficulty in determining whether any given state of facts amounts to an assault, but the behavior of men towards each other varies by such mere shades that it is

sometimes very difficult to characterize properly their acts and words. *S. v. Hampton,* 63 N. C., 14. While the law relating to this crime would seem to be simple and of easy application, we are often perplexed in our attempt to discriminate between what is and what is not an assault. But in (574) this case we have no such difficulty, as the law applicable to the facts has been clearly stated and well settled by the decisions of this Court.

An assault is an intentional offer or attempt by violence to do any injury to the person of another. There must be an offer or attempt. Mere words, however insulting or abusive, will not constitute an assault, nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. Where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun and there has been a sufficient offer or attempt. *S. v. Davis,* 23 N. C., 125, 35 Am. Dec., 735; *S. v. Reavis,* 113 N. C., 677. This principle, as stated by Judge GASTON in the first case cited, has been adopted as a correct exposition of the law of assault, not only in subsequent decisions of this Court, but in numerous cases decided in the courts of the other States. There must, therefore, be not only threatening words or violence menaced, but the defendant must have committed some act in execution of his purpose. It is not necessary at all that his words should be accompanied or followed by an actual battery, for a mere assault excludes the idea of a battery, but he must either offer to do violence, as by drawing back his first or raising a stick, or attempt to do it, as by aiming a blow at another which does not take effect because it is warded off by a third person, or by shooting at another and missing the mark—all of which is clearly and fully explained by PEARSON, C. J., in *S. v. Myerfield,* 61 N. C., 108. It is not necessary, in view of the facts of this case, that we should stop here to state how these acts can be qualified by words or otherwise, and with what restrictions or exceptions, so as to relieve the accused of any guilt. The law in this respect is also discussed in Myerfield's case, *supra.* (575)

The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton,* 63 N. C., 13; *S. v. Church,* 63 N. C., 15; *S. v. Rawles,* 65 N. C., 334; *S. v. Shipman,* 81 N. C., 513; *S. v. Martin,* 85 N.

C., 508, 39 Am. Rep., 711; *S. v. Jeffreys,* 117 N. C., 743. It is not always necessary to constitute an assault that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened rather than the present ability to inflict injury which distinguishes violence menaced from an assault. *S. v. Jeffries* and *S. v. Martin, supra.* It is sufficient if the aggressor, by his conduct, lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Pr., Pl. & Ev. (8 Ed. by Pomeroy), 907, 908.

If, therefore, the defendant had threatened the prosecutor with violence and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at the time in striking distance. But in this case, so far as the facts recited in the first instruction should be considered,
(576) there was not even violence menaced, but, at most, only offensive and profane words. There must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do a corporal injury—such an act as will convey to the mind of the other person a well grounded apprehension of personal injury. Bare words will never do, for, however violent they may be, they can not take the place of that force which is necessary to complete the offense. They are often the exhibition of harmless passion and do not by themselves constitute a breach of the peace, as the law supposes that against mere rudeness of language ordinary firmness will be a sufficient protection. *S. v. Covington,* 70 N. C., 71.

It may be, as suggested, that the positions of the two parties were relatively unequal, as the defendant belonged to a strong and dominant and the prosecutor to a weak and servile race, and it may further be that the words of the prosecutor as he approached the defendant were the cringing utterances of servility and showed great humility and submissiveness because of the lowliness of his station in life as compared with that of

the defendant, and therefore he abjectly obeyed the latter's command to come to him. All this may be true; and while it reflects little credit upon the defendant, whose conduct as it now appears to us can not be too severely condemned, it can not have the effect of reversing a long established principle of the law to which we must adhere, it being founded upon reason and justice and treated by the courts and the text writers as one of universal application. *S. v. Millsaps,* 82 N. C., 549, illustrates the extent to which the principle has been carried. In that case it appeared that the defendant addressed grossly insulting language to the prosecutor and then picked up a stone about twelve feet from the prosecutor, but did not offer to throw it, and the Court held that it was not an assault, but only violence menaced, and it was therefore error for the lower Court to charge the jury that if the acts and (577) words of the defendant were such as to put a man of ordinary firmness in fear of immediate danger, and the defendant had the ability at the time to inflict an injury, he would be guilty. Substantially to the same effect is *S. v. Mooney,* 61 N. C., 434. See also, *Johnson v. State,* 43 Texas, 576. In neither of those cases, though, was the prosecutor deterred from doing what he had a right to do, or in any respect unlawfully restrained in his action or conduct or constrained to act contrary to his wishes.

It was argued that the verdict necessarily excluded the idea that a knife was drawn by the defendant, but we can not assent to that conclusion, as the jury may have proceeded under either the second or third instruction in convicting the defendant. The prosecutor's testimony as to the use of the knife was positive, and opposed to it was that of the defendant, while that of Mr. Burton was negative. The jury did not accept and act upon the defendant's testimony, as they could not have returned the verdict they did if such had been the case, and, having accepted the prosecutor's version, as shown by the verdict, they may have adopted it in its entirety. While it may be true, therefore, that they convicted the defendant under the first instruction, it does not by any means follow that they did not do so under the second or third; but as we are unable to decide with any legal certainty which instruction influenced them, we must assume and decide that the verdict was given under the first or erroneous instruction, which entitles the defendant to another trial.

New trial.

Cited: S. v. Morgan, post, 632; *S. v. Garland,* 138 N. C., 680; *S. v. Scott,* 142 N. C., 585.

(578)

STATE v. LEARY.

(Filed 27 September, 1904.)

1. FORCIBLE ENTRY AND DETAINER—*Prosecutor—The Code, sec. 1028.*

Where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor and put his own lock on, without breaking anything or doing any violence, and committed no violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer.

2. FORCIBLE ENTRY AND DETAINER.

Where the possession of the prosecutor in forcible entry and detainer is only by sufferance, the prosecution cannot be sustained.

INDICTMENT against A. J. Leary, heard by Judge *G. S. Ferguson* and a jury, at Spring Term, 1904, of PAMLICO. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Simmons & Ward, for the defendant.

CLARK, C. J. The defendant was indicted for forcible entry and detainer (The Code, sec. 1028), which differs from forcible trespass in that the entry is committed in the absence of the person claiming possession (*S. v. Laney,* 87 N. C., 535), gist being the forcible entry as well as withholding possession by the strong hand after the return of the party who was in possession. There must be some force or violence in the entry in excess of a simple trespass (*S. v. Pollok,* 26 N. C., 305, 42 Am. Dec., 140; *S. v. Jacobs,* 94 N. C., 950), and that was not shown by the prosecutrix, whose testimony is that the defendant, in her absence, "unlocked the lock I had put on, and took it off and then put his own lock on, without breaking anything or doing any damage." Nor was there any violence on (579) the return of the prosecutrix, as in *S. v. McCanless,* 31 N. C., 375, which is quoted at length in *S. v. Laney, supra,* at page 537. The North Carolina statute (The Code, sec. 1028) is practically a copy of 5 Rich. II, chap. 8; 2 Bishop Cr. Law (7 Ed.), sec. 492. "In order to maintain * * * a criminal prosecution for forcible entry and detainer under the early English statutes, or those of a later time, which are based upon them and are similar in their provisions, it must appear that the plaintiff (person) was deprived of or was kept from the possession of the premises in question by actual force or appearances tending to inspire a just apprehension of violence." 13 Am. & Eng. Ency. (2 Ed.), 757. "A forcible entry is not

proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent any resistance. * * * Drawing a latch and entering a house seems not to be a forcible entry according to the better opinions; so, if a man opens the door with a key, or enter by an open window, or if he enter without the semblance of force, as by coming in peaceably, enticing the one out of possession and afterwards excluding him by shutting the door, without other force, there will not be forcible entry." 2 Bishop Cr. Law, 509; 1 Russell Crimes, 426. "Entering a room in a sawmill which was in occupation of the plaintiff and locked with a padlock, but in which there was no person at the time of the entry, through a hole in the floor, and afterwards removing a bolt for the purpose of making ingress and egress easy, does not constitute a forcible entry." *Pike v. Witt,* 104 Mass., 595.

Besides, the prosecutrix had no possession save by sufferance. She was the sister-in-law of the widowed daughter of the defendant, and lived, by agreement of the defendant with his daughter and her children in a house on the defendant's land till some months after the death of the daughter, when the defendant took his grandchildren to his own (580) home. The prosecutrix remained in the house, keeping her household things therein, notwithstanding the defendant's demand for possession, going to a neighbor's to sleep and returning to the house each day. The prosecutrix was not a tenant; the agreement to live with the daughter and children expired after the death of the daughter and the subsequent removal of the children. That under such circumstances the defendant quietly took possession by unlocking the door and putting on a lock of his own, did not make him guilty of forcible entry. He but resumed possession of his own and without force.

Indeed, in *S. v. Davis,* 109 N. C., 812, 14 L. R. A., 206, it is said: "When the premises are withheld by one having a bare charge or custody, as a servant or a mere trespasser or intruder, the owner may break open doors and forcibly enter if unnecessary force is not used." It is true it is there further said that a landlord is guilty of forcible entry who violently dispossesses a tenant whose lease has expired, citing Wharton Crim. Law (9 Ed.), 1087. But here the prosecutrix had never been a tenant, and there was no violence. *S. v. Mills,* 104 N. C., 907, 17 Am. St., 706, distinguishing *S. v. Hinson,* 83 N. C., 640. In instructing the jury that if they believed the state of facts above recited the defendant was guilty there was

Error.

(581)

STATE v. MOORE.

(Filed 4 October, 1904.)

FORMER CONVICTION—*Jeopardy—Justice of the Peace—The Code, secs. 898, 1133, 1144, 1145, 1149—Const. N. C., Art. IV, sec. 33.*

The conviction of a person before a justice of the peace which is collusive and not adversary is not sufficient to sustain a plea of former conviction.

INDICTMENT against Dave Moore, heard by Judge *Frederick Moore* and a jury, at August Term, 1904, of DUPLIN.

The defendant was indicted in the Superior Court for an assault with metallic knuckles on Jacob Dobson, and pleaded former conviction and not guilty. In support of the first plea the defendant introduced in evidence a proceeding before a justice of the peace, from which it appeared that on the same day on which the assault was committed he made affidavit before the justice charging himself with a simple assault on Dobson. The justice issued a warrant for Moore, on which is this entry: "Said defendant voluntarily came up to be tried and dealt with as the law directs." There was no return of any officer. Moore was then sworn and examined by the justice concerning the assault, and upon his own evidence was adjudged to be guilty and fined one dollar and taxed with the costs. It was admitted at the trial below that the defendant "swore out the warrant against himself, and that the justice, without notice to the injured party or any one else, and without hearing any testimony except the defendant's own statement, disposed of the case."

The Court charged the jury that if they believed the evidence the trial and conviction before the justice were a nullity and the plea of former conviction was not sustained. Defendant excepted. There was evidence tending to show that de-

(582) fendant assaulted Dobson with metallic knuckles, and there was also evidence tending to show the contrary and that only a simple assault was committed. The jury convicted the defendant of a simple assault, and from the judgment on the verdict he appealed.

Robert D. Gilmer, Attorney-General, for the State.
Stevens, Beasley & Weeks, for the defendant.

WALKER, J., after stating the facts. The Constitution, Art. IV, sec. 27, confers jurisdiction upon justices of the peace

"under such regulations as the General Assembly shall prescribe, of all criminal matters arising within their counties, where the punishment can not exceed a fine of fifty dollars or imprisonment for thirty days." The General Assembly has from time to time prescribed the rules and regulations under which this jurisdiction shall be exercised. Among other provisions of the law, it is required that a complaint shall be made to the justice that a criminal offense has been committed and the complainant and any witnesses produced by him shall be examined, and it must appear by such examination that an offense has been committed before any warrant is issued. The Code, sec. 1133. It is further provided that the justice before whom any person so charged with having committed a criminal offense is brought, shall examine the complainant and the witnesses, on oath, in the presence of the defendant, and he shall then proceed to examine the defendant in relation to the offense charged (sections 1144 and 1145), and the witnesses shall not be present during such examination of the defendant. Section 1149. Either party, the complainant or the accused, is entitled to a jury trial, if demanded. Section 898.

It is made clear enough by these provisions of the law, even when considered apart from the well established methods of judicial procedure, that it was contemplated there should be an adversary proceeding in all trials of criminal cases (583) before a justice of the peace, especially when the justice assumes final jurisdiction. It was never intended that the accused should be also the accuser and the sole witness against himself. Such a proceeding would not conduce to the discovery of truth, and the detection and punishment of crime, which is the real object to be obtained, and would oftener than otherwise defeat the very ends of justice. What was done by the justice and the defendant, as shown in this case, has none of the features or characteristics of a judicial investigation. It was nothing less than a sham and a mockery of justice and should never receive the countenance and surely not the sanction of the law. The State has in fact never been heard, the injured party was never notified, and no witnesses were examined to explain or contradict the defendant's statement. If the proceeding had been found to be collusive, so that it would have appeared that the conviction and light sentence were procured by the fraud of the accused, which was acquiesced in by the Court, the law would at once have adjudged it to be a nullity. *S. v. Swepson,* 79 N. C., 632; *S. v. Roberts,* 98 N. C., 756. If the Court will disregard the former conviction if found as a fact to have been obtained by fraud and collusion, with how

much greater reason should it ignore it when it appears on the very face of the proceedings, as it does in this case, and by conclusive presumption of law that there was such palpable misconduct as vitiated it and rendered void the pretended judgment of conviction. We can see by a mere inspection of the papers introduced in support of the plea that there has in contemplation of law been no judicial investigation and, consequently, no trial of the accused. If the fraud or collusion underlying the pretended prosecution does not appear upon the face of the proceedings the State, when the plea of former acquittal or former conviction is set up, is required to
(584) plead the fraud by way of replication to the plea and then the issue thus joined is tried separately by the jury. *S. v. Swepson, supra; S. v. Yarbrough,* 8 N. C., 79.

If one procures himself to be arrested and prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, and if the proceeding is really instituted and managed by himself, he is, while thus holding his fate in his own hand, in no jeopardy. The State is no party in fact, but only such in name; the magistrate under such circumstances adjudicates nothing; "All is a mere puppet show and every wire is moved by the defendant himself." The judgment, therefore, is a nullity and is no bar to a real prosecution. 1 Bishop's Cr. Law (6 Ed.), sec. 1010. In *Holloran v. State,* 80 Ind., 586, the Court fully sustains and approves the doctrine as thus substantially laid down by Bishop, and adds: "If the whole case is controlled and managed by the accused there are no adverse parties, and when this is so there can not in the true sense of the term be a former conviction or acquittal. If the proceeding is absolutely void, then it may be attacked in any manner; the State is not required to make a direct attack." One of the strongest expressions from any Court upon the subject that we have seen will be found in *S. v. Green,* 16 Iowa, 239, where it is said of a judgment procured by collusion: "In this state of the case the State had its election to appeal or to treat the action of the magistrate as a farce and his judgment as a nullity." That case is strikingly illustrative of the general rule and but shows the decided trend of judicial thought towards the view that a proceeding wherein a defendant accuses and prosecutes himself is not real but fictitious, a mere travesty, which will not be allowed to stand
(585) in the way of a serious enforcement of the law. A good statement of the principle will be found in 12 Cyc. of Law & Pro., 262, with a full and accurate citation of

the leading cases upon the subject, which we have examined and find to be in perfect accord with the text. The following authorities support the general proposition that there is no former jeopardy if the acquittal or conviction was procured by the defendant, even indirectly, by fraud or collusion or for the purpose of forestalling a real prosecution by the State or the injured party. *Watkins v. State,* 68 Ind., 427, 34 Am. Rep., 273; *Com. v. Dascom,* 111 Mass., 404; *McFarland v. State,* 68 Wis., 400, 60 Am. Rep., 867; *Thomas v. State,* 114 Ala., 31; *Bulson v. People,* 31 Ill., 409; *Peters v. Koepke,* 156 Ind., 35; *S. v. Green,* 16 Iowa, 239; 1 Wh. Cr. Law, sec. 546; Archbold's Cr. Pl. & Pr., 352; *S. v. Roberts,* 98 N. C., 756. In *S. v. Cole,* 48 Mo., 70, the defendant having committed an assault went before a justice and caused proceedings to be instituted against himself, and was fined three dollars and taxed with the costs. Subsequently a prosecution was instituted by the injured party for the same offense. The defendant pleaded former conviction in bar of the prosecution, and the Court said: "It is apparent that the first prosecution was a mere sham, gotten up by the defendant to shield him from the consequences of a real prosecution followed up by a real prosecutor. His action in that respect was a fraud upon the criminal justice of the State, and can not be allowed to succeed. The conviction, if such it might be called, is no bar to the present prosecution. It is a sufficient answer to the plea that the alleged conviction was procured by the fraud and evil practice of the defendant himself." Precisely to the same effect are the cases of *Bradley v. State,* 32 Ark., 722, and *S. v. Wakefield,* 60 Vt., 518. In each of the last three cases, the Court treated the former proceeding, which was pleaded in bar, as void on its face. In *Com. v. Alderman,* 4 Mass., 478, the defend-
ant being arraigned on an indictment for an assault and (586)
battery and being inquired of by the Clerk whether he was guilty or not guilty, said he was guilty, but added that he had himself informed a justice of the peace of the county of his offense, by whom he had been sentenced to pay a fine. The Court directed the Clerk to enter a plea of guilty alone, observing "that it had heretofore been solemnly determined that a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, was no bar to an indictment by a grand jury for the same offense."

We have discussed the matter somewhat at length because we deemed it important to the due administration of the criminal law in this State to do so. It is useless to advance further argument or to cite additional authorities to show that the

plea of former conviction was not supported by the proceeding had before the magistrate. It constituted in every respect such a wide departure from the established and well known forms of judicial procedure as to be entitled to no consideration from the law, and it was therefore properly treated as a nullity. It may be well to add that a justice or other judicial officer (as said in *S. v. Roberts,* 88 N. C., 756) who participates in or connives at an evasion of criminal justice in any proceeding before him exposes himself to prosecution for malfeasance in office. There was no error in the ruling of the Court below.

No error.

Cited: S. v. Lucas, 139 N. C., 573; *S. v. Cale,* 150 N. C., 809.

(587)

STATE v. ROBERSON.

(Filed 4 October, 1904.)

1. LICENSES—*Indictment—Emigrant Agent—Laws 1903, ch. 247, sec. 74—The Code, sec. 1183.*

   Where a statute makes it a crime to "engage in the business of procuring laborers," etc., it is sufficient to charge in the indictment that a person "engaged in procuring laborers," etc.

2. LICENSES—*Taxation—Police Power—Const. N. C., Art. V, sec. 3.*

   Laws 1903, ch. 247, sec. 74, taxing persons engaged in the business of procuring laborers for employment outside the State, is a valid exercise of legislative power to tax trades and professions, and is not a police regulation.

3. TAXATION—*Licenses—Constitutional Law.*

   A tax on the business of procuring laborers for employemnt outside the State being an exercise of the power of the State to levy taxes, the amount is not reviewable by the courts.

INDICTMENT against J. W. Roberson, heard by Judge *Frederick Moore* and a jury, at April Term, 1904, of FRANKLIN. From a judgment of guilty upon a special verdict, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

Day & Bell, T. B. Womack and *Murray Allen,* for the defendant.

CONNOR, J. The defendant was indicted for violating section 74, chap. 247, Laws 1903, in the following words: "The jurors for the State, upon their oath, present: That J. W. Roberson, late of the county of Franklin, at and in said

county * * * did engage in procuring laborers for employment out of the State without having first paid the license tax," etc., etc. The defenadnt made a motion in this Court to arrest the judgment for defect in the (588) bill of indictment, in that it did not charge that the defendant *engaged in the business of procuring laborers,* etc.

The statute is in the following words: "On every emigrant agent or person engaged in procuring laborers for employment out of this State an annual license tax of one hundred dollars for the State and one hundred dollars for the county for each county in which such agent or person does business, the same to be collected by the sheriff. Any person engaging in this business without first paying said tax shall be guilty of a misdemeanor," etc. It is insisted by defendant's counsel that the statute is enacted and must be sustained under the power conferred upon the Legislature to tax trades, professions, franchises and incomes. Const., Art. V, sec. 3. That this section does not empower the Legislature to impose a tax upon the single act of procuring laborers, etc., but upon the business of doing so. That the last clause of the statute makes "engaging in this business," a misdemeanor, and that the charge in the bill must be as broad as the language of the statute. The well prepared brief cites a number of authorities sustaining this position. We do not question its correctness, and if the bill upon a reasonable construction simply charges a procuring of laborers, etc., the motion should be allowed. We are of the opinion, however, that the words "engaged in procuring laborers," etc., is equivalent to the charge of engaging in the business, etc. To say that one is engaged in an occupation signifies much more than the doing of one act in the line of such occupation. It is an expression in common use, and well understood, that one is engaged in merchandizing or in practicing law. Webster's International Dictionary defines—"Engage": "To embark in a business; to employ or involve oneself; to enlist." Century Dictionary: "To occupy oneself; be busied." 11 Am. & Eng. Ency. (2 Ed.), 33. To charge that the defendant "did keep a tenpin alley" was held (589) not to be equivalent to charging that the defendant engaged in the business of keeping a tenpin alley. *Eubanks v. State,* 17 Ala., 181. If the charge had been that the defendant engaged in keeping a tenpin alley we think the bill would have been sustained. The motion in arrest of judgment is supported by a well considered brief and oral argument to which we have given due consideration. For the reasons given, and in obedience to the provisions of section 1183 of The Code, we

think the bill sufficiently charges the offense. The motion must be denied.

The jury found for their special verdict "That in February, 1904, the defendant J. W. Roberson did engage in the business of procuring laborers for employment out of the State, to-wit, for one R. H. Jones in the State of Georgia, without having paid or offered to pay the license tax, either to the State or county, required by section 74 of chap. 247, Laws 1903. The Court upon the special verdict adjudged the defendant guilty and pronounced judgment, to which he excepted and appealed. His first exception is based upon the contention that the tax imposed by the statute "is unreasonable, excessive, restrictive and prohibitive." It is conceded, and we have no difficulty in holding, that the statute is an exercise of the power to tax trades, professions, etc., and not a police regulation. The brief of the defendant seems to suggest that this Court in *S. v. Moore,* 113 N. C., 697, 22 L. R. A., 472, held that the tax of $1,000 imposed by Laws 1891 was void because excessive and prohibitive. A careful examination of the very able and well considered opinion of Chief Justice SHEPHERD clearly shows that the Court held that if the statute was to be construed as a measure for raising revenue it was invalid because the tax imposed was not uniform—applying only to certain counties.

(590) If to be construed as an exercise of the police power, the amount of the license fee was restrictive and prohibitory. The Chief Justice says that in the opinion of the Court it was a tax. Holding as we do, that the act of 1903, being section 74 of the Revenue Act, and a part of "Schedule B," which expressly declares that the taxes imposed are license taxes "for the privilege of carrying on the business or doing the act named," we regard the questions raised by the defendant's first exception as settled by the decision of this Court in *S. v. Hunt,* 129 N. C., 686, 85 Am. St., 758, rendering it unnecessary to do more than refer to the opinion of the Court as written by the present Chief Justice and concurred in by Justices MONTGOMERY and DOUGLAS. It is true that the tax imposed by the statute under review in that case was twenty-five dollars, and in the case before us one hundred dollars. We would have no difficulty in holding that, in the absence of any evidence or finding in the special verdict as to the number of persons who might be employed as laborers, the extent of the business or the profits to be made, the tax imposed was not unreasonable or excessive. We do not wish to be understood as intimating that this Court has any power to declare a revenue measure, otherwise constitutional, invalid because of

the amount of tax levied. When the Constitution confers upon the Legislature the power to lexy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of *power,* but not as to the manner of its exercise. In an exhaustive and very able opinion written by Mr. Justice *White* in *McCray v. The United States,* 195 U. S., 27, he says: "Since the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the result to arise from its exercise." The other exceptions have been disposed of by (591) the decision in *S. v. Hunt, supra,* citing *Williams v. Fears,* 179 U. S., 270. We refrain from discussing the question from the standpoint of an exercise of the police power for the reason suggested in the concurring opinions in Hunt's case. For the reasons stated there is

No error.

Cited: Carr v. Comrs., ante, 126; *S. v. Roberson, post,* 592; *S. v. Sheppard,* 138 N. C., 583; *Lane v. Comrs.,* 139 N. C., 444.

STATE v. ROBERSON.

(Filed 11 October, 1904.)

1. LICENSES — *Indictment — Emigrant Agent — Laws 1903, ch. 247, sec. 74.*

   Where a statute makes it a criminal offense to "engage in the business of procuring laborers," etc., it is sufficient to charge in the indictment that a person "engaged in procuring laborers," etc.

2. LICENSES—*Former Conviction.*

   Where a statute levies an annual license tax and makes it indictable not to pay the same, a conviction thereunder is a bar to a further prosecution during the current year.

INDICTMENT against J. W. Roberson, heard by Judge *Frederick Moore* and a jury, at April Term, 1904, of FRANKLIN. From a judgment of guilty upon a special verdict, the defendant appealed.

Robert D. Gilmer, Attorney-General, F. S. Spruill and *W. H. Ruffin,* for the State.

T. B. Womack, Day & Bell and *Murray Allen,* for the defendant.

CONNOR, J. The defendant was in this case indicted (592) for violating section 74, chap. 274, Laws 1903, in the same manner and form as in *S. v. Roberson,* 136 N. C., 587, at this term, except that, here, the time is laid in March, 1904. He pleaded former conviction. The jury rendered the same special verdict, except in respect to the time. The Court held against the defendant upon his special plea and adjudged him guilty, and he appealed from the judgment rendered.

The only exception which we deem necessary to notice is that directed to the ruling of the Court below upon the special plea. We think it should have been sustained. The charge is that he engaged in procuring, etc., and this we have held is a sufficient charge of engaging in the business of procuring, etc. As we have said, it is not the single act of procuring laborers, but engaging in the business without a license, which is made a misdemeanor; hence, it would seem to follow that each separate act is not indictable, and that as the tax is annual, one conviction would bar any further prosecution during the current year. This view is sustained by the fact that the minimum punishment is fixed at a fine equal to the tax. This opinion has been adopted by the Supreme Court of Alabama in *R. R. v. Attahala,* 118 Ala., 362, and the reasons given for the conclusion are entirely satisfactory to us. *Coleman,* J., says: "Statutes which prohibit the engaging in or carrying on business without license must not be confounded with those which declare single acts, such as the selling of vinous, spirituous or malt liquors without license, to be misdemeanors." In declining to sustain the special plea of former conviction there was

Error.

Cited: Carr v. Comrs., ante, 126.

---

(593)

STATE v. MORGAN.

(*Filed 4 October, 1904.*)

1. BAIL—*Forfeitures—Scire Facias.*

The entry of the forfeiture of a recognizance in a criminal case cannot be contradicted or traversed by an answer or a plea to a *scire facias* issued to enforce the forfeiture.

2. BAIL—*Motions—Pleadings—Scire Facias.*

Where the recognizance in a criminal case is entered on the records of the court as forfeited, and *scire facias* is issued to enforce the forfeiture, an answer denying the truth of the record, though

informal, is equivalent to a motion to set aside the entry, when that appears to have been the intention of the defendants.

3. BAIL—*Penalties—Forfeitures—The Code, sec. 1205.*

An application for the reduction or remission of the penalty in forfeited recognizances by the direct provisions of the statute is addressed to the discretion of the court, and its action is not reviewable.

4. BAIL—*Penalties.*

Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty.

5. BAIL—*Continuances—Recognizances.*

The continuance of a criminal case does not release the recognizance given for the appearance of the defendant.

SCIRE FACIAS by the State against Lawrence Morgan and others, heard by Judge *Frederick Moore,* at February Term, 1904, of WILSON.

This is a proceeding by *scire facias to* enforce a forfeited recognizance. The respondents had entered into a recognizance in the sum of $6,000, conditioned that the defendant Morgan should make his personal appearance at the Superior Court on the second Monday of December, 1903, to an- (594) swer a criminal charge for murder and not depart the same without leave. On the record of the Court at said December Term is this entry: "The defendant Lawrence Morgan is called and failed. Judgment *nisi, sci. fa.* and *capias.* The *scire facias* was issued and served on the defendants and they filed an answer and affidavits in support thereof, the substance of which is as follows: "Lawrence Morgan appeared at December Term from day to day until the final adjournment of the Court, and on Monday of said term his case was called for trial and continued—Morgan being present and answering when his name was called, and insisting on a trial. The Court adjourned for the term on Thursday afternoon, and immediately thereafter the presiding Judge left the county for his home. At noon on Thursday, Morgan not having given a new bond, the fact was called to the attention of the solicitor, and the crier of the court was directed to call Morgan, whereupon the court crier went to the window to obey the order of the Court, when the crier was informed by counsel for Morgan that it was unnecessary for him to be called, as he was then present at the bar of the Court. He answered when he was called, and went up to the rail of the bar near the Clerk's desk and was standing there when the forfeiture was entered, and heard the Judge direct the Clerk to make the entry. His

presence in court was known to the presiding Judge, to the solicitor, the clerk and the sheriff. It was ordered by the Court that Morgan should have until the following Monday within which to give his bond for his appearance at the next term, and then the forfeiture of his bond was entered upon the records of the Court while Morgan was present at the bar of the Court. Morgan remained in the town of Wilson several days after the adjournment of court, making no attempt to conceal the fact of his presence, as he was seen upon the streets of the
(595) town daily until he left. The respondents were not advised of the action of the Court in declaring the forfeiture, but were afterwards advised that they had been relieved of any liability as sureties of Morgan by his appearance at said December Term and by the action of the Court as before stated.

The State filed affidavits and exhibits which tended to show that Morgan was called by the court crier and failed to answer, and thereupon the forfeiture was directed by the Court to be entered and was accordingly entered, and that the record does in fact speak the truth. Before the entry was made, but after Morgan was called and failed to answer, it was stated to the Court by one of his counsel that his sureties were out of town and he could not therefore renew his bond until the next Monday, and counsel requested the Court not to enter the forfeiture, which request the Court refused, but directed the forfeiture to be entered in the regular form, and instructed the Clerk that if Morgan renewed his recognizance by the next Monday night he need not issue the *sci. fa.* and *capias.*

The solicitor objected to so much of the respondents' answer and affidavits as tended to contradict the entry of forfeiture. The Court finally ruled that said matter could not be considered for that purpose, and, upon a suggestion by counsel of the respondents that the same might be treated as an application for relief under section 1205 of The Code, the Court declined so to treat it, but without prejudice to the right of the respondents to apply hereafter for relief under that section.

Upon consideration of the record and the answer to the *sci. fa.*, after excluding the matter mentioned above, the Court adjudged that the State recover the full amount of the recognizance and the costs of the proceeding, and that exe-
(596) cution issue therefor. The respondents excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.

F. A. Woodard, Shepherd & Shepherd and *Connor & Connor,* for the defendants.

WALKER, J., after stating the facts. The obligation of Morgan and his sureties for his appearance at court was treated in the argument before us as a recognizance, though it has the form and appearance of a bond, and it is so called in one part of the record, while in the *scire facias* it is referred to as a recognizance. *S. v. Houston,* 74 N. C., 549; *S. v. Jones,* 88 N. C., 683. There was much said in the discussion here about the technical distinction between the two in respect to the method of their enforcement, but we think it can make little or no practical difference, in the view we take of the case, whether it is a bond or a recognizance, which is a debt of record, and whether, therefore, it was erroneous to enter a judgment *nisi* instead of issuing a *scire facias* merely, and requiring the respondents to show cause why an execution should not issue, that being the proper remedy to enforce payment of the amount due on a forfeited recognizance. *S. v. Mills,* 19 N. C., 552; *S. v. Smith,* 66 N. C., 620.

Whether it is a bond or a recognizance, the entry of the forfeiture became a part of the record, a fact averred in the record, and it cannot be contradicted or traversed by an answer or a plea to the *scire facias* issued to enforce the forfeiture. The fact of the defendant's failure to appear is conclusively established by the entry, and the respondents will not be heard to impeach the record, as it stands, in a collateral way, and a suit or *scire facias* founded on the forfeiture is a collateral proceeding. Their remedy, if they wished to put the truth of the matter in issue, was by motion to set aside or vacate the entry, or, as is sometimes said, to reverse the order of forfeiture. This is but the application of an elementary (597) principle. A record imports absolute verity and is conclusive concerning the matters to which it relates. So long as it stands unreversed, the recitals as to what was actually done in the Court cannot be contradicted or varied except upon application to the Court to correct the record so that it will speak the truth. When it is said by the Court in *S. v. Mills, supra,* which was cited and relied on by the respondents that "a recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the Court to remit or mitigate the forfeiture," it was not intended that a denial of the truth of the record could be thus set up by way of plea or answer to a *scire facias.* Matters of "legal avoidance" there referred to are such as, being entirely consistent with the truth of the facts stated in the record, furnish a valid legal execuse for the failure of the defendant to appear accord-

ing to the condition of his recognizance. The sureties, for example, could show in answer to the *scire facias* the death of the principal before the time for his appearance had arrived, or that he had been arrested under other process issued at the instance of the State, or that he had become insane, and there are still other matters which could be alleged and proved and which would constitute in law a legal avoidance of the forfeiture. But it will be observed that all pleas of the kind mentioned are not only consistent with the truth of what is averred in the record, but they are predicated upon the assumption of such truth. Where it is sought to revive a dormant judgment by *scire facias,* or, under our present procedure, by motion for leave to issue execution, it is not competent, in answer to the *scire facias* or the motion, to attack the judgment or impeach its correctness, as, being a record, it stands for verity and can only be avoided by a direct proceeding in the Court which made the record to vacate it. The very question under (598) discussion has, we find, been frequently considered by the courts of other States and they have, so far as we can ascertain, invariably decided that such a defense as that set up in this case cannot be entertained, as a few extracts from some of those decisions will show. "A record of the Court into which a recognizance is returned, that the principal made default, cannot be controlled or contradicted by parol evidence on a *scire facias* against his bail." *Com. v. Slocumb,* 80 Mass., 395. "The defendant could not, however, be allowed to prove by parol that the prisoner was in attendance at the Court ready to answer to his recognizance. The appearance of the prisoner must be shown by the record. The effect of the evidence would have been to contradict the record by parol evidence. The record shows that the prisoner being called to answer the indictment against him according to the tenor of his recognizance made default of his appearance. His appearance must be shown by evidence of as high character as that which shows his default." *S. v. Clemons,* 9 Iowa, 534. "If the facts set forth in these answers are true, and there was not in fact any calling and forfeiture of the recognizance, the defendant should have applied to the Court declaring the forfeiture to vacate the entry; but while that record remains the rules of evidence and sound public policy will not permit it to be contradicted by parol testimony." *Calvin v. State,* 12 Ohio St., 60. "Mistake or fraud in making up a record can neither be averred nor proved by parol evidence in a collateral proceeding nor in an action founded on it. The only mode of relief is through the Court where the record is thus erroneous. The record must be re-

ceived as absolute verity and speak for itself. If wrong, the only mode of having it corrected is by application to the Court where the proceeding or judgment was had, to have it reformed according to the truth or vacate it as may be requisite. In no other manner can a party or privy to the judgment or proceeding be relieved." *Clark v. McCommon,* 63 Pa., (599) 469. "The record of the default is conclusive evidence of the fact, and of course not subject to be impeached, controverted or affected by extrinsic evidence." *S. v. Gilmore,* 81 Me., 405. "It is a maxim in law that there can be no averment in pleading against the validity of a record, although there may against its operation. Each of these pleas attempted to question the verity of the record of the Circuit Court. We understand the law to be well settled that the record imports absolute verity and no averment can be taken against it. For this reason the pleas were bad and the demurrer properly sustained." *Wellborn v. People,* 76 Ill., 516. The courts in the cases cited were speaking with reference to an action brought or a *scire facias* issued upon a forfeited recognizance, and the pleas and evidence available to a respondent in such a proceeding. See also, *Eddinger v. Miller,* 153 Pa., 457; *S. v. Wenzel,* 77 Ind., 428; *Maynes v. Brockway,* 55 Iowa, 457. The proper course was pursued and approved by the Court in *S. v. Hayes,* 104 La., 461.

But while the respondents have not selected the remedy which the law provides for such a case as the one presented by the averments of their answer, and while a strict enforcement of the rules of pleading and procedure would be fatal to their plea and deprive them of any relief save what the Court may grant in the exercise of its discretion or as an act of mere grace, we yet think it would be taking too narrow a view of the case to decide it upon such a technical ruling, as it sufficiently appears from the record that the respondents intended to ask for relief upon the ground that the record did not speak the truth of the matter and that they wished to have that question passed upon in some competent way. If it be true, as alleged, that the defendant Morgan fully kept and complied with the condition of his recognizance and appeared from day to day during the term, answered when he was called to the bar, and in all things was ready to do and perform what was required of him and to the extent that he was bound, we do not (600) think the State should exact the penalty of the appellants simply because in some slight particular they have mistaken the form of their remedy. Upon that state of facts they would owe nothing, and they should be permitted to acquit themselves of liability if they can.

It was suggested below that the answer and affidavits be considered as an application for relief from the forfeiture under section 1205 of The Code, which extends only to a reduction or remission of the penalty. Such an application, by the terms of the statute, is addressed to the discretion of the Court, and the granting of it is a mere act of favor, and the Court can exercise its clemency with such conditions as it may see fit to impose. We cannot review its action.

While the evidence offered could not be received to impeach the record, and while the respondents have not proceeded very regularly in seeking relief, yet we think that it sufficiently appears from the case that their purpose was to have the truth found and declared by the Court, to the end that they might be relieved from the forfeiture. They must have intended to impeach the entry, and all that was needed to present the question properly to the Court was the formal motion to vacate it. When they failed to obtain relief by invalidating the record against them, they then appealed to the Court to exercise its discretion in their favor and remit the penalty.

Upon a review of the whole matter, we think the ends of justice will be subserved by setting aside the judgment and permitting the respondent to move to vacate the entry of forfeiture. The Court can then find the facts upon the evidence offered by the parties and the case can be heard upon its merits. If the Court, upon the facts found, should refuse to strike out the forfeiture and again give judgment for the State,
(601) the respondents will be at liberty to apply for relief under section 1205 of The Code, which may be granted to such extent and upon such terms as the Court may deem proper and just to the State and the respondents.

While we adhere strictly to the rule that a record cannot be impeached collaterally, but must be accepted as importing the exact truth until reversed or modified by some direct proceeding in the Court which has full possession and control of it, we rest our decision upon the ground that the respondents have, in effect, though not in the precise form of the law, sought to have the record corrected, and their answer and affidavits might well have been taken as an application to be relieved of the forfeiture in that manner. The ruling of the Court that the record could not be impeached collaterally was indeed correct, but we do not think it reached the legal merits of this particular case. If we were proceeding under The Code our way would be plain, as relief would be granted upon the facts without regard to the form of the prayer.

In early times, when a defendant failed to appear his default was recorded, and the recognizance, having become absolute or forfeited, was estreated (extracted or taken from the other records) into the Court of Exchequer to be sued in behalf of the King, to whom the debt had become due unconditionally. 4 Blk., 253. But even in that Court the recognizance might be discharged or compounded according to the equity and circumstances of the case (1 Chitty Cr. Law, 4 Am. Ed., 106, note *a*), and by statute 4 Geo. III, chap. 10, the Barons of the Exchequer were given power to discharge recognizances and remit forfeitures and penalties. 1 Bac. Ab., p. 597. Our statute (The Code, sec. 1205) is copied substantially from 4 Geo. III, though the power of the Court is somewhat amplified. It seems, therefore, to be the policy of the law to lodge a very full and free discretion with the trial Judge so that he may virtually do, under the provisions of that (602) law, what would be done if the forfeiture were set aside upon a finding that it does not state the truth. We would seem, therefore, to be refining too much if we should, under the circumstances of this case, refuse the respondents the opportunity to be heard and to show, if they can, that their principal punctually complied with his recognizance. We will insist on an observance of legal forms and procedure, but will give them the chance of doing in the manner prescribed by law what they evidently intended to do. It was early said to be for the advantage of public justice that it should be in the power of the judges to spare recognizances if, upon the circumstances of the case, they see fit. It may be that the record speaks the truth and should stand as it now is, and that the defendants are not even entitled to any favorable consideration or indulgence. These are matters for the Judge, and not for us, to decide.

The continuance of the case certainly did not release the recognizance. *S. v. Smith, supra; People v. Hanaw,* 106 Mich., 421. We refrain from any intimation of opinion upon the other questions of law, as they may not again be presented, and if they are they can be considered more intelligently when all the facts are before us.

The case is remanded with directions to set aside the judgment upon the forfeited recognizance, to the end that the respondents may move to vacate the entry of forfeiture if they are so advised—the facts to be found by the Court and such judgment entered thereon as the law directs. If the Court refuses to set aside the forfeiture, the respondents shall have leave by petition to apply for such relief as, under section 1205 of The

Code, the Court is authorized to grant in the exercise of its discretion. The appellants will pay the costs of this Court.

Remanded.

Cited: S. v. Schenck, 138 N. C., 563; *S. v. Holt,* 145 N. C., 451.

(603)

STATE v. TWIFORD.

(Filed 4 October, 1904.)

1. NAVIGABLE WATERS—*Waters and Watercourses.*

Where a stream is navigable in fact, it is navigable in law, and the capability of being used for the purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use.

2. NAVIGABLE WATERS—*Grants—The Code, sec. 2751, subsec. 1.*

Lands covered by navigable waters are not subject to entry.

3. NAVIGABLE WATERS—*Evidence.*

That the former riparian owner charged people one-fourth of the catch for fishing in a creek, and that some in their ignorance submitted to the exaction, is not proof of the non-navigability of the creek.

4. NAVIGABLE WATERS—*Waters and Watercourses—Question for Jury.*

In this prosecution, for the obstruction of a watercourse, whether it is navigable is a question for the jury.

5. NAVIGABLE WATERS—*Waters and Watercourses.*

The control of navigable water belongs to the public, and is not appurtenant to the ownership of the shore.

INDICTMENT against G. W. Twiford and another, heard by Judge *W. A. Hoke* and a jury, at Spring Term, 1904, of CURRITUCK. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
E. F. Aydlett and *J. F. Minturn,* for the defendant.

CLARK, C. J. There was evidence on the part of the (604) State tending to show that the waterway in question leads off from Currituck Sound and is about four hundred yards wide and six feet ten inches deep in the channel at its mouth, and the following widths at these distances from its

mouth: Five hundred yards wide, one mile; four hundred yards wide, a mile and a half, and sixty yards at Shipyard, about two miles above; that the obstructions were placed in the stream at a point three hundred and fifty yards from the mouth of the creek. At this point Jean Guide Creek is about three hundred and fifty yards wide, and boats drawing five or six feet of water could sail up to the point where the obstructions were placed and a mile and a half above the mouth of the stream. The watercourse in question has been used by the public for thirty-five years "for fishing and harboring and as a passway and for landing purposes" and "as an harbor for protection in time of storms," and "as a thoroughfare by the public as long as the witness could remember, and by persons coming in from the sound who would go up to the head of the creek at Shipyard, leave their boats and then go by land, and has seen boats carrying freight land at the pier." Barges drawing three and a half feet of water and transporting timber can go to Shipyard, turn and come out. This witness also testified that he had seen a sloop two hundred yards above the point at which the obstructions were placed.

There was also evidence tending to show that the land covered by the waters of Jean Guide Creek is claimed by Hannah M. Lyons, of New Jersey, who acquired her alleged title through mesne conveyances from a grant from the State of North Carolina to one Hodges Gallop, dated 30 May, 1872. It also appeared that land on both sides of the creek belongs to Hannah M. Lyons and that no public road leads from the creek, but only a private road for the use of the owner and her tenants. The defendants, Twiford and Tate, admitted that they, by the orders of said riparian owner, (605) placed the obstructions in the creek in October, 1902. The stakes constituting the obstructions are strongly driven down and their tops rise three or four feet above the surface of the water. They are two and a half feet apart. There is a gate near the center of the stream used exclusively by the owner, which is kept locked so as to prevent the general public from using the waterway.

The defendants excepted to the refusal of the Court to charge: 1. That if the jury believed the evidence the creek is not navigable, and to find the defendants not guilty. 2. That as the obstructions were placed by the defendants under orders "of the owner of the land on both sides of the creek and title to the stream belongs also to her, to return a verdict of not guilty." 3 and 4. That as the creek leads from the sound to the land of the employer of the defendants and not to any

public place, and there is no public road adjoining or touching the creek, and any one landing at any point on the creek must go over the land of said riparian owner, to find the defendants not guilty. 5. That if the evidence is believed, the creek is not navigable and is owned by Hannah M. Lyons and she had a right to place the posts in the creek, and the defendants acting under her orders were not guilty.

The Court charged the jury, among other things: "If this stream or bay is properly described and generally known as Jean Guide Creek, and is wide enough and deep enough for navigation by boats ordinarily used for carrying traffic and commerce on the sound waters and was required and used for such purposes by the necessities and conveniences of persons generally engaged in such traffic, it would be an indictable nuisance to obstruct it; and if the jury are satisfied beyond a reasonable doubt it was that character of stream so used and required by public convenience and that defendants put the obstruc-
(606) tions in the stream, the defendants would be guilty and you should so return your verdict." Defendants excepted. "If the stream is not navigable by vessels of the kind described or if the stream was so shut in or is so situated that it was not used or required for traffic or commerce by the convenience of the public or persons generally engaged in traffic with vessels on the sound, then it would be no nuisance to obstruct it or shut it up and the jury should acquit the defendants." The defendants again excepted. The question was submitted to the jury as one of fact under the above instructions. The rest of the charge, which fully set out the contentions of the parties and the law, was not excepted to. These are the only exceptions and we find no error as against the defendants.

If a stream is "navigable *in fact* (as the jury found under the above instructions) it is navigable in *law*." Gould on Waters (3 Ed.), sec. 67. The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test and not the extent and manner of such use. *S. v. Eason,* 114 N. C., 787, 23 L. R. A., 520, 41 Am. St., 811; *Hodges v. Williams,* 95 N. C., 331, 59 Am. Rep., 242; *Ingram v. Threadgill* 14 N. C., 59; *Wilson v. Forbis,* 13 N. C., 30. The same ruling is maintained in the United States Supreme Court, *The Daniel Ball,* 77 U. S., 557; *The Montello,* 78 U. S., 411; S. C., 87 U. S., 430.

Navigability is a question of fact dependent upon the depth of water and other circumstances and was properly submitted to the jury in the charge. Navigability cannot be affected by

the condition on the adjacent land, such as there being a large town on the shore with numerous streets and wharves, or whether, as here, one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access by land. It is the navigability of the water that is the test, its accessibility by water and not accessibility by (607) land—else whether bays, estuaries, creeks and rivers are *publici juris* would depend upon whether or not riparian owners have monopolized the ownership of the adjacent soil.

Land covered by navigable waters was not subject to entry at the date of the grant to Gallop, and is not now, and the grant of the land covered by Jean Guide Creek is void. Bat. Rev., chap. 41, sec. 1 (1); The Code, sec. 2751 (1); *Skinner v. Hettrick,* 73 N. C., 53; *Blount v. Spencer,* 114 N. C., 777; *Bond v. Wool,* 107 N. C., 139; *Wool v. Edenton,* 115 N. C., 10; *Holley v. Smith,* 130 N. C., 85. Even if the grant passed a title to the land covered by the waters of the creek, the title became vested in the owner subject to the public easement—the right of navigation. *Brodnax v. Baker,* 94 N. C., 675, 55 Am. Rep., 633; *Hodges v. Williams,* 95 N. C., 331, 59 Am. Rep., 242; Gould on Waters (3 Ed.), sec. 87.

The above test, the capacity for navigation, is laid down in *S. v. Club,* 100 N. C., 477, 6 Am. St., 618, as follows: "Navigable waters are natural highways—so recognized by government and the people—and hence it seems to be accepted as part of the common law of this country, arising out of public necessity, convenience and common consent, that the public have the right to use rivers, lakes, sounds and parts of them, though not strictly public waters, if they be navigable in fact, for the purposes of a highway and navigation, employed in travel, trade odr commerce. Such waters are treated as *publici juris* in so far as they may be properly used for such purposes in their natural state."

Mr. Justice DOUGLAS in a more recent case, *S. v. Baum,* 128 N. C., 600, says that in early days "the navigability of a stream depended more upon the temper of those living along its banks (Indians) than upon its natural features, * * * but that now the public have the right to the unobstructed (608) navigation as a public highway for all purposes of pleasure or profit of all watercourses, whether tidal or inland, that are in their natural conditions *capable of such use.* The navigability of a watercourse is therefore largely a question of fact for the jury and its best test is the extent to which it has been so used by the public when unrestrained."

The evidence tends to show that Jean Guide Creek has been

used by the public for thirty-five years for the purposes of fishing, as a passway and as an harbor for protection in time of storms. "These conditions constitute ample evidence of a navigable stream." *S. v. Baum, supra.* The defendants' contention that to make a waterway, it must have a public termination, cannot be sustained. That may come later, but that will not make the stream deeper or more navigable when it comes. This stream is an arm or part of Currituck Sound, from which sound there is a passage way through the waters of Albemarle and Pamlico Sounds and up various rivers to many towns in the State. If above evidence is true, the stream is in itself navigable in fact, and its navigation is certainly "in some degree required by the necessity or convenience of the public." The right to anchor is essential in navigation, and Jean Guide Creek, according to the evidence in the case, has been used "as an harbor of protection in time of storms." In Gould on Waters (3 Ed.), sec. 95, it is said: "The right of navigation includes the right to anchor as incidental to its beneficial enjoyment."

The whole matter is thus summed up by *Shaw,* C. J., in *Attorney-General v. Woods,* 108 Mass., 436, 11 Am. Rep., 380: "If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the
(609) capacity of the water for use in navigation." It would be a serious detriment to the public if water, capable of such usefulness as here, can be made private property by buying up the adjacent land. The control of such water belongs to the public and is not appurtenant to the ownership of the shore. It is not a case "where the tail goes with the hide."

Nor is it material that the former riparian owner charged people one-fourth of the catch for fishing in the creek and that some in their ignorance submitted to the exaction. This no more proves ownership of a navigable stream than the exaction of toll by feudal barons on the Rhine proves ownership of that great artery of commerce to-day by those who have succeeded them in the ownership of the lands on which their castles once stood. Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.

No Error.

(610)

STATE v. THORNTON.

(Filed 4 October, 1904.)

1. ASSAULT—*Schools—Teachers—Evidence.*

In the prosecution of a scohol-teacher for whipping a pupil, evidence as to the government of the school before defendant was installed, and the request of a committee that he should preserve order, is not competent.

2. CHARACTER—*In Evidence—Assault—Evidence.*

In the prosecution of a school-teacher for whipping a pupil, proof of defendant's good character must be confined to his general character.

3. EVIDENCE—*Assault—Schools.*

In the prosecution of a school-teacher for whipping a pupil, evidence of the good effect of the chastisement is not admissible.

4. ASSAULT—*Schools—Malice.*

Where the correction administered by a school-teacher is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it is administered.

5. SCHOOLS—*Assault.*

Within the sphere of his authority, the school-teacher is the judge as to when correction of a pupil is required, and of the degree of correction necessary.

6. SCHOOLS—*Assault—Presumption.*

Where a school-teacher exercises his judgment in whipping a pupil, the presumption is that he exercised it correctly.

7. ASSAULT—*Schools.*

Where a school-teacher, in administering correction to pupils who disobey the rules of the school, uses his authority as a cover for malice, he is indictable.

8. MALICE—*Presumption—Assault.*

In the prosecution of a school-teacher for whipping a pupil, the jury may infer malice from an excessive punishment.

9. SCHOOLS—*Assault—Malice.*

A school-teacher who, prompted by revenge, administers corporal correction, is as guilty criminally as if he had acted with malice.

10. INDICTMENTS—*Assault—Schools—Justices of the Peace—Warrant—Const. N. C., Art. I, sec. 13, Art. IV, sec. 27.*

A defendant in a prosecution for a simple assault may be tried in the Superior Court on the warrant of the justice of the peace without an indictment by a grand jury.

11. WARRANT—*Assault—Schools—Damage.*

A warrant charging a school-teacher with inflicting on a pupil immoderate punishment, but not setting out any facts showing serious damage, is for simple assault only.

INDICTMENT against F. A. Thornton, heard by Judge
(611) *G. S. Ferguson* and a jury, at May Term, 1904, of SAMPSON.

A criminal action for an assault, heard in Superior Court on appeal from a justice of the peace.

The defendant was a school-teacher and the prosecutor one of his pupils about ten years old. The boys of the school had been guilty of misconduct and the defendant warned them and threatened to punish any repetition of it. There was evidence tending to show that the prosecutor had repeated the act complained of, and other evidence that it was accidentally and not intentionally done. There was also evidence tending to show that the defendant whipped the prosecutor immoderately and in anger, and other evidence tending to show the contrary. It is not necessary to set out the evidence in full.

The defendant asked the Court to charge the jury that
(612) there was no evidence of malice in this case. This was refused, and the defendant excepted. At the request of the defendant the Court charged the jury: 1. That the law permits a teacher to inflict corporal punishment upon the pupil to enforce discipline and obedience to the rules of the school, and when it is administered under such circumstances the burden is on the State to show beyond a reasonable doubt that the teacher was actuated by malice towards the pupil, or that the injury inflicted is permanent, and that unless they found that there was either malice or a permanent injury they should acquit the defendant. 2. The difference between general and particular malice, as stated in *Brooks v. Jones,* 33 N. C., 260, was then explained to the jury. 3. That the defendant had the right to whip the prosecutor for any violation of the rules of the school, and even though the jury should find that the whipping was more than was necessary and was attended by bodily pain and suffering, they should not convict unless they found that there was either malice or a permanent injury, the latter being an injury which is lasting and will continue indefinitely.

After giving these special instructions at the defendant's request, the Court charged generally in regard to the rights, duties and liabilities of a teacher with respect to his pupil, to which there was no exception. The Court told the jury that there was no permanent injury to the prosecutor, and then gave this instruction to the jury, to which the defendant excepted: "If the jury are satisfied beyond a reasonable doubt from the evidence that the punishment was excessive, they may take the excessive punishment into consideration with the other evidence

in the case in determining whether the defendant was actuated by malice." The Court further charged substantially as follows: "That if they found from the testimony the defendant bore malice against the prosecutor and whipped the latter excessively to gratify his malice, ill-will, or grudge, or for the purpose of being revenged on him [whether the de- (613) fendant was actuated by previous malice towards the prosecutor individually, which still existed, or his purpose and intent were to be revenged on him for the misconduct of the other boys in popping the matches, his motive being malice or vengeance as thus explained and not merely the enforcement of the rules of the school], they should convict the defendant. The defendant objected to so much of the charge as is in brackets. The Court stated fully the contentions of both sides, to which there was no exception. Verdict of guilty, judgment and appeal by defendant.

Robert D. Gilmer, Attorney-General, for the State.
George E. Butler and *T. M. Argo,* for the defendant.

WALKER, J., after stating the facts. We are unable to see how any of the evidence which was excluded by the Court upon objection by the State had any bearing on the case. The government of the school before the defendant was installed as its master and the request of the committee that he should preserve order and enforce discipline had no tendency to prove the absence of malice at the time he whipped his pupil. He had a perfect right to punish his pupil for the purpose of correction, but even if the school had not been well managed, and he had been specially requested to be more strict in compelling obedience to the rules, he had no more authority by reason thereof than he would otherwise have possessed, and his criminal liability for an excessive and malicious use of his power would be just the same. Similar evidence was held to have been properly excluded in *S. v. Dickerson,* 98 N. C., 708. The defendant had the right to prove his good character and to have it considered by the jury, but it should always be confined to general character. This has now become familiar learn- (614) ing. The good effect the chastisement of the prosecutor had upon the discipline of the school was manifestly irrelevant. Suppose the defendant had grievously wounded the prosecutor, or disfigured or maimed him, would such evidence be competent, and if not in such a case why should it be if the punishment was excessive and inflicted maliciously? The law does not tolerate evil that good may come. A teacher by his very excesses

may inspire terror in his pupils and thus subdue them to his will and authority, but the law will not excuse his cruel acts for the sake of good discipline in his school.

The rule by which the criminal liability of a teacher for punishment inflicted on his pupil is determined was clearly and forcibly stated by GASTON, J., in *S. v. Pendergrass,* 19 N. C., 365, 31 Am. Dec., 416. It has been accepted as a leading authority upon this subject, not only by this Court but by the courts of many of the other States and by text writers. We quote substantially from that case such parts as are specially applicable to the facts in our case. When the correction administered is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of his authority the master is the judge when correction is required, and of the degree of correction necessary; and like all others entrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose. His judgment must be presumed to be correct, because he is the judge, and also because of his special knowledge of other facts and circumstances which may have influenced his conduct and which may be difficult to be proved. But the master may yet be punishable when he does not transcend the powers granted if he grossly abuse them. If he use his authority as a cover for malice, and, under pretense
(615) of administering correction, gratify his own bad passions, the mask of the judge shall be taken off and he will stand amenable to justice as an individual not invested with judicial power. The jury should be instructed that unless they are fully satisfied that the correction had produced or was calculated to cause lasting injury to the pupil, they should acquit, however severe the pain inflicted and however disproportionate to the alleged offense, unless the jury find that the defendant did not act honestly in the performance of duty, according to his sense of right, but, under the pretext of duty, was gratifying malice. This principle was declared with reference to the following state of facts: "The defendant kept a school for small children. Upon one occasion, after mild treatment towards a little girl of six or seven years of age had failed, the defendant whipped her with a switch so as to cause marks upon her body, which disappeared in a few days. Two marks were also proved to have existed—one on the arm and another on the neck—which were apparently made with a larger instrument, but which also disappeared in a few days."

As the clear result of all the authorities, Bishop, in his work

on Non-contract Law, sec. 956, thus states the law: "The teacher has the power to enforce obedience to the rules and to his commands. One of the means recognized by the law is corporal chastisement. He may thereby inflict temporary pain, but not 'seriously endanger life, limb or health, or disfigure the child, or cause any other permanent injury.' He cannot lawfully beat the child, even moderately, to gratify his own evil passions; the chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree; it is impossible he should ever inflict it without"; citing, among (616) other cases, *S. v. Pendergrass.* Many authorities could be cited in support of this view of the law, but a few will suffice. *S. v. Black,* 60 N. C., 263, 86 Am. Dec., 436; *S. v. Rhodes,* 61 N. C., 453, 98 Am. Dec., 78; *S. v. Alford,* 68 N. C., 322; *S. v. Jones,* 95 N. C., 588, 59 Am. Rep., 282; *S. v. Long,* 117 N. C., 791; *Drum v. Miller,* 135 N. C., 204.

When tested by the principle thus established, we find that the charge of the Court contained a correct statement of the law applicable to the facts of the case and was fully as favorable to the defendant as he had any reason to expect, and the court was equally correct in refusing the defendant's prayers for instructions. The punishment administered by defendant was certainly as severe as that inflicted by Pendergrass, which was held sufficient to carry the case to the jury upon the question of malice. The jury may infer malice from the excessive punishment. *S. v. Black,* 60 N. C., 263. It also follows from what we have said that the defendant was as guilty if he was prompted by revenge, or if he intended to punish the prosecutor for the misconduct of others, as he would be if he had acted with malice. In either case his motive would be bad and the punishment unlawful. *Stevens v. R. R.,* 10 Exch., 356.

The defendant moved to arrest the judgment because the Court had no jurisdiction to try the defendant without an indictment. This question has long since been settled against him, upon a construction not only of the statute, but of the Constitution. *S. v. Quick,* 72 N. C., 241; *S. v. Crook,* 91 N. C., 536; Const., Art. I, sec. 13, and Art. IV, sec. 27. The other ground urged in this case for the arrest of the judgment is equally untenable. The warrant alleges only that the defendant inflicted "immoderate punishment and serious (617) injury," but does not set out any facts from which the Court can decide as matter of law that there was serious damage.

It was a warrant for a simple assault only. *S. v. Stafford,* 113 N. C., 635; *S. v. Battle,* 130 N. C., 655. We do not think the case comes within the principle of *S. v. Huntley,* 91 N. C., 617, especially in view of the particular findings of the jury, upon which the verdict must have been based, when it is considered in connection with the charge. The case in this respect is more like that of *S. v. Stafford, supra.*

We find no error in the case and no defect in the record.

No Error.

Cited: S. v. Jones, 145 N. C., 460.

STATE v. ADAMS.

(Filed 11 October, 1904.)

1. HOMICIDE—*Evidence—Questions for Jury.*

   In this prosecution for homicide the evidence is sufficient to be submitted to the jury on the question of the guilt of the defendant of murder in the first degree.

2. HOMICIDE—*Malice.*

   It is not necessary to show malice in order to convict a person of murder.

3. HOMICIDE—*Evidence.*

   In a prosecution for homicide it is error to instruct the jury that the fact that money was stolen from the house of the deceased tends to prove the guilt of the prisoner, it not being shown that the prisoner knew where the money was, nor that he had any of the stolen money.

4. APPEAL—*Instruction—Homicide—Exceptions and Objections.*

   Though exceptions to instructions in a capital case are taken by the prisoner for the first time in the Supreme Court, the Court will consider them.

INDICTMENT against Will Adams, heard by Judge
(618) *George H. Brown* and a jury, at March Term, 1904, of WAKE. From a verdict of guilty and judgment thereon the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
William B. Snow and *E. M. Shaffer,* for the defendant.

MONTGOMERY, J. The prisoner was convicted of murder in the first degree. There was no fault found in the course of the trial with any of the State's evidence, and the prisoner introduced none. The exceptions of the prisoner relate to and are

connected with the refusal of the Judge to hold, or to instruct the jury in one form or another, that there was no evidence tending to connect the prisoner with the homicide. The enormity of the crime and its ghastly features, together with the fact that the evidence against the prisoner is entirely circumstantial, have caused us to examine with great care the whole evidence.

The husband of the murdered woman, about sunrise on the 22d of last January, left his wife and several children at their home, about twelve miles from Raleigh, alive and well. When he returned, about sundown, he found his wife dead in a cotton field a hundred yards from the house, lying on her face, with her skull crushed, and two of the children so badly beaten and injured that they died on the same day. The community naturally was filled with terror and excitement. Somehow or other the husband's suspicions were directed against the prisoner and he at once had him arrested. There was evidence that the prisoner, who lived a mile away, was seen on the premises and at the corner of the dwelling-house of the deceased at 1 o'clock on the day of the homicide, and four hours later secreting himself under some bushes near the public road a half-mile away. The tracks leading from the house and to and from the dead body and in the direction of the house of the prisoner were described by one of the witnesses as being those of (619) a man who wore a number eleven shoe and who walked in what is called a "slew-footed" manner—that is, with feet set out in a right and left angle. That witness further said that he knew and had often seen the tracks of the prisoner, and that they were identical in size with those around the house and near the dead body, and that the prisoner walked with his feet at right angles. In addition, the prisoner was shown to have made contradictory statements as to his whereabouts on the day of the homicide.

We are of the opinion that the evidence, while not of the strongest character against the prisoner, was properly submitted to the jury, which body alone could pass upon its strength and weight.

But there was an error committed in the trial below which necessitates a new trial. The State, in its efforts to prove a motive on the part of the prisoner for the homicide, introduced evidence tending to show that robbery—pecuniary gain—was the incentive to the murder. The prosecutor, the husband of the deceased, testified that he left six dollars in a drawer at the house on the morning of the homicide, and that when he returned the money had been stolen or abstracted. He was asked

if the prisoner knew of his having money in the house, and his only answer was that he had never told him so. There was no evidence to the effect that the prisoner knew there was any money in the house. When he was arrested he was thoroughly searched to the body, the pockets of his clothing also being examined, and only two half-dollars and four one-cent pieces were found. The four one-cent pieces were paid to him the day before as a balance due for labor, and the prosecutor did not testify that the two silver half-dollar pieces were a portion of his money. Upon that evidence his Honor instructed the jury that "the fact that money was taken from the house, and all these circumstances, tend to prove the fact that not only
(620) was Mary Bridgers killed, but that she was killed by the prisoner, and was killed in pursuance of a premeditated, deliberate purpose." There was error in that instruction. It is not necessary to the conviction of one accused of murder that a motive for the homicide should be shown. The intention is the matter necessary to be shown, and not the motive. Where the evidence is circumstantial only, jurors ordinarily require that a motive be proved for the committal of the homicide—that is, a motive, or the want of a motive, has an important bearing upon the probability of the guilt or innocence of the accused. Therefore it is of the highest consequence to the prisoner that if an attempt to prove a motive for his act is made, it should be shown by strictly legal evidence and that all reference thereto by the Judge in his instructions to the jury shall be clear and accurate. In this case there was no evidence of motive against the prisoner. Where pecuniary advantage—robbery—is charged to be the motive, it must be shown that the prisoner knew the facts at the time of the killing. 2 Am. and Eng. Ency. Law, 215; *People v. Morgan,* 124 Mich., 527; *Gillum v. State,* 62 Miss., 547; *Cockrill v. State,* 32 Tex. Cr. Rep., 585.

There was no evidence, as we have said, that the prisoner knew there was any money in the house, and none that any part of it was found on him when he was searched.

Exception was taken to the instructions of the Court below for the first time in this Court, but the Attorney-General agreed that it might be considered here, and this Court would be slow to refuse in a case involving the life of the prisoner, to give him the benefit of a point upon the technical ground that an exception was not entered in the Court below. *S. v. Morris,* 84 N. C., 761.

New Trial.

Cited: S. c., 138 N. C., 689; *S. v. Turner,* 143 N. C., 643; *S. v. McKay,* 150 N. C., 815.

(621)

STATE v. HANKINS.

(Filed 11 October, 1904.)

1. FORMER ACQUITTAL—*Larceny.*

The evidence in this prosecution for larceny is not sufficient to sustain a plea of former acqiuttal.

2. PLEADINGS—*Former Acquittal—Judgment—Verdict.*

A plea of former acquittal should aver that a judgment was entered upon the verdict in the former trial.

INDICTMENT against Joseph Hankins, heard by Judge *G. S. Ferguson* and a jury, at April Term, 1904, of NEW HANOVER.

The defendant and one Sam Bell were indicted for stealing a hat, cap, pants, collar buttons and suspenders from R. F. Hamme, and the State, being unable to show that the defendant, Hankins, took any of the articles described in the bill, proposed to prove by the prosecutor that he saw him take a coat at the same time, but in a different part of the store, Bell being at the showcase and the defendant at the clothing table; the avowed object of the Solicitor being to show a conspiracy to steal the articles mentioned in the bill and thereby to convict the defendant. The Court admitted the testimony, but upon its appearing afterwards that defendant had not taken any of the articles alleged in the first trial to have been stolen, and that the parties had not talked or made any signs to each other, and there being no other evidence of a conspiracy, the Court charged the jury that there was no evidence of a conspiracy, and directed a verdict of not guilty as to Hankins, which was entered. The defendant was thereupon indicted for stealing the coat and pleaded former acquittal and not guilty, and the first plea was tried upon the evidence already stated and the further evidence that the coat was the same coat which the prosecutor identified in the first case and was taken at the same time the other articles were taken and from (622) the same person. The Court instructed the jury that if they believed the evidence they should return a verdict against the plea, as it had not been sustained. There was a verdict against the defendant upon his plea of not guilty. There was no exception as to this plea. Judgment and appeal.

Robert D. Gilmer, Attorney-General, for the State.

Bellamy & Bellamy and *Herbert McClammy,* for the defendant.

WALKER, J., after stating the case. The fact that the defendant took the coat was not used as evidence against him on

the trial of the first indictment, because, while the Judge at first admitted it as evidence, he subsequently withdrew it from the consideration of the jury by charging them that there was no evidence of a conspiracy and consequently none of defendant's guilt The verdict in that case determines that there was no joint action between defendant and Bell and no intent common to both of them, and it further determines that defendant did not steal any of the goods mentioned in the first indictment. The object of the State was not to show that the defendant took the articles described in that indictment and the coat at one and the same time, but to prove that there was a conspiracy between Bell and Hankins because they took different goods in the same store at the same time which belonged to the same person. The case does not therefore fall within the principle of *S. v. Weaver,* 104 N. C., 758, which was cited by defendant's counsel. The true principle by which to test the sufficiency of the plea of former acquittal as a bar is said to be this: Unless the first indictment was such as that the defendant might have been convicted upon it by proof of the facts contained in the second, an acquittal on the first can be no bar to the sec-
(623) ond. *Rex v. Vandercomb,* 2 Leach, 716; *S. v. Birmingham,* 44 N. C., 120; *S. v. Nash,* 86 N. C., 650, 41 Am. Rep., 472; *S. v. Williams,* 94 N. C., 891. This statement of the principle (which was taken from the opinion of Justice *Buller* in *Rex v. Vandercomb*), has, we think, been justly criticised, as it may exclude the right of the defendant, by proof of facts other than those alleged in the second indictment, to show the identity of the two offenses, and it has been suggested that the rule should be that unless the evidence as brought forward to prove the allegations of the second indictment would be sufficient to convict upon the first, the plea of former acquittal or conviction should not avail the defendant (*S. v. Nash,* 86 N. C., at p. 656), but this would not remove the fault unless the rule is further extended so as in terms to include the right of the defendant to prove the identity of the offenses charged in the two indictments, which might otherwise appear to be different.

In order to support a plea of former acquittal it is not always sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense; the same both in law and fact. *S. v. Jesse,* 20 N. C., 98; *S. v. Nash, supra; S. v. Williams, supra.* Nor is it sufficient to sustain the plea that evidence of the facts alleged in the first indictment would also be competent evidence of the facts alleged in the second. *S. v. Jesse, supra.* In the case last cited, RUFFIN,

C. J., for the Court, says: "We are to inquire whether the facts alleged in the two indictments are actually or legally the same; if they be, the accused cannot be a second time put on trial; if they be not, he is tried but once on the same accusation." So that, it follows if there is not a complete identity of the two accusations as alleged in the indictments, there must be an averment in the plea of such facts as will show the identity of the two, and on the trial of the issue joined on the plea there must be proof of the facts thus averred. *S. v. Birmingham, supra; S. v. Nash, supra.* Applying these principles to (624) the case in hand, we find that the indictments are not precisely the same, and therefore that it required averment and proof to establish the actual or legal identity of the two offenses charged to have been committed, and in order to do this it was at least necessary to allege and show that the defendant took and carried away the goods described in the first and second indictments at the same time and place, by one and the same act and with one and the same felonious intent, and that in the trial of the first indictment proof of such taking of the article described in the second indictment had been introduced for the purpose of convicting the defendant of the larcency charged in the former indictment. 1 Bish. New Cr. Pro., sec. 814, *et seq.;* Wharton Cr. Pl. and Pr. (9 Ed.), sec. 470. But there was no evidence of that kind in this case. The defendant did not take any of the goods described in the first indictment. On the contrary, the proof was that the two men entered the store at different times and stole different articles which were not in the same part of the store, the only identity between the offenses being that they were committed at the same time and that all the goods belonged to one and the same person. The evidence, therefore, necessary to support the second indictment would not have been sufficient to procure a legal conviction upon the first, and *e converso,* there being no actual or legal identity between the two accusations.

The rule we have just stated as to the sufficiency of the evidence is the one laid down by Archbold and approved by this Court in *S. v. Williams,* 94 N. C., at page 894, and when applied to the proof in the case is fatal to the defendant's plea. The mere fact that the State was permitted to show the taking of the coat as a fact to establish a conspiracy is not sufficient to sustain the plea, as it did not by itself tend to prove a conspiracy or any concert of action, and the Court so held.
The case then stands upon proof only of a separate and (625) distinct taking and asportation by each of the parties of different articles, instead of a single taking by the defendant

of all the articles at one and the same time. This presents a state of facts which is the converse of *S. v. Bynum,* 117 N. C., 749, but within the principle of that case.

Assuming, as we have, for the sake of the argument, that if defendant had himself stolen all the articles at one and the same time, the prosecutor had the right to carve as large an offense out of the transaction as he could, but must cut only once; and if defendant had been indicted for stealing only one of the articles and was acquitted, he could successfully plead the acquittal in bar of a subsequent prosecution for stealing another of the articles, we yet do not perceive how the defendant has made any such case, and for this reason we cannot say that there has been any former jeopardy.

We have not adverted to the fact that the plea, as far as appears, does not aver, nor does the proof show, that there was any judgment entered upon the verdict of acquittal in the first case, and this is an essential ingredient of a good plea, and, if properly averred, the necessary proof must be forthcoming to sustain the allegation. According to the precedents, the pleader should have averred that judgment was entered on the verdict of acquittal, "as by the record more fully and at large appears, which judgment still remains in full force and effect, and not in the least reversed or made void." Archbold's Cr. Pl. (3 Am. Ed.), 89; *S. v. Williams,* 94 N. C., at p. 893. The statute of 15 Vict. has not been adopted in this State.

The Judge's ruling upon the plea of former acquittal was correct, and, there being no other error alleged or found in the record, the conviction of the defendant must be sustained.

No Error.

Cited: S. v. White, 146 N. C., 609.

---

(626)

STATE v. LEWIS.

(Filed 18 October, 1904.)

LARCENY—*Evidence—Presumptions.*

Where the prosecutor testified that the defendant offered to return the money alleged to have been stolen, evidence that the defendant was timid was admissible to rebut the presumption of guilt arising from the proposition.

INDICTMENT against Thomas Lewis, heard by Judge *G. S. Ferguson* and a jury, at June Term, 1904, of LENOIR. From a verdict of guilty and judgment thereon defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Land & Cowper, for the defendant.

CONNOR, J. The defendant being on trial upon a charge of the larceny of money from the person of the prosecutor, it was in evidence that the prosecutor was in the habit of getting drunk and claiming to lose money; that on other occasions he had accused persons of taking his money and they had paid him to avoid prosecution, but whether said persons were guilty or not the witnesses said they did not know. There was evidence that defendant denied having the money and said he did not get it. The prosecutor swore that defendant said he had the money and would pay it back if he would go with him to Snow Hill; that he went and defendant dodged him. The defendant offered to prove by one Sullivant that he was a timid man and easily frightened, to account for his conduct in proposing to pay the prosecutor and to settle the matter for the purpose of rebutting any presumption of guilt which might arise from such proposition. This testimony was, upon objection from the State, excluded, and defendant excepted. For the purpose indicated, the proposed testimony was competent. The State having shown conduct on the part of the defendant which, (627) unexplained, amounted to a confession, it was competent to show the state of mind of the defendant at the time of such conduct—as that he was frightened, or that inducements were held out, promising immunity from prosecution, or that, as in this case, he was a timid man and easily frightened. The fact, if true, that the defendant was a weak-minded man, easily imposed upon, credulous or timid, is relevant as tending to explain his conduct. The rules controlling the admission of testimony in respect to its relevancy are based upon experience and observation of mankind in their social, business and other relations. Conduct tending to show guilt or innocence is stronger or weaker according to the state of mind, physical condition, temperament, environment, etc., of the party. "The sex, age, disposition, education and previous training of the prisoner are to be considered in determining whether the confession was or was not free and voluntary, for it is well known that a determined, incredulous and experienced man is not so susceptible to threats or to promise of immunity as a feeble woman or a person of feeble intellect or will power." Underhill Cr. Ev., sec. 128. It is proper that juries shall have the assistance which such facts afford in passing upon conduct from which they are required to draw inferences of guilt or innocence. The weight to be attached to it is dependent upon the opportunity

the witness has for knowing the temperament or disposition of the defendant and the circumstances under which they are manifested. What weight the jury may attach to such evidence we may not conjecture. In this case it may not have affected the verdict. If it was competent—that is, relevant—the defendant was entitled to have it submitted to the jury for the purpose suggested. Of course his Honor, either at the time of its admission or in his charge to the jury, will explain to them for what purpose it was admitted and in what way they
(628) may consider it. For the error in rejecting the testimony the defendant is entitled to a

New trial.

STATE v. MORGAN.

(Filed 25 October, 1904.)

1. ARSON—*Intent—The Code, sec. 985, subsec. 6, 1761—Laws 1885, ch. 66.*

In a prosecution for burning a barn the State must prove a criminal intent.

2. INSTRUCTIONS—*Arson—The Code, sec. 413.*

An error in giving an erroneous instruction is not cured by subsequently correctly stating the law.

INDICTMENT against Elizabeth Morgan and Samuel Ford, heard by Judge *R. B. Peebles* and a jury, at August Term, 1904, of UNION. From a verdict of guilty and judgment thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, and *Adams, Jerome & Armfield,* for the State.

Redwine & Stack, for the defendants.

WALKER, J. The defendants were indicted for burning a barn or granary, the property of Henry Dry. There were two counts in the bill. In the first it was alleged that Samuel N. Ford willfully, wantonly and feloniously set fire to the barn, and in the second that Elizabeth Morgan and her husband, John E. Morgan, unlawfully, willfully, wantonly and feloniously incited and procured him to do it. The indictment was
(629) drawn under section 985 (6) of The Code, which requires the act to be done "willfully and wantonly," and makes it a felony.

The State introduced evidence which tended to show that Ford had set fire to the barn and that the other persons named in the bill procured him to do so, and there was evidence for the defendant tending to show the contrary. John E. Morgan died before the trial.

Numerous exceptions to the admission and rejection of testimony were noted by the defendants, but as there is an exception taken to the charge of the Court to the jury which we must sustain, it is deemed unnecessary to consider the other questions raised, as they may not be again presented.

The State alleged, and it was one of its principal contentions, that John E. Morgan and his wife and the other defendant, Samuel N. Ford, had formed a conspiracy to burn the barn because John E. Morgan was mad with one Henry Dry, and as one of Morgan's tenants had left him and gone to live with Dry he wanted to have his revenge. This was assigned by the State as the motive for the burning, and in referring to the question of motive the Court charged the jury as follows: "While it is permissible to show motive as a circumstance to be considered by the jury upon the question of guilt, it is not necessary, as contended by counsel for the defendants, that the State should show a motive. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the bill of indictment." To the last part of this instruction the defendants in apt time excepted.

It must be conceded that it is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. *S. v. King,* 86 N. C., 603; *S. v. Voight,* 90 N. C., 741; *S.* (630) *v. Smith,* 93 N. C., 516; *S. v. McBrayer,* 98 N. C., 619; *S. v. McLean,* 121 N. C., 589, 42 L. R. A., 721. But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent. *S. v. King* and cases *supra.* In the latter case, if the act may be innocent or not according to the intent with which it is done, or if its criminality depends upon the intent, it is incumbent on the State to show the intent or to show the facts and circumstances from which the intent may be inferred by the jury, and it is necessary that the jury should find the intent as a fact before the defendant charged with the commission of the act can be adjudged guilty of a crime. *S. v. McDonald,* 133 N. C., 680.

The principle just stated, which is fully sustained by the au-

thorities, has been applied by this Court to cases where the act is forbidden and denounced as criminal if "willfully" or "wantonly" done. In *S. v. Whitener,* 93 N. C., 590, the defendant was indicted for "willfully and unlawfully injuring and damaging a house" by removing a window sash, under section 1761 of The Code. The Court charged the jury substantially, as did the Judge in our case, that if the defendant committed the act—that is, removed the sash—he was guilty and they should so find. This was held to be error, the Court, through ASHE, J., saying: "The facts as found and admitted clearly bring the act of the defendant within the words of the statute, but they do not bring him within its meaning and spirit. The indictment, following the statute, charges that the act of removing the sash was unlawful and willful. Conceding it to have been unlawful, it does not follow that it was willful. The word 'willful,' used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he (631) has the right or not—in violation of law, and it is this which makes the criminal intent, without which one can not be brought within the meaning of a criminal statute." *S. v. Howell,* 107 N. C., 335.

It will be seen that in *S. v. Whitener* the Court takes a case like ours, or one where by the very terms of the statute an act must be done willfully and wantonly, out of the principle that when an act is forbidden the intentional doing of the act constitutes the criminal intent and places it in that class of cases in which the intent is a necessary ingredient of the crime and must be found by the jury. It makes no difference how clearly the intent may appear from the circumstances, the ultimate fact of the intent must be found, and in order to do so the jury are required to pass upon those circumstances.

In this case the Court simply told the jury that if they found the defendants committed the acts alleged in the indictment—that is, if the defendant Ford set fire to the barn and the other defendants procured him to do it—they were guilty, as that was all the State was required to prove. This certainly did not inform the jury that it was necessary that the act should have been willful and wanton, and was not any more explicit than was the charge in Whitener's case, which was adjudged to be erroneous. When the Court undertook to tell the jury what was necessary to warrant a conviction, it should have given all of the ingredients of the alleged offense and instructed them as to all the facts necessary to be found by them before they could

convict. *S. v. Austin,* 79 N. C., 624. We think the fact that this instruction was given with the one in regard to "motive" was also calculated to mislead the jury and to impress them with the idea that proof of the commission of the bare act of setting fire to the barn was all sufficient to convict. We do not think that the error of the Court was cured by the instruction in a former part of the charge to the effect that the State must satisfy the jury beyond a reasonable doubt that (632) Ford set fire to and burned the barn as charged in the bill, and that if they found him guilty and were satisfied beyond a reasonable doubt that the defendant Elizabeth Morgan counseled and procured him to burn the barn, then they should convict her. We doubt very much if those instructions were in themselves sufficient to present the question of intent properly to the jury. *S. v. Edmund,* 15 N. C., 340. But in connection with those instructions the Court charged the jury that if they found Samuel Ford burned the barn and granary, they should convict him, and that the guilt of Mrs. Morgan hinged on that of Ford. Even if the former instructions stood by themselves we might perhaps question their correctness, as they do not seem to be a compliance with the requirement of the law. The Code, sec. 413. But, assuming them to be correct, they do not cure the error committed in the instruction subsequently given and to which exception was taken. The jury are not supposed to know which instruction is the correct one, the first or the last, and we must presume that they acted upon the erroneous instruction, as we can not know certainly that they did not. *Edwards v. R. R.,* 132 N. C., 99; *Williams v. Haid,* 118 N. C., 481; *Tillett v. R. R.,* 115 N. C., 662; *S. v. Barrett,* 132 N. C., 1005; *S. v. Daniel, ante,* 571. If the jury, under the instruction of the Court, had merely found in a special verdict that the defendants committed the acts alleged in the bill of indictment, without finding as a fact that the commission of them was willful and wanton, the verdict would have been defective and judgment could not have been pronounced thereon. *S. v. Blue,* 84 N. C., 807; *S. v. Whitener, supra.* If such a special verdict would have been defective, the charge of the Court must have been erroneous, as it embraces no more findings of fact than such a special verdict. (633)

Our conclusion is that there was error in the charge, and it must be so certified, to the end that a new trial may be awarded to the defendants.

New trial.

STATE v. VAN PELT.

(Filed 13 December, 1904.)

1. BILLS OF PARTICULARS—*Indictments—Grand Jury.*

A bill of particulars, not being made by the grand jury, cannot supply a defect in an indictment.

2. BILLS OF PARTICULARS—*Conspiracy.*

Where a solicitor files a bill of particulars the State is confined in its proof to the items therein set out.

3. INDICTMENTS—*Conspiracy.*

The bill of particulars in this case makes sufficiently definite the charge and means by which the alleged conspiracy was to be put into execution.

4. CONSPIRACY—*Indictment—Quashal.*

An indictment charging that certain persons notified the prosecutor that he would not be considered in sympathy with organized labor if he employed others than union men, nor if he retained nonunion men with whom he had already contracted a year in advance; and upon refusal of prosecutor to discharge the nonunion men and not to agree to employ only union men, a notice was made in a newspaper that at a meeting of carpenters and joiners the attitude of the prosecutor was declared unfair toward organized labor and so listed, and that no union carpenter would work any material from the shop of the prosecutor after a given date, does not constitute a conspiracy.

INDICTMENT against A. Van Pelt, W. T. R. Jenkins, (634) C. A. Sherman, S. W. Henry and S. A. Sherman, heard by Judge *M. H. Justice* at May Term, 1904, of ROWAN.

This was an indictment against the defendants in the following words, to wit: "The jurors for the State, upon their oath, present that A. Van Pelt, W. T. R. Jenkins, C. A. Shuman, S. W. Henry and S. A. Shuman, being persons of evil minds and dispositions, together with divers other evil disposed persons, whose names are to the jurors unknown, wickedly devising and intending to injure and destroy one C. A. Rice of the county of Rowan and State of North Carolina, in his trade and business as a dealer in lumber, on 15 January, 1904, at and in the county of Rowan and State aforesaid, and within the jurisdiction of this Court, fraudulently, wickedly, maliciously and unlawfully did conspire, combine, confederate and agree together, between and amongst themselves unlawfully to injure and destroy the said C. A. Rice in his trade and business which he then and there used, exercised and carried on as aforesaid, against the peace and dignity of the State. And the jurors

aforesaid, upon their oaths aforesaid, do further present that the said A. Van Pelt, W. T. R. Jenkins, C. A. Shuman, S. W. Henry and S. A. Shuman, together with other evil disposed persons whose names are to the jurors unknown, contriving and devising to injure and destroy the said C. A. Rice in his trade and business aforesaid, and as much as in them lay unlawfully and feloniously to ruin him in his trade and business as a dealer in lumber which he then and there carried on, used and exercised as aforesaid, and to prevent and hinder him from using, exercising and carrying on the said trade and business in as full, ample and beneficial a manner as he was used and accustomed to, on 15 January, 1904, in the county and State aforesaid, and within the jurisdiction of this Court, unlawfully, wickedly and maliciously did conspire, confederate, combine and agree together, with divers fraudulent and (635) wicked means and devices, to injure, oppress and impoverish the said C. A. Rice, and wholly to prevent and hinder him from using, exercising and carrying on his trade and business of a dealer in lumber as aforesaid, and caused to be published in a certain newspaper issued daily in the city of Salisbury, county and State aforesaid, a certain article in words and figures as follows, to wit:

"'ACTION OF THE CARPENTERS AND JOINERS.—At a meeting of the Carpenters and Joiners held last evening, for his attitude towards organized labor Mr. C. A. Rice was declared unfair, and so listed, and that no union carpenters would work any material from his shop after 15 February, 1904.

"'S. A. SHUMAN, SR., *President.*

"'W. T. R. JENKINS, R. S.'

"And that the aforesaid publication was caused to be printed as aforesaid in the newspaper aforesaid on 16 January, 1904, to the great damage of the said C. A. Rice, to the evil and pernicious example of all others in the like case offending, and against the peace and dignity of the State."

Defendants moved that the State be required to file a bill of particulars to the first count in the indictment. Motion allowed, whereupon the Solicitor filed the following bill of particulars, to wit:

"The State alleges that the defendants, A. Van Pelt, S. A. Shuman, W. T. R. Jenkins, S. W. Henry and C. A. Shuman, together with other evil disposed persons to the State unknown contriving and devising with the intent to injure and destroy one C. A. Rice in his trade and business as a dealer in and

manufacturer of lumber, and as much as in them lay unlawfully and maliciously to injure and ruin him in said
(636) trade and business as a dealer in and manufacturer of lumber which he then and there carried on, used and exercised in the county of Rowan and State of North Carolina, and to prevent and hinder him from using, exercising and carrying on the said trade and business and manufacture in as full, ample and beneficial a manner as he was used and accustomed to, on 15 January, 1904, in the county and State aforesaid, and within the jurisdiction of this Court, unlawfully, wickedly and maliciously did conspire, combine and agree together to injure, oppress and impoverish the said C. A. Rice, and with the intent to prevent and hinder him from using and carrying on his trade and business as a dealer in and manufacturer of lumber as aforesaid, caused to be published in a certain newspaper in the city of Salisbury, county and State aforesaid, a certain article in words and figures as follows, to-wit:

"'ACTION OF CARPENTERS AND JOINERS.—At a meeting of the Carpenters and Joiners held last evening, for his attitude towards organized labor Mr. C. A. Rice was declared unfair, and so listed, and that no union carpenter would work any material from his shop after 15 February, 1904.

"'S. A. SHUMAN, SR., *President.*

"'W. T. R. JENKINS, R. S.'

"And that the aforesaid publication was caused by the defendants to be printed in the newspaper as aforesaid on 16 January, 1904, to the great damage of the said C. A. Rice, and that it was the intent and purpose of the defendants, by said publication, to injure, oppress and impoverish the said C. A. Rice in his trade and business and manufacture as aforesaid, and that the defendants did combine, agree and conspire together to publish said notice as above set forth for the unlawful and malicious purpose of injuring the said C. A. Rice
(637) in his trade and business and manufacture as aforesaid, by inducing all persons who would otherwise have purchased lumber and material from the said C. A. Rice to refrain from so doing, for fear of the ill will of the defendants and other evil disposed persons so conspiring and contriving with them, whose names are to the State unknown, and for fear that if they—that is to say, all persons who would otherwise have purchased lumber and material from the said C. A. Rice—should so purchase the same, they, the said persons, would be subject to delay and inconvenience by reason of the refusal of

the defendants, and other evil disposed persons whose names are unknown to the State, to work the material so purchased from the said C. A. Rice, and that in so conspiring and combining together to injure the business of the said C. A. Rice as aforesaid, by the publication as aforesaid, in manner and form as above set forth, the defendants intended to prevent persons desiring to purchase lumber from purchasing the same from the said C. A. Rice, and to influence and deter persons desiring lumber from procuring the same from the said C. A. Rice, with the intent to injure, destroy and damage the trade and business and manufacture of the said C. A. Rice.

"And before the said 15 January, 1904, as hereinbefore mentioned, the said A. Van Pelt, W. T. R. Jenkins and S. W. Henry, three of the defendants in this case, did unlawfully, wickedly, maliciously conspire and agree together, and did go together, on or about 13 January, 1904, to the place of business of the said C. A. Rice in the city of Salisbury, in the county and State aforesaid, and then and there notified the said C. A. Rice that he, the said C. A. Rice, could not be considered in sympathy with organized labor unless he kept constantly employed only union men, and notified him further that he would not be in sympathy with organized labor if he kept in his employ any nonunion men, notwithstanding the fact that he had heretofore employed and contracted with non- (638) union men for as much as a year in advance, and to discharge them would be a violation of his contract with such nonunion men; and upon being informed by said Rice that he would not discharge any nonunion men with whom he had contracted in advance by the year to work for him, and that he would not agree to employ only union men in his business, the said A. Van Pelt, W. T. R. Jenkins and S. W. Henry went away, and on 15 January, 1904, in furtherance of their said conspiracy and combination to injure and destroy the business of the said C. A. Rice as aforesaid, they combined and agreed among themselves and with the other defendants, and with divers evil disposed persons whose names are to the State unknown, to publish the aforesaid notice hereinbefore set forth, for the purpose aforesaid, and did actually cause the same to be published with the intention to injure and destroy the business and trade and manufacture of the said C. A. Rice as above set forth. HAMMER, *Sol.*"

The counsel for the defendants thereupon demurred *ore tenus* to the bill of indictment, and moved to quash, for that the bill,

together with the bill of particulars, did not charge a criminal offense. Motion and demurrer sustained, and bill quashed. The State excepted to the order of the Court and appealed to the Supreme Court.

Robert D. Gilmer, Attorney-General, J. H. Horah and *A. H. Price,* for the State.

T. F. Kluttz, R. Lee Wright and *Overman & Gregory,* for the defendants.

CONNOR, J. We do not find it necessary to consider the sufficiency of the first count in the bill. By filing the bill of particulars the State, for the purpose of this appeal, makes (639) sufficiently definite the charge and means by which the alleged conspiracy was to be put into execution. The demurrer *ore tenus* is based upon the indictment and the bill of particulars. We, however, fully approve the language of *Shaw,* C. J., in *Com. v. Hunt,* 45 Mass., 111. "From this view of the law respecting conspiracy we think it an offense which especially demands the application of that wise and humane rule of the common law that an indictment shall state with as much certainty as the nature of the case will admit the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of an acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense." It is further said that when the criminality of the offense consists in an unlawful agreement to compass some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; if the criminality intended to be charged consists in the agreement to compass some purpose not unlawful or criminal in itself by the use of force, fraud, falsehood or other criminal or unlawful means, such intended means must be set forth in the indictment. *Lambert v. People,* 9 Cow., 578. In *S. v. Trammell,* 24 N. C., 379, GASTON, J., says: "It is said that the gist of a criminal conspiracy is the unlawful concurrence of many in a wicked scheme and that the crime of conspiracy is complete without any act having been done to carry it into execution. This consideration renders it but the more important that the charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may know what is the accusation they are to defend."

Waite, C. J., in *U. S. v. Cruikshank,* 92 U. S., 542, passing

upon the sufficiency of an indictment for conspiracy, says: "The accused has therefore the right to have a (640) specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment. So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the Court, not the prosecutor. Therefore the indictment should state the particulars to inform the Court as well as the accused. It must be made to appear—that is to say to appear from the indictment without going further—that the acts charged will if proved support a conviction for the offense alleged." Mr. Justice *Clifford,* concurring in the result, says: "Descriptive allegations in criminal pleadings are required to be reasonably definite and certain, as a necessary safeguard to the accused against surprise, misconception and error in conducting his defense and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of this kind are entitled to respect, but it is obvious that if such description of the ingredient of the offense created and defined by an act of Congress is held to be sufficient, the indictment must become a *snare* to the accused." *Pettibone v. United States,* 148 U. S., 197. In *S. v. Younger,* 12 N. C., 367, 17 Am. St., 571, the offense is fully described and the means by which it was consummated set out, to-wit, by making the prosecutor drunk and falsely, fraudulently and deceitfully cheating him at a game of cards.

While it is the right of the defendant to demand and the duty of the Court to require a bill of particulars, this is for the benefit of the defendant and does not in any degree deprive him of the right to have the bill of indictment quashed if insufficient. Mr. Bishop well says: "The bill of par- (641) ticulars not being made by the grand jury on oath can not supply any defect in the indictment." Crim. Prac., sec. 646. It would seem that as the defendant is entitled to demand the bill of particulars, and as the State on the trial is restricted to proofs of the facts set out, it would be more in accordance with reason, good criminal pleading and the safety of the citizen to require the State to set out *in the indictment* the charge in full, together with the means by which the alleged conspiracy is to be effectuated. It is so held by many courts and required by statutes. No offense is so easily charged and so difficult to be met

unless the defendants are fully informed of the facts upon which the State will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written Constitution. We can see no good reason why an exception to the general rules of criminal pleading should be made in favor of this crime; certainly there is nothing in the history of the criminal law of England or this country to recommend it to the favor of courts having regard for liberty regulated by law. Such an indictment has been appropriately termed "a drag net of vague charges" to catch innocent persons, who in times of excitement may be convicted by the suspicions and prejudices of juries. An examination of the cases cited in Wright on Criminal Conspiracy, 186, discovers a state of painful uncertainty in the rulings of courts, explained frequently by the political or other bias of temper or opinions of the Judge. Certainty should never be sacrificed to the plea for simplicity. Viewed properly there is no conflict between them. We cannot but think

(642) that an omission of the needless repetition of epithets and denunciatory terms of the defendant and the insertion, in place thereof, in plain language, of the facts relied upon would be conducive to that certainty and simplicity which are the real safeguards to society and the citizen. General and indefinite descriptions of alleged crimes, like general warrants, "are dangerous to liberty and ought not to be tolerated." Const., Art. I, sec. 15. "Every man has a right to be informed of the accusation against him." *Ib.*, 11. These truths are of the essence of civil liberty. They are not to be explained away to meet the demand for speedy trials and swift punishment. "No man shall be put to answer any criminal charge * * * but by an indictment," etc. We find nothing here of "bills of particulars" drawn up, after indictment found, by prosecuting officers to aid defective bills, or bills in which, if the charge was set forth in a full and specific manner, could never have received the endorsement of a grand jury. "Bills of particulars" are suggestive of "Informations" which became odious because of the oppressive use made of them by officers of the Crown in the prosecution of persons charged with offense. When grand juries would not aid in such prosecutions "Informations" were resorted to. They recall the days of "constructive treasons." Men were hung, drawn and quartered for *"imagining"* the death of the King. They recall the time when

Titus Oates swore away the lives of innocent men charged with being members of an imaginary "Popish Plot."

The Solicitor having filed a bill of particulars, the State is confined "to the items therein set down." Bish. Crim. Proc., 643. We are thus brought to a consideration of the question whether eliminating all irrelevant matter, the facts charged and admitted by the demurrer constitute a criminal conspiracy —either by reason of the character of that which was agreed to be done or the means by which the agreement was to be effectuated. "The preamble and introductory matter (643) in the indictment—such as unlawfully, deceitfully, designing and intending unjustly to extort great sums, etc.—is mere recital and not traversable, and therefore can not aid an imperfect averment of facts constituting the description of the offense. The same may be said of the concluding matter which follows the averment as to the great damage, etc." Stripped of these introductory recitals and alleged injurious consequences and the qualifying epithets, attached to the facts, the averment is this, that the defendants conspired to injure the prosecutor in his trade and business and thereby impoverish him: (1) That pursuant to this agreement three of the defendants on 13 January, 1904, went together to the place of business of the prosecutor and notified him that he could not be considered in sympathy with organized labor unless he kept constantly employed union men. (2) That he would not be considered in sympathy with organized labor if he kept in his employment nonunion men—notwithstanding the fact that he had theretofore employed and contracted with nonunion men for as much as a year in advance. (3) That upon being informed by said Rice that he would not discharge nonunion men with whom he had contracted and would not agree to employ only union men, etc., the defendants published the notice set out in the bill of particulars. That the purpose of publishing said notice was to induce all persons who would otherwise have purchased lumber and material from the said Rice to refrain from doing so (*a*) for fear of the ill will of the defendants, etc., and other evil disposed persons; (*b*) that they would be subject to delay and inconvenience by reason of the refusal of the defendants and other evil disposed persons, whose names are to the State unknown, to work the material so purchased from the said C. A. Rice, etc. That by the means aforesaid the defendants intended to prevent persons desiring to purchase lumber from purchasing the same from the said C. A. Rice, etc. That (644) by the means aforesaid the defendants intended to prevent persons desiring to purchase lumber from purchasing the

same from the said C. A. Rice, and to influence and deter persons desiring lumber from purchasing the same from the said C. A. Rice with the intent to injure and destroy, etc. We omit at this time any reference to the alleged motive of the defendants.

A criminal conspiracy is defined to be an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. *Shaw*, C. J., in *Com. v. Hunt*, says: "Without attempting to review or reconcile all the cases, we are of the opinion that as a general description, though perhaps not a precise or accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy and punishable by indictment. * * * But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as a conspiracy."

Mr. Wright in his work on Criminal Conspiracy classifies the decisions in the different States and places North Carolina in the class which holds that conspiracies are indictable "where neither the object or the means are criminal but where injury results to individuals," and for this he cites *S. v. Younger*, 12 N. C., 357. With the exception of *S. v. Younger*, we find no case in our own Reports in which an indictment is sustained which did not allege a conspiracy to commit acts, or the (645) bill of particulars did not set out facts showing a conspiracy to commit acts, indictable either at common law or under some statute. It must be conceded that expressions are to be found in the opinions of the Court to the contrary. In *S. v. Tom*, 13 N. C., 569, the charge was a conspiracy by slaves to commit murder. It was made indictable by statute. It was equally so at common law. In *S. v. Trammell*, 24 N. C., 379, Judge GASTON says that it is not necessary to decide whether the facts set out constitute a criminal conspiracy. The Court held that in no view were the defendants guilty. In *S. v. Christianbury*, 44 N. C., 46, the Court expressly declined to pass upon the sufficiency of the bill, putting the case off on the statute of limitations. In *S. v. Brady*, 107 N. C., 822, the second count charged a conspiracy to cheat and defraud by falsely and fraudulently representing that certain lands contained gold

mines, whereas the defendant well knew that the said lands did not contain gold mines, etc. There was a motion to quash which was denied. There was a general verdict of guilty. The Court said that if either count was good it would support the verdict. This was sufficient to dispose of the appeal. The second count was undoubtedly good and the motion to quash could not be allowed. In *S. v. Powell,* 121 N. C., 635, MONTGOMERY, J., says that the bill charged a conspiracy to commit an offense indictable at common law. In *S. v. Wilson,* 121 N. C., 650, the question is not raised or discussed—a new trial was given on other grounds. In *S. v. Earwood,* 75 N. C., 210, the only question decided was the admissibility of evidence upon which a new trial was given. In *S. v. Howard,* 129 N. C., 585, there were three counts. The first charged generally a conspiracy to cheat and defraud. The second and third, setting out the facts showing a conspiracy to rob and to obtain money under false pretenses, and the means resorted to, were *nol prossed* but referred to as a bill of particulars. The first count was (646) sustained by a divided Court, the present Chief Justice, writing for the majority, saying that by the second and third counts considered as a bill of particulars, the defendants were fully informed, etc. It will thus be seen that in all of the cases in our Reports a conspiracy to commit an indictable offense is charged in the indictment, or facts set forth in a bill of particulars, charging a conspiracy to commit such an offense. In Younger's case, *supra,* the charge in the indictment was that the defendants conspired to cheat and defraud the prosecutor, etc., and to accomplish that end they procured him to be intoxicated and engaged him to play at cards, by means whereof by falsely, fraudulently and deceitfully playing at the game of cards they cheated him, etc. It is not necessary to discuss the question whether the acts charged were indictable at common law. *S. v. Phifer,* 65 N. C., 321. We incline to the opinion that they were. The learned Chief Justice writing the opinion did not seem to think so, although he says: "Playing at cards for money was in itself unlawful." The word is of such varied and uncertain import that it is unfortunate that it was ever used to define a criminal act. It is not our purpose to bring the *decision* of Younger's case into question, but we can not accept the definition given of a criminal conspiracy. "Every combination to injure individuals or to do acts which are unlawful or prejudicial to the community is indictable." It will be noted that this case was submitted by the Attorney-General without argument and the defendants were not represented by counsel. The Court cites but one case to sustain the definition.

King v. Journeyman Tailors of Cambridge, 8 Mad., 10 (1721). That was an indictment against certain journeymen tailors for a conspiracy to raise their wages. The Court said: "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them to do
(647) if they had not conspired to do it, as appears in the case of *Tubwomen v. The Brewers.*" An examination of the report of that case shows the length to which counsel and Court went in sparring over technicalities and losing sight of the real merits of the question. Quite a number of objections were made to the indictment which at this day would not be listened to with any degree of respect. The Court announces the proposition that any conspiracy, however lawful its purpose, is indictable. The case has been treated with but scant courtesy in England and would not at this day be cited as authority. By statute it was made indictable for journeymen tailors to enter into any contract or agreement to advance their wages. Happily this and all other such laws have been repealed in England and were never in force in this State. Lord *Campbell* in *Hilton v. Eckerby,* 6 E. & B. (88 E. C. L., 62), 1855, repudiated the definition given in the Tailors' case, referring to what it said in this and other cases as "loose expressions." He says: "I can not bring myself to believe, without authority more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor and liable to be punished by fine and imprisonment. The object is not illegal; and, therefore, if no illegal means are used, there is no indictable conspiracy." The courts have found but little difficulty in adhering to satisfactory and consistent rulings in those cases wherein the conspiracy charged is to commit acts which are criminal and indictable either at common law or by statute. Dr. Wharton says: "The conflict begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offense, but from the idea that the policy of the law for-
(648) bids the reaching of the attempted object by a conspiracy." Crim. Law, 357. After discussing conspiracies to cheat and defraud, he says: "But to extend indictable conspiracies so as to include cases where acts, not in themselves indictable, are attempted by concert involving neither false statement nor concerted force should be resolutely opposed. A distressing uncertainty will oppress the law if the mere act of concert in doing an indifferent act be held to make such act

criminal. We all know what acts are indictable, and if we do not, the knowledge is readily obtainable. Such offenses when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious and permanent. It is otherwise, however, when we come to speak of acts which though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. * * * No man may know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitution of an indictable offense * * * that it should be prohibited either by statute or common law, but conspiracies to commit by nonindictable means nonindictable offenses, if we resolve them into their elements, are neither prohibited by common law nor by statute. * * * An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which in one phase of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been treated, an indictable offense. Legislative and judicial compromises which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy." In this country, in which judges are in respect to their source of appointment and tenure sensitive (649) to changes of popular opinion and temper, amid the ever increasing acuteness of the struggle between opposing social and industrial forces, the lines which separate a criminal from a noncriminal conspiracy should be clearly defined. To a timid, conservative, judicial mind trained to regard even the slightest disturbance of such forces as portending danger to the peace of the State, a combination of the most harmless character would assume "unlawful" form and force. To a different type of judicial mind, believing that the safety and highest interest of the State are promoted by the freest possibly play of mind and action, in trade competition, "however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation or other such illegalities," the same combination would appear not only lawful, but stimulating to trade in the community. The study of the struggle between the ruling class and the laborers in England, culminating in the passage of the statute of 38 and 39 Vict., is of interest to the student and value to the lawmaker and judge. It is declared by that statute that an agreement or combination to do any act in furtherance of

a trade dispute shall not render the person committing it indictable for a conspiracy if such acts committed by one person would not be punishable as a crime. "These latter words may almost be described as 'The Workman's Charter of Liberty,' for they dispose at once and forever of the contention that a combination to do acts, not illegal in themselves, is entitled to be regarded by the law as a conspiracy." Cent. Law Reform, 253. A great English statesman said that for the first time employers and employed sat under equal laws. As indicating the practical operation of the definition of a criminal conspiracy contended for by the State we may recall some incidents coming under our observation. Not long since, the farmers producing cotton in this and other States believed that their interests de-
(650) manded combined action to protect themselves against what they considered an unreasonably high price charged by the manufacturers for jute cotton bagging. They openly and with the avowed purpose of compelling the manufacturers to sell bagging at a lower price and of course reduce their profits and to that extent injure them in their trade and business, formed combinations and adopted measures, entirely peaceful and lawful, to accomplish their purpose. They agreed themselves, urged and by various means induced others to refrain from buying or using jute bagging. They encouraged the use of other kinds of bagging, and by and through organization maintained a peaceful but effective contest with the manufacturers. Their declared purpose was to injure, cripple and, if necessary, destroy the manufacturers unless they sold their product at a lower price. Again, at a more recent date, the producers of tobacco found the price of their product, as they thought, unreasonably low. They believed that a large and wealthy corporation, being the largest purchaser in the markets, was responsible for the low price of tobacco. Large numbers of the producers, with the avowed purpose of compelling the purchasers, and especially the said corporation, to pay them higher prices, combined and agreed that they would withhold their product from the market, urged and induced all other producers to do so. They declared their purpose to refuse to buy the goods of the corporation, and urged and induced merchants to refuse to buy or sell such goods. They held public meetings, made and issued addresses, and by many other lawful and peaceful means sought to injure and, so far as possible, destroy the offending corporation. It did not occur to any one that these men were guilty of a criminal conspiracy, nor were they. It must be noted that in neither instance was there any legal standard as to the price of cotton bagging or tobacco; they were

sold in open market and, from a legal standpoint, with fair competition. The farmers who in one case were (651) buyers *thought bagging unreasonably high*, and in the other, being sellers, though tobacco unreasonably low. They believed that in order to protect themselves from what they regarded unfair treatment they must organize. That their purpose was to injure the manufacturer in the one instance and the purchaser in the other in their trade and business was not denied, but openly avowed; their defense being that they were seeking fair treatment at the hands of both. We must keep in mind the fact that we are discussing the question as it is affected by the common law. The proposition is that the defendants conspired for the purpose of injuring the prosecutor in his trade and business, and that it is unlawful for them to do so. It can not be that every conspiracy to injure one in his trade and business, without reference to the means to be employed, is criminal. A carpenter, or joiner, has by his apprenticeship, study and experience acquired skill and knowledge in his trade. His capital consists in his physical strength and his intellect trained and directed by his skill and experience. It is the use of this which in a sense he offers for sale. In what respect, for the purpose of securing the best prices for his labor on the best terms, do his rights differ from the man who has cotton for sale, the product of his capital—land and labor—or the man who has money to invest in mercantile or manufacturing enterprise? Each of them enters into the field of competition. Each finds that organization with others engaged in the same field of labor or investment will secure better results and fairer *treatment from those with whom he deals.* There is no evil or harm in organization *per se.* Every copartnership, corporation, joint stock company and other association of labor or capital is a recognition of this truth. We find no better illustration of the correct principle upon which this right depends and the benefits which may come from its application under proper limitations than that given by Chief Justice *Shaw* (652) in *Com. v. Hunt, supra.* "Suppose a baker in a small village had the exclusive custom of his neighborhood and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of bread too high, should propose to him to reduce his prices, or if he did not they would introduce another baker, and on his refusal such other baker should, under their encouragement, set up a rival establishment and sell his bread at lower prices; the effect would be to diminish the profit of the former baker and to the same extent to impoverish him. And it might be said, and proved,

that the purpose of the association was to diminish his profits and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the price of bread to themselves and their neighbors. * * * We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another—that is, to diminish his gains and profits—and yet so far from being criminal or unlawful the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent. If by falsehood or force it may be stamped with the character of conspiracy. It follows as a necessary consequence that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment." Although decisions have been made by some of the American courts which hold otherwise, they are in every instance based upon the principle of the journeymen tailors' or other English cases which follow that decision. Mr. Wright, after a review of the cases, says: "These authorities on the whole, strongly favor the view that a combination to injure a private person (otherwise (653) than by fraud) is not as a general rule criminal, unless some criminal means are to be used." Cases may be found to the contrary. Judge *Holmes,* in his dissenting opinion in *Vegelahn v. Gunter,* 167 Mass., 92, discusses the question with much force and clearness. Speaking of the right of laborers or mechanics to combine to promote their interests, he says: "If it be true that workingmen may combine with a view to getting the greatest possible returns, it must be true that when combined they have the same liberty that combined capital has to support their interest, by argument, persuasion and the bestowal or refusal of those advantages which they otherwise lawfully control. * * * The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful any more than when a great house lowers the price of certain goods for the purpose and with the effect of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice *Shaw* in *Com. v. Hunt."* He further says: "There is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them might lawfully do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some,

as yet, unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle." See, also, his dissenting opinion in *Plant v. Woods,* 176 Mass., 504.

Judge *Caldwell,* in *Ames v. R. R.,* 62 Fed., 714, says: "Organized labor is organized capital. It is capital consisting of brains and muscle. * * * If it is lawful for the stockholders and officers of a corporation to associate and confer together for the purpose of reducing the wages of its employees, or for devising other means for making their (654) investment more profitable, it is equally lawful for organized labor to associate, consult and confer with a view to maintain or increase wages." *Thomas v. R. R.,* 62 Fed., 803; *People v. Radt,* 71 N. Y. Supp., 846. It is said: "One may refuse to deal with a firm because of a belief that it does not give honest compensation for labor, and may ask his friends or the public to do the same thing, and the conduct may do injury to the public without thereby becoming illegal." *Ib.* "An agreement among the members of an association of plumbers not to deal with wholesale dealers who sell to any who are not members of the association, and the sending notices to that end, do not constitute an unlawful conspiracy, since the object of the combination and the means adopted for its accomplishment are lawful. *Macauley v. Tierney,* 19 R. I., 255, 37 L. R. A., 455. In *Mfg. Co. v. Hollis,* 54 Minn., 223, it appears that the plaintiff was a manufacturer and dealer, wholesale and retail, in lumber and other building material. The defendant was a voluntary association of retail lumber dealers. It had certain rules for its government and that of its members. The plaintiff sold two bills of lumber to contractors, or consumers, in places where members of the association were engaged in the retail business. The secretary of the association made a demand upon the plaintiff for ten per cent on the sales so made. The demand not being complied with, the secretary notified, or, as the complaint averred, threatened that unless plaintiff immediately settled the matter he would send to all members of the association the lists or notices provided by the by-laws, notifying them that plaintiff refused to comply with the rules and was no longer in sympathy with it. The Court, referring to the affidavits, etc., said: "Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong and even exasperated assertion, and in many words and expressions of very indefinite and illusive meaning, such as 'wreck,' 'coerce,' (655) 'conspiracy,' 'monopoly,' 'drive out of business,' and the like. This looks very formidable, but in law, as well as in

mathematics, it simplifies things very much to reduce them to their lowest terms. * * * Now, when reduced to its ultimate analysis, all that the retail dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or other nondealers at points where a member of the association is engaged in retail business. The means adopted to effect this end are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to consumers not dealers at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendant's offense. * * * There was no element of fraud, coercion or intimidation, either towards plaintiff or the members of the association." The Court says that the compliance with the demand was entirely optional with the plaintiff. "The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not of itself render those acts unlawful. That depends on whether the acts are in themselves unlawful. 'Injury,' in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious."

"The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in (656) others, of the withdrawal of the patronage of the members of the association in case of a failure to comply, was unlawful, because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the mem-

bers of the association to rid themselves of the competition of those not members, with a view of increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition." *Macauley v. Tierney,* 19 R. I., 255, 37 L. R. A., 455. The Court refused to enjoin the defendants. It is urged by counsel that the guilt of defendants does not involve what they did, but what they conspired to do. If the defendants had pleaded to the first count in the bill without calling for a bill of particulars, they would have gone to the jury on the general issue of traverse to the bill. When, however, the State files its bill of particulars, which, for the purpose of the trial, is as if the (657) means had been set out in the original bill of indictment, the question is presented whether, either in respect to the purpose of the conspiracy or the means by which it was to be accomplished, any crime is charged. If no crime is charged there is nothing for the jury to pass upon. The Court will either, upon motion, quash the indictment, or, as it did in *Com. v. Hunt, supra,* arrest the judgment. We are of the opinion that a conspiracy to injure one's business is not *per se* indictable. Do the means set out make it so? This brings us to consider the acts done by the defendants. Three of them, on 13 January, 1904, went together to the prosecutor's place of business and notified him that he could not be considered in sympathy with organized labor unless he kept constantly employed union men. Certainly the number of the defendants was not so large as to intimidate him, and there is no suggestion that their manner was either offensive, violent or even discourteous. As we have seen, organized labor, or labor organizations, are not unlawful. The prosecutor had no legal right to demand that he should be considered in sympathy with organized labor; therefore he was not to be deprived of any legal right if he preferred to employ nonunion men, and the defendant had an equal right to consider him unsympathetic with organized labor if he exercised such right. Suppose the same number of persons, being members of the anti-saloon league, should go to a merchant's store and notify him that he would not be considered in sympathy

with the temperance cause if he employed clerks who did not belong to the league. If he continued to employ such clerks he was simply considered as unsympathetic with the cause. We fail to see any difference in principle between the act of the defendants and the case supposed. They notified him that he would not be considered in sympathy with organized labor if he kept in his employment nonunion men, although he
(658) was then under contract with nonunion men for a year in advance. It is intended, we assume, in this item to charge that the defendants conspired to compel the prosecutor to break his contract with nonunion men and discharge them. It will be noted that it is nowhere charged that such was the purpose of the defendants. Not a word is said capable of that construction. Certainly nothing should be left to conjecture. To what extent a conspiracy to induce men to violate their contracts is criminal is not clear. We are not required to discuss or decide it here. There is no complaint that the conduct of the defendants was intended to injure nonunion men. This case has no such element in it, and we do not wish to be understood as expressing any opinion in regard to it. The question has been before other courts. There is a painful absence of harmony in the decisions. Suppose, however, that it be conceded that the defendants did notify the prosecutor that unless he discharged nonunion men with whom he had contracted, etc., what was to be the result to him if he refused? He was to be considered as unsympathetic with union labor. This falls far short of intimidation or coercion. It will be noted that there is no charge that these defendants were members of any secret or other organization, or that they had the power or threatened to control the conduct of large numbers of men. It is said that they, "together with other evil disposed persons, conspired," etc. Who "the other evil disposed persons" are, what, if any, relation they bear to the defendants, is not stated. This alleged conspiracy is confined to the five defendants. When informed by the prosecutor that he would not discharge any nonunion men with whom he had contracted, and that he would not agree to employ only union men in his business, the defendants "went away" and "in furtherance of the said conspiracy did actually" publish and cause to be published the aforesaid notice, etc.: "Action of Carpenters and Joiners.—At a meeting of the carpenters
(659) held last evening, for his attitude towards organized labor Mr. C. A. Rice was declared unfair, and so listed, and that no union carpenters would work any material from his shop after 15 February, 1904." The counsel for the prosecutor, in their brief, say: "It is perfectly true that defendants had

a right to refuse to work material from Rice's shop. That they had a right to put him on their unfair list." The criminality, they say, consists in the intent or purpose with which these things are done; this, they say, is a question for the jury. It is not easy to see how it is a question for the jury, when the defendants admit the purpose, etc. If that which they did is lawful—if they had a perfect legal right to do it—we are unable to perceive how the publication renders it unlawful. We are not aware of any principle of law which makes it criminal to publish that a person has done an act which he had a perfect legal right to do, or that a person intends to pursue a course of conduct which he has a legal right to pursue. Judge *Holmes* says: "As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, giving warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences, so as to 'compulsion' it depends upon how you 'compel.'" *Parker*, C. J., in *Nat. Protec. Ap. v. Cumming*, 170 N. Y., 315, says: "A labor organization is endowed with precisely the same legal right as an individual to threaten to do that which it may lawfully do." "If an act be lawful—that is, one which a person has a legal right to do—the fact that he may in doing it be actuated by an improper motion, does not render it unlawful." *Bohen Mfg. Co. v. Hollis, supra.* It being properly conceded that it was not unlawful—that is, for the purpose of this discussion, criminal—for the defendants to declare Mr. Rice "unfair" and to refuse to work his material, we can find nothing criminal in the publication made of their opinion or purpose. Does the fact that the defendants in- (660) tended to induce persons who might otherwise purchase material from Mr. Rice to refrain from doing so make their conduct unlawful? This brings us back to the original questions. Persons who might wish to buy material from Mr. Rice had no legal claim on the services of the defendants—they were under no obligation to work the material purchased from him —therefore, in saying that they would not do so they deprived such persons of no legal right. They could not have maintained an action for damages against the defendants for refusing to work such material or for saying so. How, then, in a legal sense, can he be said to be injured? It is said that the purpose of the defendants in making the publication was to induce persons to refrain from purchasing material for fear of incurring the ill will of the defendants. This certainly is not unlawful. *Bowen v. Matheson*, 96 Mass., 499. If courts were to maintain actions upon such grounds, society would soon be converted into an ar-

ray of hostile litigants. As is well said by Judge *Black* in *Jenkins v. Fowler,* 24 Penn., 308: "Malicious motives make a bad act worse, but they can not make that wrong which in its own essence is lawful. * * * Any transaction which would be lawful and proper if the parties are friends can not be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates, we must leave his motive to Him who searches the heart."

In *Heywood v. Tillson,* 75 Me., 225, it is said: "To entitle the plaintiff to recover there must be a wrong done. No one is a wrong doer but he who does what the law does not allow. He who does what the law allows can not be a wrong doer, whatever his motive." "The exercise of a legal right can not be a legal wrong to another." Cooley on Torts, 65; *Cotterell v. Jones,* 73 E. C. L., 713. In *Hunt v. Simonds,* 19 Mo., 583, it is
(661) said: "The act charged upon the defendants as having been done by preconcert was an act which each and every one of the defendants had a right to do, and was no violation of any right which the plaintiff could claim under the law. He had no right to demand insurance upon his boat from any or all of the defendants, nor that they should insure cargo upon his boat, and consequently their refusal to insure, from any motive, however improper, could give him no right to sue them. The moment it is established that the conspiracy is not a substantial ground of action, it follows that no action can be brought to recover damages for the joint act of several unless the right itself is alleged." The case of *Payne v. W. & A. R. R.,* 13 Lea, 507, 49 Am. Rep., 666, illustrates the principle as seen from the other viewpoint. The agent of the railroad caused to be posted by the yardmaster a notice in these words: "Any employee in this company on Chattanooga pay roll who trades with L. Payne from this date will be discharged. Notify men in your department." The plaintiff alleged that he was a merchant, having a large trade with the employees and others; that the act of the defendant was malicious, etc. The defendant demurred. The Court sustained the demurrer in an able opinion, holding that as the act was not unlawful the motive with which it was done did not give a cause of action. The Judge said that any other doctrine would lead to evils innumerable. "It would be incredible that our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act. It is suggestive of the days of constructive treason." *Phelps v. Nowlen,* 72 N. Y., 39. In *Richardson v. R. R.,* 126 N. C., 100, CLARK, J., says: "But upon the plaintiff's own

showing, his discharge was within the right of the defendant and not wrongful, and malice disconnected with the infringement of a legal right can not be the subject of an action." The principle is well stated by *Bowen,* L. J., in *Mogul Steamship Co. v. McGregor,* 23 Q. B. D., 612: "We were (662) invited by plaintiff's counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have popular and less precise signification, into which it is necessary to see that the argument does not slide. An intent to 'injure,' in strictness, means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." The question as applied to a disturbance of relations between an employer and employed underwent a most exhaustive examination in *Allen v. Flood,* L. R. A. C., 1, in which the conclusion was reached that "an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer liable." In the later case of *Quinn v. Leathem,* L. R. A. C. (1901), the same question with some modifying facts was discussed. The reporter says: "*Allen v. Flood* explained and its real effect stated." An interesting discussion of the question may be found in the Law Quar. Rev., January, 1904. Without undertaking to mark the limitations or exceptions to the general principle, we are of the opinion that the defendants' conduct was not unlawful. That the motive prompting them does not change or affect its legal quality. It is not to be doubted that many acts which subject a party to a civil action, without regard to the motive with which they are committed, are indictable either by the common law or by statute by reason of the motive which prompts them. To kill a man's horse is actionable; to do so maliciously is indictable. The act itself is a legal injury. The stat- (663) ute makes it a crime when malice is the moving cause. Many other instances readily occur to the mind. We think that it will be found that in every case where the act is criminal there is a trespass on some legal right or a legal wrong done to the complaining person. We concur with his Honor that no criminal act is charged in the indictment. We have not overlooked the cases cited in the briefs. The courts are very far

from agreement in regard to the law of conspiracy. This fact tends to show the danger of giving to the word "unlawful" a broad and all embracing meaning in the definition of a criminal conspiracy. We are told this is a case of great importance. It is said: "We are now at the parting of the ways. It is safe to predict that there will be no more criminal conspiracies, no more demands for union shops and no strikes, sympathetic or otherwise, in this State, if the Court sustains the bill in this case." We are also told by counsel that it rests upon the members of this Court to decide whether labor and capital * * * shall dwell together in peace and unity, controlled by the law, etc. It is desirable that this condition, which has always so happily prevailed in this State, shall be preserved. We are duly sensible of our duty, as Judges, to so declare the law as to secure as far as the law may this condition. As we have endeavored to show, concerted action and association to protect common interests and promote common advantage is not peculiar to those whose capital consists in their labor. The security of the State demands that the same principles of law must apply to all sorts and conditions of men. It is well to consider how far liberty of thought and action may be restricted by a resort to the "loose expressions" and dangerously uncertain definitions of this crime affecting the liberty of the citizens.

(664) It is very doubtful whether industrial conditions, or relations between employers and employees, have been improved by prosecutions for criminal conspiracy. As we have seen, in England, the subject has received the most careful attention of enlightened statemen, resulting in the passage of wise statutes. It is asked, May not a man conduct his business in his own way? And undoubtedly he may. For any unlawful interference with this right he has a remedy, either civil or criminal, as such interference may justify. The question is asked, May not men organize to promote their common interests, and when such interests conflict with other interests resort to lawful and peaceful means to secure the best results? It is clear that they may. Where, then, is the line which separates conduct which is lawful from that which is unlawful? The answer comes from Chief Justice *Shaw*, one of the wisest and most learned of American jurists. "If it is to be carried into effect by fair or honorable or lawful means, it is, to say the least, innocent. If by falsehood or force, it may be stamped with the character of a criminal conspiracy." We would not be misunderstood. Capital, either in the form of money or other property, or in the form of skill, experience, intelligence and strength, may combine for lawful purpose. When in either

form, or under whatever guise it seeks or conspires to effectuate its purpose, however lawful, by means of violence to person or property, or by fraud or other criminal means, or when by such means it conspires to prevent any person from conducting his own business in his own way, or from employing such persons as he may prefer, or by preventing any person from being employed at such wages or upon such terms as he may prefer, the courts will be prompt to declare and firm to administer the law to punish the guilty and protect the injured. What acts will constitute such unlawful means it is impossible to define. As all other questions arising out of the struggle of political, social or industrial forces, they must be decided as they are presented. (665)

We have refrained from using terms having a popular but as yet indefinite legal meaning. The word "boycott," by reason of the circumstances under which it originated and the extent to which the means used to accomplish the purpose of the parties engaged in it were carried, is commonly supposed to involve unlawful means. The word is defined in Black's Law Dictionary, p. 150, as follows: "In criminal law. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying from or employing the representatives of said business by threats, intimidation, or other forcible means." In *Brace v. Evans*, 3d R. Y. Corp. Law J., 561, it is said: "The word in itself implies a threat in popular acceptation, it is an organized effect to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence and have coerced him through fear of his own injury to submit to dictation in the management of his affairs." In *Matthews v. Shankland*, 56 N. Y. Supp., 123, the term is held to come within the statutory definition of an "unlawful conspiracy." For history of the word and definition as adopted by many courts, see "Words and Phrases," Vol. 1, page 855. We find nothing in the charge in this case which brings the purpose or conduct of the defendant within such definition. Much obscurity and uncertainty has originated in the careless use of terms of this character.

Mutual confidence, forbearance, patience and concession, accompanied by a free, frank interchange of thought and feeling, will do more to perpetuate the kindly relations existing among us with our homogeneous population than prosecutions for criminal conspiracies, when no criminal or unlawful elements exist. In view of the wide divergence of judicial opin-

(666) ion, by reason whereof the law is oppressed with a distressing uncertainty, it would seem that the Legislature should abrogate the common law on the subject and enact a plain, clearly expressed and carefully guarded statute in lieu thereof. We think it also proper to say in the discussion of this case, we do not mean to suggest that Mr. Rice is unfair to his employees. We have considered the appeal in its legal aspects as presented by the record. His Honor's judgment quashing the indictment must be

Affirmed.

CLARK, C. J., concurring. As stated in the opinion in chief "the sufficiency of the first count in the bill is not called in question, as filing the bill of particulars makes sufficiently definite the charge and means by which the alleged conspiracy was to be put into execution. * * * The Solicitor filed a bill of particulars, and the State is confined 'to the items therein set down.'" Bishop Cr. Pro., 643. Those items are in substance (1) that pursuant to a previous agreement three of the defendants at the time charged went to the prosecutor's place of business and notified him that he could not be considered in sympathy with organized labor unless he employed none but union men; (2) nor if he retained non-union men, notwithstading he had already contracted with some as much as a year in advance; (3) that upon the prosecutor's refusal to discharge the non-union men with whom he had already contracted and whose time had not expired, and would not agree to employ only union men in his business, the defendants published in a local newspaper that, at a meeting of the carpenters and joiners to consider the attitude of the prosecutor towards organized labor, he was "declared unfair and so listed, and that no union carpenter would work any material from his shop after 15 February, 1904." It was charged that the defendants conspired to do this with intent to injure the prosecutor in
(667) his business by causing other persons to refrain from buying lumber and material from the prosecutor, for fear of the ill-will of the defendants, and also lest they might be subjected to delay and inconvenience by reason of the refusal of the defendants and others to work upon material purchased from the prosecutor.

A criminal conspiracy is defined to be, "An agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." No act charged above, nor any of the means set out in the bill of particulars, is unlawful, and the charge of intent is immaterial unless the act or the means used

were unlawful. It was not unlawful for the carpenters' union to try to induce the prosecutor to employ none but members of their union, neither illegal threats nor violence or other unlawful means being used; nor was it forbidden by any law to publish the fact of his refusal and to ask those friendly to their organization not to patronize him. Whether such publication would reduce or increase the prosecutor's business would depend entirely upon the public, and whether a majority of those dealing with one in the prosecutor's business preferred the union or non-union system. The State was restricted to the items set forth in the bill of particulars, and there being no unlawful act alleged therein, nor unlawful means to do a lawful act, the bill was properly quashed. This matter is fully discussed and thus held by *Parker,* C. J., in *Protective Assn. v. Cumming,* 170 New York, 313.

There is no exception to the means being furnished by a bill of particulars, but it may be well to note it is well settled that in indictments for conspiracy, barratry, assault and battery, nuisance and some other offenses, it is sufficient if the illegal act is charged, and the means need not be charged. In *Aikens v. Wisconsin,* U. S. Supreme Court, 7 November, 1904, it is said "the very plot is an action in itself," citing *Mulcady v. Queen,* T. R. 3 H. L., 317. The means are never charged in most if not all other offenses, for instance, (668) in murder, burglary, rape, arson and indeed nearly all crimes, yet as to conspiracy and others above named a bill of particulars as to the means may be, and usually will be, ordered by the Court to furnish information to the defendant. In *S. v. Brady,* 107 N. C., 824, which was an indictment for conspiracy, it was held, citing the English cases, that an illegal conspiracy being indictable, though no act be done in pursuance thereof, the means need not be charged. It is enough if the conspiracy is charged to do an act, which act the Court can see is unlawful, but the Court would order a bill of particulars, if asked. The Court quotes, among other cases, from *Goersen v. Com.,* 99 Pa. St., 398, which was an indictment for murder: "The nature and cause of a criminal prosecution are sufficiently averred by charging the crime alleged to have been committed. This must be done. The mode or manner refers to the instrument with which it was committed, or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment. Whenever one, before trial, needs more specific information than is contained in the indictment to enable him to make a just defense, it may be obtained on proper application to the Court." This Court then goes on (*S. v. Brady,*

supra) to state the practice as to applications for bills of particulars, and adds: "This practice is much favored, because no demurrer or motion to quash lies to a bill of particulars, but if an insufficient bill is furnished the Court will order a fuller statement of particulars to be furnished."

The object of the law is not to require technical refinements in indictments that guilty men may escape punishment, but to dispense with them that criminal cases may be tried upon the facts and the truth of the charge ascertained. The object of the indictment is simply to give the defendant notice
(669) of the crime with which he is charged. If he needs information as to the means by which the State will seek to prove that he committed the crime, the Court will order a bill of particulars, and if the one furnished is not sufficient will order another and another. *S. v. Brady* has been cited and approved on this point in *S. v. Gates* (indictment for perjury), 107 N. C., 832; *S. v. Dunn* (resisting an officer), 109 N. C., 840; AVERY, J., in *S. v. Bryant* (destroying line trees), 111 N. C., 694; AVERY, J., in *S. v. Shade* (secret assault), 115 N. C., 758; *Townsend v. Williams*, 117 N. C., 337; MONTGOMERY, J., in *S. v. Pickett* (resisting officer), 118 N. C., 1233, and in the *Gold Brick* case (*S. v. Howard*), 129 N. C., 657, in which last many authorities elsewhere are cited and our ruling re-affirmed that in indictments for conspiracy to do an unlawful act the means being mere matters of evidence need not be charged in the indictment, but that a bill of particulars will be ordered for information of the defendant, if applied for. In *S. v. Brady* this Court cites with approval from Wright on Criminal Conspiracy, 189, 191, that "If unexecuted, the means cannot be stated; if executed, the means employed are but evidence of the offense or an aggravation of it, * * * for the crime of conspiracy consists of the *conspiracy* and not of the execution of it," *i. e.*, the agreement to do an unlawful act. In the present case the act agreed to be done, the publication aforesaid, was not an unlawful act.

The practice is uniform in all jurisdictions. In 2 McClain Cr. Law, secs. 966, 976, 977, it is said that it is not necessary to charge anything as done. "A conspiracy to do an unlawful act is a separate and distinct offense from that of the act itself, and is to be governed in its prosecution by the provisions relating to conspiracies and not those relating to the specific offense, citing *Com. v. McHale*, 97 Pa. St., 397; but that
(670) the Court will order a bill of particulars to give the defendant all necessary information, citing numerous cases, among them upon the last point *Rex v. Hamilton*, 7 C.

& P., 448; *Reg. v. Rycroft,* 6 Cox, 76; *Reg. v. Esdaile,* 1 F. & F., 213; *Com. v. Meserve,* 154 Mass., 64. To the same effect (in embezzlement) *Rex. v. Hodgson,* 3 C. & P., 422, and *Rex v. Bootyman,* 5 C. & P., 300. The law and practice seem uniform, and is thus summed up by Dr. Wharton in his admirable work on Pleading and Practice, sec. 702, with abundant citation of authorities: "It is allowable to indict a man as a common barrator, or as a common seller of intoxicating liquors, or assaulting a person unknown, or as conspiring with persons unknown to cheat and defraud the prosecutor by 'divers false tokens and pretenses,' and in none of these cases is the allegation of time material, so that the defendant is obliged to meet a charge of an offense comparatively undesignated, committed at a time which is not designated at all. Hence has arisen the practice of requiring in such cases bills of particulars; and the adoption of such bills instead of the exacting of increased particularity in indictments is productive of several advantages. It prevents much cumbrous special pleading, and consequently failure of justice, as no demurrer lies to bills of particulars. And it gives the defendant, in plain, unartificial language, notice of the charge he has to meet." The same statement as to the law is made in 1 Bishop New Crim. Proc., sec. 644, (2) with the same reason that a bill of particulars "enables the defendant on the one hand fairly to defend himself, and on the other hand not fettering the prosecution." In 2 Bishop New Crim. Proc. sec. 208, it is said as to conspiracy: "As agreed means are not essential to the offense, it would be a perversion of justice to require the prosecuting power to allege them"; and in section 209 he says that as to conspiracy, assault and battery, barratry, common scolds and some others, "they may be charged in as few words" as possible, adding that where further information as to the means, which are mere (671) evidential matters, should be given the defendant, the Court will order a bill of particulars. The courts all seem to adopt the same rule and for the same reason. It was held that a bill of particulars was the remedy on an indictment for adultery. *People v. Davis,* 52 Mich, 569. It was recognized as the settled practice in indictments for nuisance (*S. v. Hill,* 13 R. I., 314); in indictments for perjury (*Williams v. Com.,* 91 Pa. St., 493); in indictments for murder (*Goerson v. Com.,* 99 Pa. St., 388). In short, in all cases where information as to the means is necessary to the defendant it will be given him by a bill of particulars, but these need not be set out in the indictment, which is required only to charge the offense, which in conspiracy is the "conspiring" to do an illegal act. Hence

the act must be charged, but not the means, which are merely evidential and which cannot be known, as often none are resorted to—the "conspiracy," not the perpetration of a substantive offense, being the charge. In an ancient case in Massachusetts (*Com. v. Hunt,* 45 Mass., 111), *Shaw,* C. J., did say that in cases where the conspiracy charged was not to do an unlawful act, but to resort to unlawful means to do a lawful act, the means should be charged. But this does not conflict with the above authorities, for the unlawful act conspired to be done must be charged, and when the unlawfulness is the unlawful acts to be done to effect a lawful purpose, of course such unlawful acts must be charged. And in a much more recent case in Massachusetts (*Com. v. Meserve,* 154 Mass., 72, 73, 1891), that learned Court re-affirmed the universal doctrine above laid down that the means need not be charged in an indictment for conspiracy, but that information will be given by a bill of particulars, and cites *Com. v. Hunt, supra,* as authority that such information should be in the indictment only when "the purpose of the conspiracy itself does not appear to be criminal or unlawful."

(672) The practice as to setting out evidential matters in bills of particulars is a wise one, observed in the English as well as the American courts, and has been held by all the authorities here, as elesewhere, and has been reaffirmed by us as recenly as the *Gold Brick case,* 129 N. C., 657.

The whole matter is well summed up in the Star Route case (*U. S. v. Dorsey,* 40 Fed., 752), which holds, citing *U. S. v. Cruikshank,* 92 U. S., 564, that if an indictment for conspiracy charges that the object was to commit a crime or unlawful act, the means being evidential need not be set forth in the indictment, and information, if desired by the defendant, may be given him by a bill of particulars; but where the conspiracy is to use unlawful means to do a lawful act, then the means is the unlawful object to be effected by the conspiracy and must be charged in the indictment. Indeed, the definition of criminal conspiracy, "An agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means," might be properly shortened by omitting the latter half, for where the conspiracy is to resort to unlawful means to secure the lawful end, such unlawful means is the unlawful act which the conspiracy contemplates, and should be charged, that the Court may see, as a matter of law, that an offense is charged.

Bills of particulars are not peculiar to indictments for conspiracy, but are allowed as to all offenses, and in civil cases also. The Code, sec. 259. They are for the benefit of defendants

desiring information as to evidential matters which are not required to be set out in an indictment or complaint. The practice is just the opposite of "general warrants" or "information." No good pleading ever requires matters of evidence to be set out, and this is simply a benevolent practice recognized by all courts, and our statute as well, to furnish the defendants information, if applied for, to assist in preparing the defense.

DOUGLAS, J., concurring. I concur in the admirable opinion of the Court upon well-settled rules of law as (673) well as the highest principles of public policy and natural right. I can add nothing thereto beyond what has been said in my dissenting opinion in *S. v. Howard,* 129 N. C., 663. In that case I used the following language: "I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons; and if the English rule prevails in this State, what is there to prevent the indictment of the members of our usual labor organizations?" What I then foresaw has come to pass; and it needs not a prophet's vision to foresee the vast potentialities of evil that would attend the decision of this Court were it other than it is.

We are assured that if we break up the labor organizations there will be no more strikes, and that peace and order will reign throughout the land. When Kosciusko fell and Poland lay once more beneath the Cossack's heel, Sebastiani announced that "Order reigns in Warsaw"; while Louis Napoleon, in seizing the throne of France, declared that "The Empire is peace." North Carolinians seek not the peace of depotism, but that peace alone which follows the mutual recognition of equal rights and the impartial enforcement of just and equal laws.

Cited: Holder v. Mfg. Co., 138 N. C., 310; *S. v. Dewey,* 139 N. C., 559; *S. v. Long,* 143 N. C., 676; *S. v. Leeper,* 146 N. C., 675; *S. v. Cline,* 150 N. C., 859.

(674)

STATE v. BELL.

(Filed 13 December, 1904.)

1. LANDLORD AND TENANT—*Notice—The Code, sec. 1759—Crops—Evidence.*

A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. *S. v. Neal*, 129 N. C., 692, overruled.

2. NEW TRIAL—*Vested Rights—Trial.*

In this case, overruling a former decision, a new trial is granted, but the trial will be under the law as declared in the overruled decision.

INDICTMENT against Josiah and Joshua Bell, heard by Judge *G. S. Ferguson* and a jury, at March Term, 1904, of LENOIR. From a verdict of guilty and judgment thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, for the State.
Wooten & Wooten and *Land & Cowper,* for the defendants.

CONNOR, J. The defendants were indicted for removing and selling tobacco made by them as tenants on the lands of the prosecutor without having satisfied the liens thereon or giving five days' notice of such removal and sale, as required by section 1759 of The Code. There was no controversy in regard to the terms of the lease. The defendants admitted the removal and sale of the tobacco. The defense is set forth in the exceptions. From a judgment based upon a verdict of guilty they appealed.

There was evidence tending to show that before the removal of any part of the crop the prosecutor consented to the sale of several loads of tobacco to get money to save the balance.
(675) Thereafter the defendants removed and sold the balance of the crop and retained the proceeds.

The defendants offered to show that they had sustained damage by reason of the failure of the landlord to comply with the contract; that such damage amounted to more than the rents and advancements. The Court, upon objection by the State, excluded the testimony so far as it affected the rents. Defendants excepted. The counsel for defendants insist that the testimony was competent as settled by this Court in *S. v. Neal,* 129 N. C., 692. In that case the defendant, being on trial for the

same offense, was permitted to show that he had sustained damage by reason of the failure of the landlord to repair the house on the premises as he had contracted to do. That he contracted for the use of twenty-five acres and was permitted to cultivate only fifteen acres. It is not easy to distinguish the two cases. It is evident that the majority of the Court were impressed with the hardship of the statute construed as contended for by the State. Mr. Justice DOUGLAS, in a concurring opinion, speaks of "the hardship which might result to the tenant" by permitting him to be convicted when he might be able to show that he did not owe the landlord. The statute is very explicit in prohibiting the removal of any part of the crop until the liens are satisfied or "before satisfying all liens," unless the tenant shall give five days' notice. The language of the statute would seem to be capable of a construction prohibiting such removal without regard to the satisfaction of the liens unless the notice was given. This Court has construed it otherwise. *S. v. Crowder,* 97 N. C., 432. While we should always avoid giving to a criminal statute a construction in case of doubt, which makes its operation harsh or oppressive, we may not disregard the plain expression of the legislative will because we may think it harsh or even unjust. We do not think that the words used are open to reasonable doubt. The tenant owes the rent or advancements. The landlord has a lien (676) on the crops, the product of the land of one and labor of the other. The statute declares that the crop shall remain on the land, unless otherwise agreed, until the landlord and tenant come to a settlement of the accounts and dealings and the liens are satisfied. If the landlord will unduly or unjustly refuse to come to a settlement the tenant may by giving the five days' notice sell a part of the crop without subjecting himself to a criminal prosecution. This gives to the landlord a reasonable time to come to a settlement. If they cannot do so, either of them may apply to a court having jurisdiction to compel a settlement. Pending such proceeding, the rights of both parties are protected by retention of the crop or a bond for the value. The evident purpose of the Legislature was to prevent litigation. Nothing is more certain to bring about litigation than the course pursued by the defendants. They had not satisfied the liens, and it is evident from the testimony that they knew the law. To satisfy a claim is to pay or discharge it—not to set up some other claim for unliquidated damages. There was not, so far as the testimony shows, any suggestion by the defendants to the landlord that they had any such claim. While we recognize the duty of the Court to avoid overruling its decisions, we

feel well assured that the language of the statute demands that we concur with his Honor's ruling and overrule our own decision in Neal's case. It is very desirable that the relative rights and duties of landlords and tenants be clearly defined. The statute is plain, and when it is understood that the Court will not encourage experimenting with it both parties will recognize and respect the rights of each other.

While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this Court in *S. v. Neal, supra.* If so, to try
(677) them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the Court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the Court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this Court, to order a new trial, with the direction that the testimony offered in this case, in so far as it is made admissible by the ruling of this Court in *S. v. Neal,* be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in Neal's case they are entitled to do so, but the construction now put upon the statute will be applied to all future cases. While, as we have said, we find no authority directly in point, we think this course is sustained by what is said in Wells on Stare Decisis, 566. See also *Township v. State,* 150 Ind., 168, 26 A. & E. Ency., 179, 8 Fed. Cases, No. 4, 146, p. 37. There will be a new trial. Let this be certified.

New Trial.

DOUGLAS, J., concurring in result. I still adhere to the principles asserted in my concurring opinion in Neal's case, as it seems proper that all statutes should, as far as possible, be construed in accordance with natural justice. Section 1759 of The Code provides that "Any lessee or cropper, or the assigns of either, or any other person, who shall remove said crop
(678) or any part thereof from such land without the consent of the lessor or his assigns and without giving him or his agent five days' notice of such intended removal, and before

satisfying all the liens held by the lessor or his assigns on said crop, shall be guilty of a misdemeanor."

It will be noticed that the conjunction "and" is used in connecting the three acts constituting the offense, which, therefore, depends upon the concurrence of all three of the conditions. If consent is obtained, or notice is given, or the liens are paid, there can be no offense, as one of its essential conditions is lacking. The evident purpose of the statute is to secure the payment of all liens; and if such liens are paid, its essential object is fully accomplished.

The record states that "The defendants offered to prove that they had suffered damage by reason of the prosecutor not complying with his contract in excess of the advancements and the rents. The Court said he would permit the evidence to set-off the advancements made by the prosecutor, but exclude its application to set-off the rents." I do not clearly see the distinction between rents and advancements. In either aspect I do not see why a defendant may not be permitted to plead a just indebtedness arising out of the same transaction of renting. This would be a valid set-off or counter claim in a civil action, and would prevent any recovery by the landlord. Of course the tenant would act at his own peril and would be criminally liable if he failed to make good his defense; but it seems to me that he should have the opportunity of presenting it. Whether the landlord was in fact liable in any amount to the defendants in the case at bar is immaterial to the consideration of this question. We must assume he was, as they were refused the opportunity of proving the fact. It did the defendants no good to permit them to set-off their claims against the advancements if they were held criminally liable for the rents. Land owners are justly entitled to the equal protection of the law; but I do not feel called upon to change the conjunctive "and" in the statute into the disjunctive "or," when it results in (679) putting a man upon the roads for neglecting to pay a debt that he did not owe, and removing a crop that was his own.

Cited: Hill v. R. R., 143 N. C., 578; *Hill v. Brown,* 144 N. C., 120; *Mason v. Cotton Co.,* 148 N. C., 511; *S. v. Fulton,* 149 N. C., 492, 494.

STATE v. HUFF.

(Filed 17 December, 1904.)

1. ASSAULT WITH INTENT TO COMMIT RAPE—*Evidence.*

In a prosecution for an assault with the intent to commit rape, two witnesses having testified to certain facts, it is competent to show what they said to each other relative to the alleged assault at the time of the commission thereof.

2. ASSAULT WITH INTENT TO COMMIT RAPE—*Evidence.*

In a prosecution for an assault with intent to commit rape, evidence that a witness near by called to the prosecutrix at the time of the alleged assault is competent as showing that the prosecutrix knew the witness was near.

INDICTMENT against George T. Huff, heard by Judge *G. S. Ferguson* and a jury, at July Term, 1904, of WAKE.

The defendant was indicted for an assault with intent to commit rape, and convicted by the jury of a simple assault. So much of the testimony as is necessary to present the exceptions is as follows:

Mrs. Jones, the prosecutrix, testified that she lived at Fuquay Springs; that defendant came to her house about dark on the day of the alleged assault; that she was sitting in the door. She first thought it was her husband, and then thought it was Alex. Hobbs. He came up and said "Good evening," and she said "Good evening." He asked for her husband, and she told him he was in the store. Defendant said he was not; came
(680) and put his foot on the door-step and said that Mr. Jones had gone to Chalybeate to arrest a man and would not return until 12 o'clock, and he had come to stay until he came back. "He told my little girl to hand him a match; he wanted to light a cigar." While she was gone the defendant took her by the hand and said "Let us go to bed." Witness said "You must be crazy; you leave here." Witness prepared supper, and while she and the children were eating the defendant came back; she saw him when he jumped up in the door. Mr. Arnold's dog was under the house and barked. He told the dog to "hush"; said he would kill it; put his hand in his pocket when he said that. Witness was sitting feeding the baby—the table in front of her and the baby in her lap on her left arm. Defendant took hold of her by the hand; he pulled up a chair and sat down by her and put his hand in her bosom. She pushed it away and he put it back again and tried to put his hands under her clothes and she pushed them away; could not push him away because he was stronger than the witness. He was

there ten or fifteen minutes. Witness saw her husband coming and told the defendant. She made no outcry because the defendant tried to shoot the dog and she was afraid that he would shoot her. When she saw her husband coming she told defendant she would tell him and he would kill defendant. He begged her not to tell him; he got up and sat down on the step. Defendant asked her husband to go to the store; that he wanted to buy something. They went to the store in a few minutes. Witness told her husband what defendant had done when he first came back from the store. Witness was asked in regard to her relations with a man in Florida and other men, all of which she denied.

Defendant testified that he went to Jones' house to get him to go to the store to get a bundle, and he asked Mrs. Jones if her husband was at home and she said "No." He asked if he had gone to the store and she said "No." She (681) asked defendant to have a seat; that Mr. Jones would be back in a few minutes. She was sitting in the door, on the door-step. Defendant put his foot on the door-step and stood there. She took hold of his hand and said "she never expected to see him sunburned as badly as that." While holding his hand she leaned over, and his hand might have touched her bosom. She made him a proposition; told him to go out fifteen or twenty minutes, until she could lay the baby down, and she would come and meet him. Witness went down to the branch and waited a few minutes. He returned to the house and asked her why she did not come. She said "Wait awhile"; that she could not get the baby asleep. She said "Come back another time," and not to go anywhere else. Witness never offered to force her or take any liberties with her except what she invited. She said that she had been wanting to meet witness for some time, and asked him if he got the word she sent him. Witness never went into the house, and he was not under the influence of liquor.

The defendant introduced Benjamin Arnold, who testified that he lived at Fuquay Springs, sixty or sixty-five feet from the house of the prosecutrix; there was no obstruction between the two houses; he could see all that passed between defendant and Mrs. Jones. He was at home, sitting on the door-step with his wife. Defendant was standing on the ground with one foot on the door-step, and Mrs. Jones sat in the door; could not hear what they said; they were talking in low tones; he told her good evening and left; went to the branch. Some time after he came back and sat in the door, and the witness got his banjo and sat in his door, then went to bed. Before defendant went off the first time, and while he was standing with his foot on the

steps, witness called Mrs. Jones and asked her where her husband was; called pretty loud, but she did not answer. Defendant asked witness to give his reason for calling Mrs.
(682) Jones, and the State objected; objection sustained and defendant excepted. Witness said that he saw nothing that looked like an assault; could have seen it, as it was bright moonlight and there was no obstruction; that he and his wife were talking, and that Mrs. Jones could have heard the conversation if she had listened. Defendant offered to prove by the witness the conversation between him and his wife with reference to what they saw and what they did in consequence thereof. Witness stated that he was going to call Mrs. Jones to keep her from doing wrong; that he called twice, and his wife told him to hush, that it was none of his business, and that in consequence of what he saw he got his banjo and sat in his door, but retired soon after, at his wife's request. This testimony, upon objection by the State, was ruled out, and defendant excepted.

Mrs. Arnold was introduced and testified the same as her husband. Defendant asked the witness: "In consequence of what you and your husband saw between defendant and Mrs. Jones, what did you and your husband do?" Objected to and ruled out; defendant excepted. This was for the purpose of showing that the witness and her husband knew that an assignation was being made and that they tried to stop it; that witness prevented her husband from interfering.

From a judgment upon a verdict of guilty the defendant appealed.

Attorney-General Gilmer, for the State.
B. C. Beckwith, for the defendant.

CONNOR, J., after stating the case. We think that the testimony was competent and should have been admitted. The theory of the defense was that the prosecutrix consented to all that was done by the defendant; that from this point of view, and for the purpose of contradicting the prosecutrix and
(683) corroborating the defendant's testimony, the evidence of Arnold and his wife was relevant and very material. If believed by the jury it fully sustained the defendant's view of the transaction. For the purpose of corroborating each other, it was clearly competent for them to testify as to what they said to each other at the time, and what they did. They were sixty-five feet from the prosecutrix and the defendant. The relations between the families were friendly. The fact that the witness called twice to Mrs. Jones in a loud voice sixty-five feet away

was clearly compentent as tending to show that she was aware that Arnold was sufficiently near to render her assistance if the defendant was committing an assault upon her.

It is well settled that a witness who is either impeached or whose testimony is called in question by the mode of cross-examination or by contradictory testimony may, for the purpose of sustaining his credibility, testify to statements made by him in respect to the matter about which he testifies at or immediately after the alleged transaction. It was material in this case on the part of the defense to show that Mrs. Jones knew of the presence of Arnold and his wife at their home sufficiently near by to enable her to call for help if assaulted. When they testified that they were sitting in the door, where they could see the entire transaction, and that for the purpose of calling Mrs. Jones' attention to their presence Arnold called her twice, it is competent to show the state of his mind as explaining his conduct. We think that what he said to his wife at the moment, and what she said to him in respect to the very matter in issue, was competent for the purpose for which it was offered. It would certainly have put the witness in a very unenviable position to have shown that he was withinn sixty-five feet of his neighbor's wife, who was being assaulted, and saw the transaction and made no effort to rescue her. The only explanation of such conduct consistent with that of an honorable man, whose testimony was entitled to credit before the (684) jury, was that he thought the defendant's conduct was not objectionable to her. It was competent to show, as explaining his conduct, what his wife said to him at the moment.

There was much other testimony tending to impeach the prosecutrix. We do not deem it necessary to pass upon the many other exceptions, as they may not arise upon another trial. The rejection of the evidence offered by the defendant entitles him to a

New Trial.

STATE v. SMITH.

(Filed 20 December, 1904.)

ASSAULT WITH INTENT TO COMMIT RAPE—*Evidence—Sufficiency—Questions for Jury—Questions for Court.*

In this prosecution for an assault with intent to commit rape, the evidence is not sufficient to be submitted to the jury.

CLARK, C. J., dissenting.

S. *v.* SMITH.

INDICTMENT against Sam Smith, heard by Judge *G. W. Ward* and a jury, at October Term, 1904, of BLADEN.

The defendant was convicted of assault with intent to commit rape and sentenced to imprisonment in the State's Prison for five years. The testimony of the prosecutrix was: "I know the defendant; he came into the cotton patch when I was at work last summer. I was hoeing cotton in the field alone; can't say what time of day it was; it was in the morning. Defendant asked me where my pa was and where Asa White was. He then asked me where my two brothers were. I told him
(685) they were gone to the field where pa and Asa White were. The field was a half mile away, in 'new ground' field. He asked me when they would come back, I said in 'a few minutes.' He then said 'give me the hoe and let me hoe out that row of cotton.' I did so and went and got another hoe. He hoed out to the end of the row and threw the hoe in the corner of the fence. He then grabbed me by my left arm and started to put his right to my neck under the chin. He did not quite touch my neck with his right hand. I drew back my hoe with my right hand and told him if he did not go away and let me alone I would kill him with the hoe. He then turned me loose and walked off ten or fifteen steps and said 'you are going to kill me,' and I said 'yes, I am if you don't go off and let me alone.' He went off then to his work in Mr. White's field. I then started to the field where pa was and met my two brothers and told them what had happened. When I told him to turn me loose, he did it; did not threaten me, but scared me."

Asa White testified that the defendant was working for his mother and he heard defendant say afterwards, in speaking of the difficulty, that he had been over there. Witness asked him what he went for and he said to "get some." This is all he said.

It was in evidence that defendant was not seen in the neighborhood again until he was at the preliminary trial. The sheriff found him in Robeson jail. This was the entire evidence. The defendant asked his Honor to instruct the jury that he could only be convicted for a simple assault. This was declined and defendant excepted. From a judgment on the verdict the defendant appealed.

Attorney-General Robert D. Gilmer, for the State.

No counsel for the defendant.

(686) CONNOR, J., after stating the case. The only question presented by the exception is whether there was any evidence on the question of intent proper to be submitted

to the jury. Mr. Justice ASHE, in *S. v. Massey,* 86 N. C., 658, says: "In order to convict defendant on the charge of an assault with intent to commit a rape, the evidence should show not only an assault but that defendant intended to gratify his passions on the person of the woman, and that he intended to do so at all events notwithstanding any resistance on her part." This language has been since the decision of that case the guide followed by the courts in this State. In that case the question bearing on the evidence of intent was much stronger than here. The woman saw the man following, threatening if she did not stop to kill her. The Court held the evidence insufficient. In *S. v. Jeffreys,* 117 N. C., 743, Massey's case is approved and may now be regarded as the settled law of the State. The case is easily distinguished from *S. v. Mitchell,* 89 N. C., 521, and *S. v. Page,* 127 N. C., 312. In both these cases there was evidence of actual violence. We can have no hesitation in adopting the language of a Judge of such elevated character, learning and jealous regard for the sanctity of virtue as Judge ASHE, when he says: "When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal."

We do not deem it necessary to discuss the facts in this case, nor have we the right to assume the existence of any facts pertinent to the decision of the case other than those certified to us by the Court below. The record states the transaction in the language of the witness. It has ever been the province and duty of the Court to decide and declare the law, and of the jury to decide and declare facts. Whether there is any evidence tending to prove a fact in issue has always been regarded as a question of law for the decision of the Court. But whether an inference is to be drawn from the evidence (687) is exclusively in the province of the jury. We would be recreant to our duty as judges were we to fail to declare the law with respect to the question whether there is any evidence for fear of offending the jury. This question the jury do not decide. We have no right to infer, either for the State or the defendant, the existence of any facts which were heard by his Honor or considered by the jury other than those certified to us. To do so would be to depart from our sphere of action and decide a question of law upon an assumption that a state of facts existed of which we have neither knowledge nor information. It is a mistake to say that this Court passes upon the weight of the testimony, the conclusions to be drawn therefrom, or in any respect review the action of the jury. The question

which lies at the threshold of every case is whether there is any evidence to be submitted to the jury. We can see no reason why, in differing with the Judge upon this question we are reflecting upon his intelligence or learning, more than in differing with him in respect to any other question of law. To introduce considerations of this character into the decisions of this Court is, to say the least, a novelty and we think well calculated to embarrass the Court, and raise issues not proper for our consideration. Our own reports contain numerous cases in which almost every Judge who has sat upon this bench has concurred in reversing the opinion of the Court below upon the question as to whether there is any evidence, and in doing so in this case we are not conscious of any innovation or announcing any new doctrine. If this man is guilty he is guilty according to law and should be so punished. To say that his Honor found beyond a reasonable doubt that the defendant is guilty is to assume that it is the duty of a Judge to set aside every verdict in which he is not so satisfied. This we do not decide to be the duty of the Court. When, in the discharge of his duty, he shall set aside a verdict is a matter addressed to his sound
(688) judgment and is not reviewable. There is nothing in the record to show the character of the defendant except the fact that he committed an assault upon the prosecutrix. To say that every man who commits an assault upon a woman must be presumed of such character as would justify a verdict that he committed an assault with a felonious intent, would be to do violence to the language of this Court as found in *S. v. Massey, supra*. It is said that the jury are the proper triers of the facts, and the facts were within their province, and that we have no right to reverse their judgment on the facts. The fallacy in this position consists in a failure to distinguish between the functions of the Court and the jury. We decide the question of law, not the conclusion of fact. We must discharge our duty with the light that is given us to see it. To fail to do so because of any fear that we should offend twelve sensible and intelligent men would render us unfit to discharge the duties of the high office to which we have been appointed. Upon the testimony before us the defendant is guilty of an aggravated assault. There must be a

New Trial.

CLARK, C. J., dissenting. The defendant, first ascertaining from the girl that her brothers and her father were absent, in a field a half mile away, made a sudden and violent assault upon her, "grabbed her by her left hand and started to put his right

to her neck." The assault is unquestioned. What was his intent was an inference of fact which only a jury is authorized to draw. The defendant afterwards confessed that his purpose in going there was to procure sexual intercourse with the girl. The jury, from the violence and manner of the assault, the seclusion of the place, the avowed purpose of the defendant in going there, from his flight and possibly from their knowledge of the parties, might well have come to the conclusion that the intention of the defendant was to have carnal intercourse with the girl against her will. If so, he was guilty as (689) charged.

It is true Judge ASHE has stated "that the defendant must have intended to gratify his passions on the person of the woman at all events and notwithstanding any resistance on her part." Every lawyer since, who has represented a defendant charged with this dastardly offense, has relied upon this expression. There can be no doubt that the Judge so charged the jury in this case, for there is no exception to the charge. What Judge ASHE said is a correct statement of the law, but it does not mean that when the man desists from his purpose, there is no evidence that he did not intend to have intercourse "at all events and notwithstanding resistance on the woman's part." That would simply repeal the statute against assault with intent to commit rape, for if the defendant succeeds, the crime is rape.

What was the defendant doing when he suddenly and violently assaulted an unprotected girl, out of reach of help from her male relatives, of whose absence he had learned upon inquiry? Was he trying to persuade her to yield and to overcome her maiden reluctance by solicitation or was he attempting to have carnal knowledge of her "forcibly and against her will?" Was it an attempted seduction or was it "felonious gallantry?" It was necessarily one or the other, for his purpose to procure sexual intercourse is admitted. It could be procured only with the girl's consent or against her will; there is no other alternative, no middle ground. The jury of twelve men, to not one of whom he objected, and who were doubtless sensible and intelligent gentlemen, have found, beyond a reasonable doubt in the mind of a single member of the jury, that the assault was made with an intent on the part of the defendant to have sexual connection "forcibly and against the will of the woman." The intelligent Judge, who presided, not only thought the evidence should be submitted to the jury, but, notwithstanding the gravity of the punishment, did not think the in- (690) terests of justice required him to set the verdict aside.

The grand jury by a vote of at least twelve of its members

found that there was *prima facie* evidence of the defendant's guilt. Thus two full juries at least, and the Judge, after seeing and hearing the witnesses, found that there was evidence. Are a majority of the lawyers who compose this Court, sitting out of sight and hearing of the witnesses, without knowledge of their character, or bearing on the stand, able to say that all those officers have so grossly erred—not as to the law, but as to the facts, and that there was no evidence at all before them!

In vain shall we look for any decision in England, the home of the jury system, for a case in which an appellate court, sitting out of sight and hearing of the witnesses, has held in a criminal case that there was no evidence when the jury unanimously held that there was enough to satisfy each of them beyond a reasonable doubt, and the presiding Judge has refused to disturb the verdict. It is an innovation of recent introduction here, even in civil cases, by judicial construction, for there is no statute to authorize it. The tendency of courts to "amplify jurisdiction" is gradually extending the doctrine until this jurisdiction is invoked in nearly every criminal case that comes up to any appellate court, and in almost certainly every appeal in which a railroad company is defendant. If the expansion of such jurisdiction is continued, instead of the "ancient mode of trial by jury," the jury will become a mere advisory committee whose findings the appellate court may disregard at will. This is already nearly attained in some States. The evils of this assumption of jurisdiction are well stated by Judge BYNUM in *Wittowsky v. Wasson,* 71 N. C., 451.

(691) In my humble judgment, the unanimous verdict of twelve men, when not disapproved by the trial judge, is a far more accurate mode of ascertaining the truth of disputed allegations of guilt than the majority vote of the members of an appellate court who differ among themselves as to the effect of evidence which is necessarily imperfectly sent up in cold type. Is there a clearer insight into the inferences to be deduced from evidence given to those who did not hear or see the witnesses than to those who did? Those who wrought our constitutions thought otherwise. They believed juries were more competent than judges to find the facts, and equally impartial. The triers of fact should be subject to challenge. A judge of the law should not be. Such has always ben the thought of Anglo-Saxon people. Justice *Brewer* of the Supreme Court of the United States well said in a recent opinion that the great difficulty now was to secure the conviction of the guilty, and expressed his conviction that the interests of justice would be best served by returning to the English system under which,

to this day, appeals are not allowed in criminal cases. In his opinion, appeals in criminal cases had been detrimental, and had not served the interests of justice in this country.

It cannot be said there was no evidence. There is more evidence here to sustain the charge than in *S. v. Garner,* 129 N. C., 536, and fully as much as in *S. v. Page,* 127 N. C., 512. In this case there was the forcible assault, there was the avowed intent to procure sexual intercourse, there was the lonely place remote from help, there was the inquiry as to nearness of relatives, there was the "stand off" by a determined woman with her clubbed hoe and the defendant's flight from justice. There may have been other things which the jury were entitled to consider and which give much of its peculiar value to trial by jury. Suppose the girl was white and the defendant a negro? Would that not be a matter to be considered on the question whether this was an attempted seduction or an assault with intent to succeed against the woman's will? *S. v. Garner,* (692) *supra.* The jury could see for themselves the color of the parties. We cannot. It is not in the record, as many other matters cannot be sent up to us in the record. Both may have been white. We do not know. The jury knew, and they also knew the character of the witnesses and of the defendant, which was a valuable help in arriving at a true inference as to this man's intent and whether or not the defendant was attempting to succeed "against her will" in having sexual intercourse with the girl. We know nothing of the character of the defendant beyond the fact in the record that he immediately fled and was found in jail in another county, apparently for some other offense. Would a man of that character be likenly to attempt a girl of the virtue and determination shown here, unless he had expected to succeed "forcibly and against her will?" If the intent was solicitation, why so forcible and sudden an assault made? It is possible it might be explained perhaps, but the jury found that it was not. And because when she clubbed her hoe and told him if did not "let her alone, she would kill him with the hoe," he believed her and turned her loose, are we to find as a matter of law that therefore when he "grabbed her" the defendant did not then intend and was not then attempting to gratify his passions on her "forcibly and against her will?" The jury, the proper triers of the fact, have passed upon defendant's intentions in making the assault. They were within their province and within their sworn duty. I do not think we have the legal right to reverse their judgment on the facts, nor that we can come to a more just conclusion thereon than the jury and the trial judge.

DOUGLAS, J., concurring. I concur in the opinion of the Court that there is no evidence inconsistent with the innocence of the defendant. I do not mean to intimate that the
(693 Court either here or below can pass upon the weight of the evidence, or can in any event direct an affirmative verdict. *Spruill v. Ins.*, 120 N. C., 141.

Cited: Kearns v. R. R., 139 N. C., 471.

INDEX.

EXECUTORS AND ADMINISTRATORS—*Continued.*

4. In an action by heirs against an administrator for an account and settlement, an answer by him that a final settlement had been filed is not a plea in bar, and a reference may be made. *Jones v. Sugg*, 143.
5. The refusal of a motion to refer a proceeding to compel a personal representative to file a final account and settlement is appealable. *Ib.*, 143.
6. A confirmation of a sale of the estate of a decedent is a condition precedent to the exercise by an executor of the right to convey title. *Joyner v. Futrell*, 301.
7. The executor of a trustee in a deed of trust has no power to sell the property conveyed therein, in the absence of a request so to do by one of the *cestuis que trust*. *Eason v. Dortch*, 291.
8. An allotment of a year's support from growing crops at a specified value is sufficiently definite to admit the record thereof in evidence by the widow in an action for the conversion thereof. *Parker v. Brown*, 280.
9. Where a husband wills land belonging to his wife to her for life, together with certain personal property, and she qualifies as administratrix with the will annexed, she is estopped from afterwards claiming title to the lands devised other than under the will. *Tripp v. Nobles*, 99.
10. In an action by the administrator of a deceased infant to recover damages for the alleged wrongful death of the child, the father's contributory negligence is available as a defense to the extent of his interest. *Quere:* Whether the mother does not share now equally with her husband as next of kin of a deceased child. *Davis v. R. R.*, 115.
11. Where a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. *Parker v. Brown*, 280.
12. In an action by a father, as administrator of his deceased infant child, to recover damages for its death, an answer charging the "plaintiff" with contributory negligence will be construed as charging contributory negligence on the part of the father. *Davis v. R. R.*, 115.
13. Where a landlord harvests crops already allotted to the widow of the tenant as a part of her year's allowance, he holds the same in trust for her, and she may bring trover therefor. *Parker v. Brown*, 280.
14. An action may be maintained by an administrator for the death of an infant by the wrongful act of another. *Davis v. R. R.*, 115.
15. Where there is no evidence that a daughter expected to be paid or the father expected to pay for services rendered him during his last illness, it will be presumed that the services were gratuitous, and in such case the plaintiff should be nonsuited. *Stallings v. Ellis*, 69.
16. Where a debtor holds certain notes as the property of the creditor, to be applied on his debt when collected, any amount collected on the notes is part payment of the debt and the debtor shares in the funds belonging to the administrator only in proportion to the balance of the debt due. *Chemical Co. v. Edwards*, 73.