ANNOTATIONS INCLUDE 180 N. C.

NORTH CAROLINA REPORTS
VOL. 137

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1904
SPRING TERM, 1905

REPORTED BY
J. CRAWFORD BIGGS

2 ANNO. ED.
BY
WALTER CLARK

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13 " "	"	35	"
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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	"
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SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1904

SPRING TERM, 1905

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WALTER CLARK.

ASSOCIATE JUSTICES:

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‡GEORGE H. BROWN, JR.,

HENRY G. CONNOR,

§WILLIAM A. HOKE.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

*ZEB V. WALSER.

†J. CRAWFORD BIGGS.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

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* The opinions of the Fall Term, 1904, reported by Mr. Walser.
† Appointed by the Court, March, 1905.
‡ Justice BROWN succeeded Justice MONTGOMERY, 1 January, 1905.
§ Justice HOKE succeeded Justice DOUGLAS, 1 January, 1905.

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Henry R. Bryan	Third	Craven.
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Thaddeus D. Bryson	Sixteenth	Swain.

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SPRING TERM, 1905

ANDERSON, J. G.	Halifax
BRITT, J. J.	Buncombe
BROADHURST, E. D.	Wayne
CANNADY, W. P.	Granville
CHASTAIN, R. B.	Clay
CLEGG, W. R.	Moore
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DELANEY, J. L.	Mecklenburg
DENSON, C. B.	Wake
EVERETT, R. O.	Martin
FAISON, PAUL	Wake
FREDERICKS, E. F.	Wake
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MALONE, C. N.	Buncombe
MARKHAM, T. J.	Pasquotank
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MEBANE, C. H.	Catawba
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PATTON, G. M.	Alamance
SPENCE, G. J.	Pasquotank
STYLES, J. S.	Buncombe
WHITLEY, T. F.	Halifax
WILLIAMSON, J. L.	Wayne

CASES REPORTED

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

CASES CITED BY THE COURT

C

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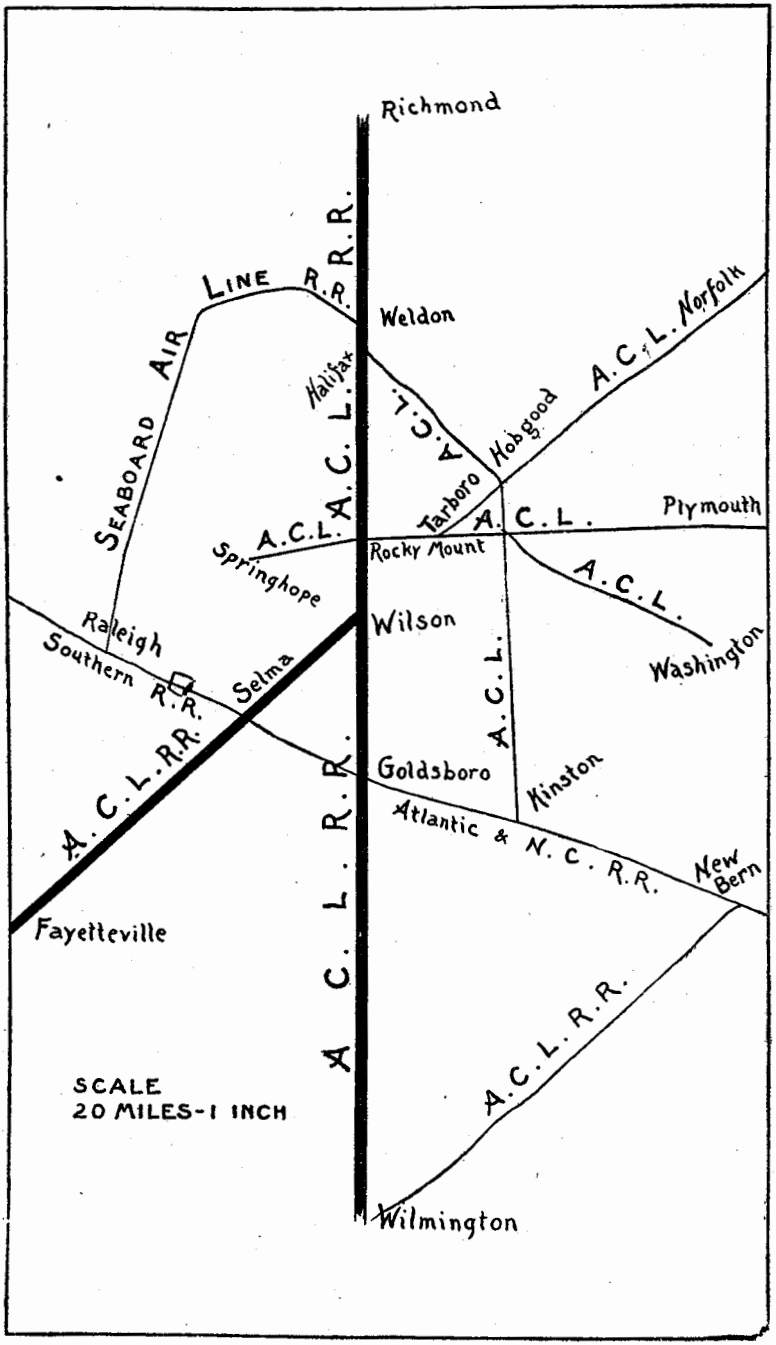
Richmond
Weldon
A.C.L. R.R.
Seaboard Air Line R.R.
Halifax
A.C.L.
A.C.L.
Springhope
Raleigh
Southern R.R.
Selma
A.C.L.R.R.
Fayetteville
A.C.L.
Tarboro
Hobgood
A.C.L. Norfolk
A.C.L.
Plymouth
Rocky Mount
A.C.L.
Washington
Wilson
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Goldsboro
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Wilmington
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1904

CORPORATION COMMISSION v. RAILROAD—"RAILROAD CONNECTION CASE."

(Filed 13 December, 1904.)

1. **Carriers—Railroads—Corporation Commission—Laws 1899, Ch. 164—The Code, Sec. 1957, Subsec. 9.**

   The Corporation Commission of the State has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company.

2. **Verdict—Issues—Evidence.**

   It is error to direct a verdict on issues of fact when there is conflicting evidence.

3. **Issues—Verdict—Immaterial Issues.**

   When the material issues are found, judgment should be entered thereon, disregarding the findings upon immaterial and irrelevant issues.

4. **Judgments—Supreme Court—Appeal—The Code, Sec. 957.**

   The Supreme Court may, if it reverses or affirms the judgment below, enter a final judgment or direct it to be so entered below.

ACTION by the North Carolina Corporation Commission (2) against the Atlantic Coast Line Railroad Company, heard by *Brown, J.*, and a jury, at April Term, 1904, of WAKE.

It appears from the record that for some ten years prior to 11 October, 1903, the passenger traffic from a large portion of Eastern North Carolina to Raleigh and the adjacent central part of the State was made by the defendant Atlantic Coast Line Railroad Company connecting with the Southern Railway at Selma at 2:50 p. m. daily. For a year or two prior to that day the connection became very irregular, to the great

inconvenience of the traveling public, passengers frequently being compelled to lie over at Selma till 11 o'clock at night and then forced to take a mixed train with uncomfortable accommodations to go westward. The Southern Railway finding its time between Goldsboro and Greensboro, thirty-eight miles per hour, dangerous on account of the condition of its track, had also lately changed its schedule to leave Goldsboro thirty minutes earlier. The matter being called to the attention of the Corporation Commission, it attempted to remedy the evil. After much correspondence with the officials of both roads, the Commission on 8 December, 1903, made the following order:

Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day; and whereas it appears that such close connection is practicable, it is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 p. m. each day, instead of 2:50 p. m., as the schedule now stands. It is further ordered that if the Atlantic Coast Line trains have passengers en route for the Southern Railway and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait fifteen (3) minutes for such delayed trains upon receipt of such notice. This order shall take effect 20 December, 1903.

By order of the Commission:

FRANKLIN MCNEILL, *Chairman.*

H. C. BROWN, *Clerk.*

This order quickened the arrival time of the Atlantic Coast Line train at Selma twenty-five minutes, but as it required the Southern to wait at that point fifteen minutes for delayed trains, it more than divided the time between the roads, exacting only ten minutes advance of time on the part of the defendant to procure this convenience to the traveling public. On 18 December, 1903, on the application of counsel for the defendant, the order was suspended and both companies were notified to appear before the Corporation Commission at Raleigh, on 12 January, 1904, that "the matter of the connection at Selma of the Atlantic Coast Line going south with that of the Southern Railway going west in the afternoon" might be heard, and asking both companies to have representatives present. The defendant appeared by its superintendent and its general counsel, and the other company was also represented. After hearing both sides, "the situation being thoroughly discussed," the Commission took the matter under advisement. On 1 January, 1904, the Commission rendered a full finding of the facts, concluding with this judg-

ment: "And it is therefore ordered that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 and by and before 2:25 p. m., each day. It is further ordered that the Southern Railway hold its train, No. 135, at Selma fifteen minutes, if for any reason the Atlantic Coast Line train connecting at that point is delayed." It was further ordered that the order should take effect 26 January, 1904. To this judgment the Southern Railway Company did not except. The Atlantic Coast Line filed five exceptions: 1. That it was not practicable to make the connection at Selma by extending the run of either its (4) Plymouth or its Springhope train at Selma. 2. That it would be unprofitable and a loss for it to make the connection by putting on an additional train from Rocky Mount to Selma. 3. The Commission has no power to require it to put on extra trains. 4. That it is not practicable to make the connection without putting on an extra train, which the Commission has no power to do. 5. That the order is unreasonable because passengers from Rocky Mount can make connection at Goldsboro at 6:50 a. m. or at Selma by night train over the Southern, or they could go up to Weldon and go over the Seaboard Railroad. A letter in the record from the transportation department of the defendant company, dated 23 January, 1904, states that prior to the breaking of connection at Selma the defendant's 2:50 p. m. train transported on an average of twelve passengers daily for the Southern at Selma, while since the average was only two. This shows 3,650 passengers annually inconvenienced by the failure to connect at that point. There is evidence elsewhere in the record that it was a very much larger number. On 2 February, 1904, the exceptions were heard by the Commission upon the testimony of witnesses offered by the defendant, and other evidence. Upon all the evidence and after argument by counsel for the defendant, the Commission, 13 February, 1904, made a fuller finding of fact, in the course of which it is recited, *inter alia,* that by the connection at Selma at 2:50 p. m. between the Atlantic Coast Line train No. 39 (southbound) and the Southern train No. 135 (westbound), "the greater portion of the section of the country reached by the said branch roads was for years furnished the nearest and cheapest route of travel to Raleigh and other Southern Railway points. The greater portion of the travel between the Atlantic Coast Line territory and the Southern Railway points was by this route. It is admitted in the correspondence of the Atlantic Coast Line in this matter that this was a most important connection, being the principal outlet for passengers (5) en route from Eastern Carolina territory to Raleigh and other Southern Railway points. There seems to have been no complaint about the failure of these railroad companies to keep this schedule and make

this connection until about the year 1900. The Atlantic Coast Line informs the Commission that 'this matter has been a frequent source of correspondence between this company and the Southern Railway Company since 1900, and that during this time frequent complaints have been made to this company by the Southern Railway Company of its failure to make schedule time at Selma.' "

The Commission found, giving its reasons, that passengers ought neither to be required to go a much longer distance around by Weldon nor to make connection at unreasonable hours at Goldsboro (6:50 a. m.) nor make a night train (11 p. m.) connection at Selma, when a few minutes quickened time would maintain the connection which had been made at Selma in the early afternoon for more than ten years. The Commission also found that the defendant could make the connection, if it chose, by extending the run of its Springhope train which coming down nineteen miles from that place reached Rocky Mount at 12:10, where it lay over until 4 p. m. before returning to Springhope, during which four hours it could easily be run 41 miles and back, making this connection. It thus concludes its judgment:

There is within the territory served by these branch lines approximately 400,000 inhabitants. The report of the Atlantic Coast Line to this Commission for the fiscal year ending 30 June, 1903, shows net earnings from operation in North Carolina amounting to $1,943,116.63, and that there was a surplus of $1,293,983.54, after paying interest on its debts and 5 per cent dividends on its stock, both common and
(6) preferred, from the net earnings of the company's entire line.

On a mileage basis, this will show that there was a surplus of net earnings in North Carolina for that year of approximately $324,493. The Commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk and Carolina branch, the Plymouth branch and the Nashville branch with No. 135 Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma, for nearly ten years should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39 as formerly, on account of this train being heavier, containing usually one or more express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from Eastern Carolina to Selma and other Southern Railway points for the last ten years, instead of being abandoned, should be made permanent and cer-

tain, and that this result be accomplished by carrying out the order heretofore made in this Court. It is ordered therefore that the exceptions be and they are hereby overruled.

FRANKLIN MCNEILL, *Chairman.*

From this order, thus repeated the third time, and after the fullest investigation, occupying several months, the defendant appealed to the Superior Court. In that court the following issues were submitted, the Corporation Commission excepting:

1. Is it practicable for train No. 39 of the Atlantic Coast Line, due to arrive at Selma at 2:50 p. m., to make connection at Selma with train No. 135, westbound, of the Southern Railway, due to leave Selma at 2:25 p. m.? (7)

2. Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return; and if so, what would be the additional expense?

3. Is it practicable to make said connection by the use of the Springhope train; and if so, what would be the additional expense?

4. In order to make such connection, would the defendant company have to run an additional train on its main line from Rocky Mount to Selma?

The court directed the jury to answer the first three issues "No," and the fourth issue "Yes," and the Corporation Commission excepted. The following issues the jury were permitted to answer, to which they responded as follows:

5. Is it practicable for said train to run the schedule prescribed in the plaintiff's order, having due regard to the number of trains and number of stops on the defendant's main line from Rocky Mount to Selma? "Yes."

6. What would be the daily cost of operating such train from Rocky Mount to Selma and return? "$40."

7. What would be the probable daily receipts from such train? "$25."

8. Is it reasonable and proper that for the convenience of the traveling public the defendant company should be required to make such connection? "Yes."

Upon the verdict the Corporation Commission moved for judgment, but the court rendered judgment for the defendant, giving as a reason that The Code of 1883, sec. 1957 (9), gave to railroad companies the right to regulate "the time and manner in which property and passengers shall be transported," and that it had been unable to find where this had been repealed; that he was of opinion that the statute had not conferred any power upon the Corporation Commission to order any connection to be made between the trains on connecting rail- (8)

roads, and hence he refrained from passing upon the defendant's further contention that the General Assembly had no constitutional right to grant such power. The Corporation Commission appealed, assigning several grounds of error which will appear in the opinion.

Robert D. Gilmer, Attorney-General, Busbee & Busbee, F. A. Woodard, and Argo & Shaffer for plaintiff.

Junius Davis and Pou & Fuller for defendant.

CLARK, C. J., after stating the facts: For more than ten years the people of a large part of the eastern portion of the State, having occasion to come to the capital or to the adjacent central section, have found their most direct and convenient route to be via Selma, at which point by its schedule the southbound train No. 39 of the defendant Atlantic Coast Line delivered its passengers at 2:50 p. m. daily in time to connect with the Southern Railway westbound train No. 135 from Goldsboro to Greensboro. On 3 October, 1903, the Southern notified the Corporation Commission that owing to the condition of its track it was dangerous to maintain its speed—thirty-eight miles per hour—on its train No. 135, and proposed to leave Goldsboro thirty minutes sooner, which would cause its arrival a few minutes earlier at Selma. This the Commission found to be proper and reasonable. It was brought to the attention of the Commission by proper complaint made, that for many months the Atlantic Coast Line had failed to make this afternoon connection regularly at Selma at its schedule time, to the great inconvenience of the traveling public, and it was asked to order the afternoon connection to be resumed and observed. After much correspondence with the officials of both roads the Commission on 8 December, 1903, ordered that the afternoon connection should be made, and to that end directed
(9) that the defendant should quicken its schedule so as to arrive at Selma at 2:25 instead of 2:50 p. m. as before, an advance of twenty-five minutes, but as the same order required the Southern train to wait fifteen minutes whenever the Atlantic Coast Line was delayed for any cause, the order practically required the defendant to arrive ten minutes earlier. Objection being taken, the order was suspended and both companies were summoned before the Corporation Commission, and after investigation and argument on 16 January, 1904, the order was renewed. The Southern thereupon acquiesced in the order. The defendant alone filed exceptions, upon which testimony and argument were heard and the Commission renewed its order in the same terms, 13 February, 1904. On appeal by the defendant to the Superior Court, there were sundry issues submitted over the exception of the Corporation Commission. But as the order of the Commission appealed from

simply directed the connection to be made as in former years, prescribing no details of the method (which was left to the judgment of the defendant itself) save an accelerating of twenty-five minutes, subject to a delay of the Southern train of fifteen minutes, when the defendant's train should be late, we think the matter could have been and was fully disposed of by affirmative response of the jury to the eighth issue—"Is it reasonable and proper that for convenience of the traveling public the defendant company should be required to make such connection?"—taken together with the findings upon the sixth and seventh issues; that even if an additional train should have to be put on between Rocky Mount and Selma, the loss to the defendant would be $15 per day (which might be overcome by the increased travel induced by certainty of connection), and the official returns made by the defendant to the Commission 30 June, 1903, as required by law and which are in the evidence, that the net earnings of the defendant from its operations in North Carolina amounted for the year ending 30 June, 1903, to $1,903,116.63, with a surplus of nearly $1,300,000 after pay- (10) ing interest on its debts and 5 per cent dividends on its stock, both common and preferred, from the net earnings of the entire line. It is surely sufficiently large, as it stands, to justify the affirmation of the order of the Corporation Commission that this great inconvenience to the public should be avoided, even at a cost to the defendant of $15 per day, when the net earnings of the defendant from all its operations in this State approximate $2,000,000 annually, and the net surplus of the defendant's whole system, after payment of interest on its debts and dividends on its stock (whether watered or not), amounts to near $1,300,000 annually. And upon such verdict the judge below should have entered judgment affirming the order of the Corporation Commission, and we should reverse his judgment and enter such judgment here, provided (1) the Legislature has conferred such authority upon the Commission, (2) and the Legislature was not restrained by any provision of the State or Federal Constitution from granting such authority. Mr. Davis, the able and accomplished counsel of the defendant, states this clearly in his brief: "The defendant's contentions in brief are as follows: 1. That the Corporation Commission had no power or authority to make the order in question in this cause. 2. That the order is in violation of the Constitution of the United States and the State of North Carolina. 3. That the order is unreasonable and unjust." His third contention is settled by the verdict and findings as above stated. As to the first proposition, we think the General Assembly clearly intended to confer and did confer the power upon the Commission to order connection made by any two railroads when the public convenience required it, and the order was just and reasonable. This is not an arbitrary power, for, as

(11) in this case, such order is subject to review by a judge and jury on an appeal to the Superior Court, whence a further appeal lies to this Court.

Section 1 of the Corporation Commission Act (Laws 1899, ch. 164) in enumerating the qualifications, the duties and powers of the Commission, provides that "they shall have such general control and supervision of all railroad . . . companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers . . . necessary to carry into effect the provisions of this act." Section 21 of the act provides that "All common carriers subject to the provisions of this act shall, according to their powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith . . . *and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public.*" This provision is positive, clear, and mandatory. Common carriers are (1) to afford all reasonable, proper, and equal facilities for the interchange of traffic and forwarding freight and passengers. This would include both the place and time of delivery and forwarding of passengers and freight. The terms of the law are general and cannot be interpreted to mean alone the place at which passengers and freight are to be delivered; it does not mean simply facility for delivery, which might be confined to the place, but also requires facility for forwarding, which includes time as well, and prohibits such management as would produce delay in forwarding passengers. This requires close connection in point of time with connecting lines. (2) In the second place, common carriers are "to make as close connection as practicable for the convenience of the traveling public." The defendant insists that this last requirement means simply a physical connection, that is, a track connection. It is contended that the demands of the law would be

(12) met by a simple joining of the railroad iron of one railroad to that of another, regardless of the time of the delivery of passengers at the junction, and of their finding the means of "traveling" on or continuing their journey, and of the delays and inconveniences resulting from a failure to make connection of trains. The statement of this proposition, even if the acts were ambiguous, contains its own refutation. But the language is plain and unequivocal, and, as Mr. Argo, of counsel for the Commission, well says, "The requirement is that 'connecting lines shall make as close connection as practicable for the convenience of the traveling public.' This means that those railroads that have or pretend to have a physical connection, a connection of tracks, shall also have as close a connection of trains as practicable, in order

to secure the convenience of the 'traveling public.' It is well known that the principal inconvenience attendant upon traveling arises from delays resulting from failure of trains to connect according to time schedules. It would contribute little to the convenience of the traveler to be dumped out upon a track making a 'physical connection' and be compelled to wait for hours, frequently without food or adequate shelter and in the night, for a train upon which he might proceed on his way. The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track; both are required to furnish facilities for traveling at all, and a close connection of both to secure the convenience of the traveling public."

It is true that section 1957 (9) of The Code of 1883, originally enacted in 1871-'72, gave to railroad companies themselves the right to "regulate the time and manner in which passengers and property shall be transported," but by Laws 1891, ch. 320, creating a Railroad Commission, the State made a radical change in its attitude towards railroads. It asserted its power to supervise and regulate their con- (13) duct, forbade discrimination and issuance of free passes, conferred upon the Railroad Commission the power to regulate and to fix their charges for freight and passengers, to prohibit rebates, to make joint through rates, to make personal visitation of all railroad offices and places of business, to examine their officers, agents, and employees under oath, to require all contracts and agreements between railroads, as to their business in this State, to be submitted for approval, to require annual reports from the railroads, to require the railroads to make repairs to their tracks and additions to or changes of their stations, forbade the abandonment of any station without the permission of the Commission, to require (if the Commission saw fit) separate accommodations for the races at the stations and in the cars, and "that connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public," and many other matters which before that had been left to the railroads themselves. This act was passed after the fullest discussion for years before the people of the State. It expressed their deliberate conviction that the time had arrived when the State, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones, and steamboats. Similar legislation had preceded our act in England, in the Federal Congress, and in many of our sister states. Similar legislation has now been adopted in most of the states. Laws 1891, ch. 320, modified The Code, sec. 1957 (9), certainly to the extent that the right formerly conferred on railroad companies of fixing the time of running their trains was made subject to the power of the Commission to require connections to be made, wherever

public convenience should require this to be done, and the order was reasonable and just. The act had a repealing clause as to all previous legislation in conflict with it. The present act of 1899 renewed
(14) the general provisions of the Railroad Commission Law, with some extension of its powers and changes, but reënacting *verbatim* the provision requiring connections to be made and giving the Corporation Commission "general control and supervision of all railroads," with all powers "necessary to carry out the provisions of this act."

In this case the excuse of the defendant for its often missing connection at Selma since 1900 is that train No. 39 was a through train and that its increase in business made it more difficult to get to Selma in time. It may be natural that the officers of the company, looking to profits, should prefer the through business to the neglect of the convenience of the people of North Carolina, and should be reluctant to avoid the delay caused by heavy through business by putting $15 per day of its profits into affording the required convenience by an additional train if necessary. But it is precisely because just and proper regard for public convenience did not always coincide with the largest profit to the corporation that the State had to enact a statute giving to the Corporation Commission the power to regulate their rates, require suitable connections to be made, and a general supervision of their conduct. An act of the Legislature or order of the Commission reducing the defendant's charges for freight and passengers many hundreds of thousands of dollars would be valid if it left enough profit, over running expenses, "with economical salaries and management (of which the court will judge) to pay interest on its *bona fide* debt and some profit to stockholders." *Wellman v. R. R.,* 143 U. S., 339. It follows that this order, even if it cost the defendant $15 per day, is in the power of the Commission, if it serves public convenience.

The other point, as to the constitutional powers of the Legislature to so enact, is also well settled. The general power of the Legislature to provide reasonable rules and regulations, directly or through a commission, has been held by us in *Express Co. v. R. R.,* 111 N. C., 472,
(15) 32 Am. St., 805; in *Corporation Commission v. R. R.,* 127 N. C., 288, and cases there cited. Among the Federal decisions, this was asserted in *Munn v. Illinois,* 94 U. S., 113, and has been reiterated in numerous cases since, collected 9 Rose's Notes, pp. 21-55. The doctrine is thus stated in *People v. Budd,* 117 N. Y., 5 L. R. A., 566, 15 Am. St., 460: "Common carriers exercise a sort of public office and have duties to perform in which the public is interested. *Navigation Co. v. Bank,* 6. How., 382. Their business is therefore affected with a public interest within the meaning of the doctrine which *Lord Hale* has so forcibly

stated. But we need go no further. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation."

This has been repeated over and over again in all the courts. Citation of authorities would be a work of supererogation. If the public can regulate the charges of a common carrier, so that only it is not deprived of all profits, as is held in *Wellman v. R. R.,* 143 U. S., 339, and *Dow v. Beidelman,* 125 U. C., 680, it can certainly require a connection for the accommodation of thousands of our people, even if, at the utmost, it requires a loss of $15 a day out of a railroad company making $2,000,000 net earnings annually out of its operation in this State.

It is not necessary that the particular service required shall be profitable if the total earnings in this State show a profit. It is precisely because some particular service, which the public comfort or convenience may require, is not profitable that the company declines to render it. It prefers to work the soft spots, the best paying ore only, and it is precisely for that reason that the Commission is vested with the power to require those things to be done, if reasonable and just (not necessarily profitable), as to which there is the protection of an (16) appeal to the Superior Court and a further review here.

In *R. R. v. Gill,* 156 U. S., 664, the Court affirming the Supreme Court of Arkansas in same case (54 Ark., 112) says that the common carrier cannot "attack as unjust a regulation which fixes a rate at which some part would be unremunerative. . . . To the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the *earnings of the entire line* must be estimated." In *R. R. v. Minnesota,* 186 U. S., 261, the Court says that if upon the whole operations in hauling coal the road makes a profit, the requirement as to a fair profit upon investment is satisfied, notwithstanding under the order of the Commission there would be a loss in hauling at the rate fixed in carload lots. In *R. R. v. Minn., supra,* the Court say: "We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the Commission in this particular." In *Cantwell v. R. R.,* 176 Ill., 512, the Supreme Court of Illinois laid down the same doctrine thus: "The sufficiency of the earnings of a railroad to justify the expense of running a separate passenger train over a certain branch line constituting part of the entire system is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts of the roads operated with the branch as one continuous line." In *R. R. v. R. R. Commission,* 109 La., 247, the Supreme Court of that State, through *Nichols, C. J.,* in defining the

powers possessed by the Railroad Commission, says: "They extend to matters concerning public comfort and convenience, and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some particular point enter as important factors in determining what is
(17) to be done. The Commission cannot ignore the comfort and convenience of numbers of citizens on a line of travel or conveyance to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. . . . In the present issue it cannnot be claimed that the Southern Pacific road, either in the operation of its line as a whole or that part of it which falls within the limits of Louisiana, has not been and is not remunerative; nor can it be said that the Morgan Railroad Company is not a paying corporation. . . . We do not think the point is made that after the business of the railroad corporation had made it fairly remunerative, the Commission is without general authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly in view."

In *U. S. v. Freight Assn.*, 166 U. S., 322, the Court says: "It must also be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges (and among such the right to take private property of citizens is not the least), and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders." In *Gladson v. Minn.*, 166 U. S., 430, the Court says: "The State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction; it may prescribe the location and the plan of construction of the road and the rate of speed at which the trains shall run and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its
(18) incorporation and the safety, good order, convenience, and comfort of its passengers and of the public." In *Wisconsin v. Jacobson*, 179 U. S., 296, the Court says: "That railroads from the very outset have been regarded as public highways, and the right and duty of the Government to regulate, in a reasonable and proper manner, the conduct and business of a railroad corporation have been founded upon that fact. Constituting public highways of a most important character, the functions of proper regulation by the Government spring from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propo-

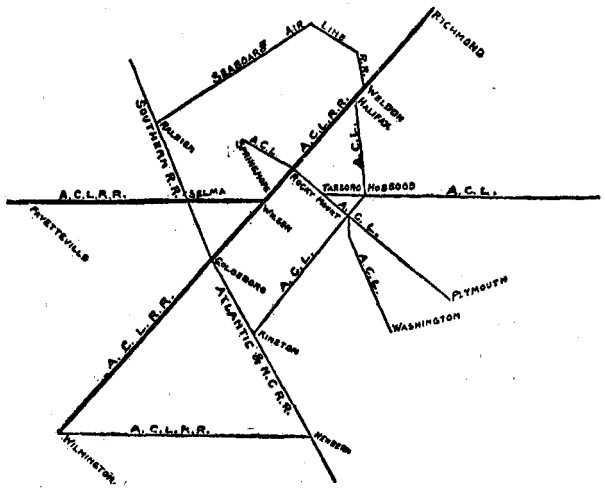
sitions. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience."

It is needless to multiply authorities. As the United States Supreme Court says in the last-cited case, the defendant was granted incorporation by the State "to subserve primarily the public good and convenience." If all those things required for the public convenience or comfort were profitable *per se* to the company, a Corporation Commission would not be necessary to compel the adoption and operation of such betterments. In *Waterworks v. Schottler,* 110 U. S., 347, it was held that the Legislature may regulate gas and water and other like companies, and require them to furnish their customers at prices to be fixed by the municipal authorities of the locality, and in *R. R. v. Bristol,* 151 U. S., 556, that the Legislature could require, even as to railroads already built, the removal of grade crossings at railroad expense. Certainly, then, the police power extends to authorizing the State Corporation Commission to require two railroad companies to make connection. The Corporation Commission, after three several investigations, has found that this connection would subserve that end. The jury, after an overwhelming array of evidence which we have not deemed it (19) necessary to recapitulate or cite, has so found. The statute clearly gives the power, and the authorities are beyond question that the Legislature could confer it. Requiring two railroads to make connection is the exercise of a far less power than making rates or compelling the erection of union depots at such junctions.

While we must reverse the decision below and affirm the judgment of the Corporation Commission, in view of the novelty and importance of this class of litigation, it is well to take notice of some of the exceptions taken by the Commission.

It was error to direct a verdict upon the first four issues. Upon the first issue, whether it was practicable to make connection by train No. 39, and the second issue, whether it was practicable to make connection by extending the run of the Plymouth train to Selma, there was a conflict of evidence, and the issues were of fact, and (if material) should have been submitted to the jury. More especially was this true since the order of the Commission was presumed to be valid and the burden was on the defendant to show otherwise. *R. R. v. Minn.,* 186 U. S., 264. On the third issue, as to the practicability of run- (20) ning the Springhope train to Selma in the four hours that it lies over at Rocky Mount, the evidence was uncontradicted that this could be done, and there was even evidence from two reputable witnesses which proved (if believed by the jury) that the costs of the extra run would be

only $10, showing a profit of $15 daily. The excuse that the engine was used for shifting at Rocky Mount, or that, being a wood-burner, a small stand for wood would need to be built at Selma—the other engines being coal-burners—did not deserve to be considered against the inconvenience to thousands of the public caused by failure to make this connection. It follows that it was error to instruct the jury in response to the fourth issue to find that the connection could only be made by an additional train from Rocky Mount to Selma.



The first seven issues were irrelevant and immaterial. The motion of the plaintiff for judgment upon the verdict should have been granted. The eighth issue, "Is it reasonable and proper that for the convenience of the traveling public the defendant company should be required to make such connection?" was answered "Yes." This was the only material issue, and upon that finding alone the judgment should be entered here. This view is strengthened by the "inspection of the whole record," which shows that the findings upon the sixth and seventh issues are that if the connection were made by the most expensive of the four methods named, the loss was only $15 per day, and the report of the defendant to the Corporation Commission, which is in the record, that its annual net earnings in this State were nearly two millions of dollars. This shows the correctness of the finding upon the eighth issue as to the reasonableness of the order, even in the most adverse view.

The court has the power to enter final judgment here, and on proper occasions has done so. The Code, sec. 957; *Alspaugh v. Win-*
(21) *stead,* 79 N. C., 526; *Griffin v. Light Co.,* 111 N. C., 438; *Cook v.*

Bank, 130 N. C., 184. Final judgment has been entered here, not infrequently, by order and without opinion, as a matter of course. In *Bernhardt v. Brown,* 118 N. C., 710, 36 L. R. A., 402, it is said: "If this Court reverses or affirms the judgment below, it may in its discretion enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since Laws 1887, ch. 192." In *Caldwell v. Wilson,* 121 N. C., 473, which resembles this case in being a matter of public interest and not a judgment for money, it was held, "the judgment must therefore be affirmed, but in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this Court," which was done—ousting the defendant from the office and seating the relator. Among many other cases in which final judgments were entered here is *White v. Auditor,* 126 N. C., 584, and similar cases, in none of which the dissents were upon the power of this Court to enter final judgment here. The Code, sec. 957, provides as to this Court: "In every case the Court may render such sentence, judgment, and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." Rule 49 of this Court provides for "a judgment docket of this Court" with references to entries as to different causes of action in which recovery is adjudged, and Rules 50 and 51 for the issuance of executions from this Court on its judgments.

In this matter there has already been a year's delay. The inconvenience to the public continues each day. The act of the Legislature for that reason expedites the hearing of these causes by giving them precedence of all other civil cases. Judgment will therefore be entered here reversing the judgment of the Superior Court, and affirming in all respects and declaring valid the order of the Corporation Commission made in this case, 13 February, 1904. That order simply directed the defendant to make the connection daily at Selma at the time mentioned therein, without specifying whether this should be done by quickening the speed of train No. 39 or by extending the run of the Springhope or the Plymouth train, or by putting on an extra train from Rocky Mount to Selma, and our judgment leaves to the defendant the same liberty of choice as to the mode in which it shall put into effect the order of the Commission. Owing to the possible necessity of making preparations to comply with this judgment, there will be a *cessat executio* till 10 February, 1905, entered on the judgment docket of this Court, and until that date no mandate shall issue to the defendant upon this judgment. The judgment of the Superior Court is

(22)

Reversed.

DOUGLAS, J., concurring: I fully concur in the opinion of the Court; but there is a question omitted therefrom which, though perhaps not essential to the present decision of the Court, may become of the greatest importance in view of the Federal question raised, or attempted to be raised, by the defendant. I think there was error in excluding, upon the objection of the defendant, answers to the following questions asked by the plaintiff, to wit:

"Q.: Mr. Borden, what is the stock of the Atlantic Coast Line worth to-day?

"Q.: What was the stock of the Wilmington and Weldon Railroad Company worth twenty years ago?

"Q.: Is not the present value of the original stock of the Wilmington and Weldon Railroad Company, which constituted the basis of the present stock of the Atlantic Coast Line, today worth $1,900 or $2,000 in the market?

"Q.: What dividends are now being received by the holders of the original stock of the Wilmington and Weldon Railroad Com-
(23) pany?" (Record, p. 294.)

The questions sufficiently disclose the scope of the proposed inquiry, but would doubtless have been followed by other questions eliciting in greater detail the desired information. In its second exception to the order of the Commission, the defendant claims the protection of the Constitution of the United States in the following words: "The company, therefore, excepts to the order of the Commission in so far as it is construed as requiring it to run an additional train from Rocky Mount to Selma between the hours above named, because to do so would be requiring the company to perform services without compensation to it for the same, and thereby taking its property without due process of law, and in violation of the Constitution of this State and in violation of the Constitution of the United States." (Record, p. 32.) In its brief the defendant also says: "Neither the Commission nor the Legislature has the power to require the defendant to run an additional train at a loss. The jury finds that to operate this train will impose a daily loss of $15 upon the defendant, and to compel the defendant to operate this train at a loss would be taking its property without compensation and in violation of the Constitution of this State and of the Constitution of the United States."

In this view of the case the excluded testimony might become of the utmost importance. We cannot presume that the Corporation Commission intends "to take the property of the defendant without due process of law" or to require unnecessary services without compensation in some form or another; but we cannot admit that the defendant can ignore the just demands of the public by creating for its own profit and con-

venience a condition of affairs that makes one train unprofitable by throwing all the remunerative business on trains that do not make connection. The order of the Commission does not require the defendant to run an additional train, but simply to make con- (24) nection. It does not necessarily require any additional, unusual, or special services, but simply the performance of its essential duties in such a manner as will meet the reasonable convenience of the public. This the defendant can do by making a through train arrive at Selma a few minutes earlier; but if it prefers to ignore the rights of those living along its line, whose lands it has taken through the exercise of the right of eminent domain, in order to cater to its through travel, it cannot justly complain if its public duties require the running of an extra train. The mere fact that through passengers from the North to Florida have the choice of three or more routes, varying but little in time and comfort, is no excuse for an unjust discrimination against that part of the traveling public who are dependent upon local lines. This idea was evidently in the mind of this Court when, speaking by *Rodman, J.*, in *Branch v. R. R.*, 77 N. C., 347, upon the necessity for the imposition of penalties, it says on page 350: "The Legislature considered the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interest 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 or water—as from Wilmington to Augusta." The fact that the defendant in that case was the parent of the present defendant may lend additional significance to the words of the Court.

In this view the profits of the road, both for the present and the immediate past, would become material. Suppose the witness had answered that no dividend had been paid for years, and that the company was unable to earn anything beyond bare expenses, whereby the stock was almost unmarketable, would it not have been competent as tending to prove the defendant's contention that it is unreasonable to (25) demand of it any additional service? On the contrary, suppose the witness had testified as follows: That on one share of the par value of $100 in the Wilmington and Weldon Railroad Company the following stock dividends or bonuses had been issued, in addition to large annual dividends: that in 1887 the said railroad company had issued upon this one share of stock as a bonus a certificate of indebtedness in the sum of $100 bearing 7 per cent interest; that in 1900 there were issued in lieu of this one share of stock, two shares of $100 each of preferred stock in the Atlantic Coast Line Company and two shares of $100 each of common

stock in the Atlantic Coast Line Company; that in 1897 there was also issued to the holder of the one original share of stock four shares of the Atlantic Coast Line Company of Connecticut of $100 each, and in 1900 a certificate of indebtedness of the Atlantic Coast Line Company of Connecticut for $400; that all of said stock and certificates of indebtedness were much above par value and receiving handsome dividends; that recently a dividend of 25 per cent had been declared, and that the one original share in the Wilmington and Weldon Railroad Company had thus developed into thirteen shares of stock and certificates of indebtedness of the par value of $1,300, but of the real value of about $2,500. Suppose it had been further shown that a little over thirty years ago the State's half interest in the Wilmington and Weldon Railroad Company had been bought for $35 a share. Suppose, further, that it was shown that a large part of the alleged indebtedness of the company were certificates of indebtedness issued to the stockholders without any consideration whatever other than the mere capitalization of profits.

Would not this evidence have been competent to prove that the order of the Corporation Commission requiring the defendant to
(26) quicken its regular trai ntwenty-five minutes in order to make connection at Selma was not unreasonable, and *not* "taking its property without due process of law and in violation of the Constitution of the United States?" Would not such evidence also tend to prove that it would not be unreasonable to require the defendant to make such connection even if it did require an extra train at a loss of $15 per day, if other trains running on the same line of road and by the same places more than made up the difference?

These are hypothetical answers on both sides. Where the truth may be was peculiarly within the knowledge of the defendant, upon whose objection it was excluded. It cannot be contended that such an investigation would be an impertinent inquisition into private affairs, as property taken for a public purpose under the power of eminent domain is indelibly impressed with a public use. This has been too often decided by the Supreme Court of the United States to be any longer an open question. Two cases will be sufficient for my purpose. In *Wellman v. R. R.*, 143 U. S., 339, the Court says, on page 345: "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; $50,000 to $100,000 to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or

the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised it might clearly appear that a prudent and hon- (27) est management would within the rates prescribed secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

The Corporation Commission Act (ch. 164, Laws 1899), in section 2 provides as follows: "*Provided,* that in fixing any maximum rate of charge or tariff of rates or charges for any common carrier, person, or corporation subject to the provisions of this act, the said Commission shall take into consideration, if proved, or may require proof of, the fair value of the property of such carrier, person, or corporation used for the public in consideration of such rate or charge or the fair value of the service rendered as in determining the fair value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State of North Carolina; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person, or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges, and tariffs."

Cotting v. Stockyards Co., 183 U. S., 79, is cited by the defendant, but does not seem to sustain its contentions. In the opinion in that case appears the following clear distinction between those corporations which, like railroad and telegraph companies, are created for a public purpose and endowed with certain governmental powers, (28) such as that of eminent domain, and those corporations which are only incidentally devoted to public use, receiving no governmental powers and not impressed with any permanent public purpose. The Court says, on page 93: "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered, and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his

property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely a private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a large general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State,
(29) may it not be urged that he in a measure subjects himself to the same rules of action, and if the body which expresses the judgment of the State believes that the particular services should be rendered without profit, he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public? Again, wherever a purely public use is contemplated the State may, and generally does, bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State; and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public have an interest in. In reference to this latter class of cases, which is alone the subject of the present inquiry, it must be noticed that the individual is not doing

the work of the State. He is not using his property in the (30) discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract."

Cited: *Bank v. Moore,* 138 N. C., 533; *Corporation Commission v. R. R.,* 139 N. C., 129; *Industrial Siding Case,* 140 N. C., 240; *Kernodle v. Tel. Co.,* 141 N. C., 441; *Hill v. R. R.,* 143 N. C., 603; *Smith v. Moore,* 150 N. C., 159; *Griffin v. R. R., ib.,* 315; *Battle v. Rocky Mount,* 156 N. C., 339; *S. v. R. R.,* 161 N. C., 272, 274; *R. R. v. R. R., ib.,* 535; *R. R. v. R. R.,* 165 N. C., 427; *Webb v. Tel. Co.,* 167 N. C., 492; *Corporation Commission v. R. R.,* 170 N. C., 569; *Chavis v. Brown,* 174 N. C., 123.

NOTE.—On writ of error this case was affirmed, 206 U. S., 1.

BRITTAIN v. WESTALL.

(Filed 30 November, 1904.)

1. Agency.

If an agent is authorized to make a purchase, and no funds are advanced to him, he is by implication authorized to purchase on the credit of his principal.

2. Agency—Contracts.

Where a contract between an agent and his principal provides that the agent can purchase lumber for cash, he cannot buy on credit.

3. Agency.

Where an agent authorized to buy only for cash buys on credit, and the principal uses the lumber purchased, he is not liable therefor unless he knew how it was bought.

4. Agency—Principal and Agent.

It is only after a *prima facie* case of agency has been established that the acts and declarations of the agent become competent against his alleged principal.

ACTION by D. M. Brittain against W. H. Westall, heard by *McNeill, J.,* and a jury, at July Term, 1904, of CATAWBA. From a judgment for the plaintiff, the defendant appealed.

L. L. Witherspoon and M. H. Yount for plaintiff.
Self & Whitener for defendant.

(31) WALKER, J. This case was before us at the last term upon an appeal by the plaintiff from a judgment of nonsuit, which the court rendered on motion of the defendant at the close of the testimony. 135 N. C., 492. We then held there was some evidence that Townsend was the agent of Westall to buy the lumber for him, and although it was a restricted agency and Townsend could only buy for cash, yet if Townsend bought lumber from the plaintiff on Westall's credit, and the latter received and appropriated it to his own use, knowing at the time it had been so bought, he would be liable for its value. In order that this phase of the case might be submitted to the jury, the judgment was set aside and a new trial awarded. A sufficient statement of the facts for an understanding of the point decided in this appeal will be found in the case as formerly reported. It may be added, though, that there was evidence at the last trial that the defendant had supplied Townsend with sufficient funds to buy the lumber.

In *Patton v. Brittain,* 32 N. C., 8, it appeared that an agent was given authority to purchase personal property for his principal, but only so far as he had cash of his principal with which he was to pay for it. The agent purchased on the credit of the principal without paying any money and the property was delivered to the principal, who received and converted it to his own use. The Court held that when the agent violated his express instructions and bought on credit instead of for cash, the principal had the right to repudiate the contract and to refuse to receive the articles, but, having received and used them with knowledge that they had been purchased for him and upon his credit, the vendor could recover from him the price of the goods. It was said that the same result would follow whether the agent acted contrary to his authority, exceeded it, or had none at all, it being the simple case of the goods of one man coming to the use of another which he knows are not intended as a gift, but are sent to him upon the expectation that he will

(32) receive and pay for them. A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account, he cannot bind the latter by a purchase on credit, unless, perhaps, such is the well-known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. This is substantially the principle which is involved in this case, and it is sanctioned by the best authorities. See 1 A. & E. (2 Ed.), pp. 1020 and 1021, where the cases on the subject are collated.

This Court has said that when the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he

may deem best, and to sell in the same way. *Ruffin v. Mebane,* 41 N. C., 507. It may be taken, then, as a settled principle in the law of agency that if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. *Sprague v. Gillett,* 50 Mass., 91. The case of *Komorowski v. Krumdick,* 56 Wis., 23, is much like ours. The Court there held that an agent to purchase property must, in order to bind his principal, who furnishes in advance the funds to make the purchase, buy for cash, unless he has express power to buy upon credit or unless the custom of the trade is to buy upon credit, and in the absence of such express authority or of such a custom the agent cannot bind his principal by a purchase, upon a credit, of a person who is ignorant of his real authority as between himself and his principal, unless the property so bought is delivered to the (33) latter and he receives it knowing that his agent actually bought on credit or that he had no funds in his hands at the time with which to buy the same. See, also, *Jacques v. Todd,* 3 Wend., 83; *Willard v. Buckingham,* 36 Conn., 395; *Proctor v. Tows,* 115 Ill., 138; *Paine v. Tillinghast,* 52 Conn., 532, Mechem on Agency, sec. 364.

While these principles seem not to have been seriously questioned by the defendant, he contended that Townsend was not his agent, and that, even if he was, he had been supplied by him with more than sufficient cash with which to buy the lumber afterwards received by the defendant, and that Townsend had no express authority to buy on credit. In order to present these questions and have the jury pass upon them, the defendant's counsel requested the court to give certain instructions to the jury, and among others the following one, which was the subject of the defendant's second prayer: "The written contract introduced in evidence constituted Townsend the agent of Westall, with limited authority only. As such agent Townsend had authority to buy lumber for cash, with money furnished him by Westall; but he did not have authority under said written contract to buy lumber on Westall's credit." We do not see why defendant was not entitled to this instruction. On the face of the contract it appeared that Townsend was directed to buy only for cash, and this being so, he could not, of course, buy on credit contrary to the instruction of his principal. Whether the defendant subsequently ratified what he did and is therefore liable to the plaintiff, is quite another and different question.

The instruction requested in the defendant's sixth prayer was a proper one and should have been given. It was as follows: "Although the identical lumber in controversy came into possession of defendant and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or (34) accepted and appropriated the lumber with notice of the fact that Townsend had bought it on his (defendant's) credit." The contract expressly required Townsend to buy for cash, and the only possible ground of defendant's liability is that he received and appropriated the lumber to his own use, knowing that his agent had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case the latter had implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 A. & E., 1021, and notes.

The first and fourth prayers were properly refused, as none of them embraced all of the facts which it was necessary for the jury to find in order to defeat the plaintiff's recovery. They were not complete, but confined only to a single aspect of the case. The instruction asked to be given in the third prayer was not warranted by the state of the evidence. The fifth prayer was substantially given. Indeed, the modification made by the court was virtually but a repetition of the language in the first part of the prayer. The seventh prayer, which was modified and then given by the court, might well have been refused, as it is subject to the same objection as that already stated to the first and fourth prayers. It restricted the right to recover to only one view of the case, when there were others which should have been considered by the jury. Like the first and fourth prayers, it was too narrow and therefore misleading. But the amendment of the court wrought no material change in the instruction as it was asked to be given.

With reference to the objections to testimony, we may say generally that the declarations of an agent are not competent to prove the agency; it is only after a *prima facie* case of agency has once been established (35) that the acts and declarations of the agent can become competent against his alleged principal. *Francis v. Edwards,* 77 N. C., 271; *Gilbert v. James,* 86 N. C., 244; *Daniel v. R. R.,* 136 N. C., 517, at this term. When he is shown to be an agent, his acts and declarations in the course of his employment and within the scope of his agency and while he is engaged in the business (*dum ferret opus*) are competent, as in that case they are, as it were, the acts and declarations of the principal himself. What he says and does, even while engaged in transacting the business of the agency, is not competent to establish the agency, which is a preliminary fact to be shown before his acts and declarations can be admissible at all. We need not discuss the exceptions to the charge,

as they may not be presented again. There was error in the refusal to give the instructions contained in the second and sixth prayers of defendant, for which there must be a

New trial.

Cited: *Strickland v. Perkins,* 145 N. C., 94; *Metal Co. v. R. R., ib.,* 297; *Swindell v. Latham, ib.,* 148; *Wise v. Texas Co.,* 166 N. C., 619; *Brimmer v. Brimmer,* 74 N. C., 440; *In re Utilities Co.,* 179 N. C., 159.

(36)

STATON v. WEBB.

(Filed 30 November, 1904.)

1. **Actions—Pleadings—The Code, Secs. 133, 233, 260—Const. N. C., Art. IV, Sec. 1.**

   An exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable.

2. **Mortgages—Foreclosure of Mortgages—Judgments.**

   A judgment creditor, as against a simple debt of the mortgagee, is entitled to all the surplus proceeds of the sale of the mortgaged land after the payment of the mortgage debt.

3. **Mortgages—Foreclosure of Mortgages—Attorney and Client.**

   A mortgagee is not entitled to the amount of a fee paid an attorney out of the proceeds of a sale, without proof of the necessity or authority therefor in the mortgage.

4. **Pleadings—Judgment—The Code, Sec. 233.**

   No prayer for relief is necessary in a complaint where the relief sufficiently appears from the pleadings and the proof.

ACTION by H. L. Staton against W. G. Webb, heard by *Moore, J.,* and a jury, at April Term, 1904, of EDGECOMBE.

The following statement of facts, taken from the defendant's brief, substantially states the case:

On 1 February, 1896, Joseph Cobb executed to the defendant Webb a mortgage deed conveying a tract of land to secure the payment of a note for $1,000 due 1 January, 1897, with authority to sell for cash on default in the payment of said note, "and apply the proceeds of sale to the payment of the note and interest, and the surplus, if any, to the said Joseph Cobb, or to his heirs."

On 5 June, 1896, the plaintiff recovered four several judgments against the said Joseph Cobb in a justice's court of said county, and on

the same day caused them to be duly docketed in the office of the clerk of the Superior Court of said county.

That the amount due said Webb on the aforesaid mortgage indebtedness on 2 December, 1900, date of sale under said mortgage, was $1,290.16, and the amount due plaintiff on said judgments on that day was $558.57.

That the said Webb was unable to secure a cash purchaser for said land, so it was finally agreed between him and the said Cobb that the land should be sold on a credit of three years; that at the same time it was further agreed between said parties that in consideration of the labor and efforts of the said Webb to find a credit purchaser at a price in excess of the mortgage debt, that such excess bid should be applied to an unsecured indebtedness of $800 of the said Cobb to the said Webb; that said land was sold in accordance with said agreement on 2 December, 1900, on these terms; $250 cash; $500 payable 2 December,
(37) 1901; $500 payable 2 December, 1903, and $500 payable 2 December, 1904.

Deed was made to the purchaser on his making the cash payment and executing a mortgage on the land to secure the deferred payments. At the time of the mortgage sale, and the making of the aforesaid agreement with Cobb, the said Webb had no knowledge of the judgments in favor of the plaintiff.

That of the cash payment of $250 the said Webb disbursed $2.25 for stamps and recording deed to the purchaser, and paid attorneys $20 for preparing the papers between Webb and the purchaser. That Webb has received on said purchase, mortgage and notes only the following amounts: $50, 21 October, 1901; $50, 2 December, 1901; $100, 6 October, 1902, and $200, 6 January, 1904.

The plaintiff contends that he is entitled to the payment of his judgment debt after satisfaction of the mortgage. The defendant contends that he is also entitled to the payment of his unsecured debt in accordance with his agreement with the mortgagor.

The court below adjudged that the defendant was entitled to the balance of the principal and interest of his mortgage debt, together with the necessary expenses of the sale, exclusive of attorney's fees, and that the plaintiff was then entitled to the payment of his judgment debt, which exhausted the fund. The court also appointed a receiver and directed the defendant to turn over to him the unpaid note given for the purchase of the land. The defendant appealed.

G. M. T. Fountain for plaintiff.
Gilliam & Gilliam for defendant.

DOUGLAS, J., after stating the case: The defendant filed three exceptions. The first is that by the form of the complaint this is an action "for money had and received," and as such cannot be maintained unless the money has been actually received by the defendant. (38) This exception cannot be maintained, whatever might have been its merit under the old common-law practice before the adoption of the Constitution of 1868. Section 1 of Article IV provides that "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the fact at issue tried by order of court before a jury."

Section 133 of The Code is as follows: "The distinctions between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished, and there shall be hereafter but one form of action for the private wrongs, which shall be denominated a civil action." Section 223 provides that "The complaint shall contain (1) the title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant; (2) a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition, and each material allegation shall be distinctly numbered; (3) a demand of the relief to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof must be stated." Section 260 is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties."

It is evident from these provisions that the Code of Civil Pro- (39) cedure was neither a modification nor a simplification of any of the common-law modes of procedure. It practically abolished all the common-law forms of action, and adopted the old equity practice, with some slight modifications, the principal one being that in The Code practice the summons precedes the complaint, while in equity the subpœna follows the bill. *Wilson v. Moore,* 72 N. C., 558. A brief glance at the methods of procedure in actions at law before the adoption of the Code of Civil Procedure will show how complete is the change. In this State the courts followed the practice of the Court of King's Bench in

England. Much space and learning were expended upon the nature and requisites of the different pleadings, but in actual practice the method was of the simplest kind. The action was begun by an "original writ" commanding the sheriff to "take the body of C. D. (if to be found in your county) and him safely keep so that you have him before the justices of our Court of Pleas and Quarter Sessions to be held, . . . then and there to answer A. B. of a plea of trespass on the case to his damage ..... dollars." If the action lay in debt or covenant or any other form of action, the only change made was to insert in lieu of the words "trespass on the case" the words "that he render unto him the sum of ..... dollars, which he owes to and unjustly detains from him"; or a "breach of covenant," as the case might be. Eaton's Forms, 44. Under this writ the sheriff took the defendant into custody, unless belonging to some exempted class, such as a woman or an administrator, and held him to bail, or himself became special bail. The plaintiff was supposed to file a declaration, which in fact was rarely if ever done, the mere indorsement of the nature of the action on the back of the writ being deemed a sufficient compliance with the rule in the absence of a specific demand. The defendant was also expected to plead,
(40) which was usually done by his counsel merely marking upon the docket the nature of his pleas in a contracted form. Whatever it may have been in theory, the usual entry was about as follows: "Genl. issue, Payt. and set-off, Stat. Lim. with leave." The last two words mean leave to plead any other defense that may chance to occur to the pleader, such as *nil debit,* accord and satisfaction, *non est factum,* or the like. In ejectment, a form of trespass wherein the general issue was "not guilty," the procedure was more complicated, but even in that action Mr. Eaton feels called on to say: "The practice which prevails in North Carolina of trying actions of ejectment with no declaration on file but that against the casual ejector is very irregular." The force of this remark is apparent when we recall that the casual ejector had no actual existence, being purely a fictitious personage, the airy phantom of judicial imagination.

In the old system the principal difficulties lay in deciding upon the proper form of action and the danger of encountering, during the trial, some equitable rights that could not be adjusted in that court. The fact that the courts of law and equity were held by the same judge at the same place and during the same week did not prevent them from being separate and distinct courts, with subjects of jurisdiction and methods of procedure entirely different. It was to remedy these evils that the new system was adopted. Whether it comes up to the full measure of simplicity claimed for it by its most enthusiastic advocates, we are not

entirely prepared to say. We certainly do not desire to make any further complications, and in furtherance of its essential principles must overrule the exception.

The second exception is as follows: "That on the issues found by the jury the plaintiff was not entitled to the judgment rendered, for that it is found as facts (issues 5 and 6) that Cobb was indebted (41) to Webb in the sum of $800, and contracted with him that in consideration of his finding a purchaser for said land at a price in excess of the mortgage debt, such excess should be applied to said unsecured debt." This exception is based exclusively upon *Norman v. Halsey,* 132 N. C., 6, but does not come within its essential principle. In that case it was held that a mortgagee who sells under a mortgage is not liable to a subsequent mortgagee or judgment creditor for the surplus paid by him to the mortgagor, unless he has actual notice thereof before such payment. It does not decide that he can retain any surplus in payment of a further and unsecured indebtedness of his own, which is the case at bar. As between him and the mortgagee, the judgment creditor is entitled to all the surplus proceeds of the sale after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage, or are necessarily incident thereto. We are not aware of any principle that would permit the mortgagor to make a subsequent agreement with the mortgage by which he could give him the entire proceeds of the sale of the land to the exclusion of judgment creditors, under the guise of exorbitant commissions.

The third exception was to the refusal of the court below to allow an attorney's fee of $20. The exception cannot be sustained. *Turner v. Boger,* 126 N. C., 300; 49 L. R. A., 590. If an attorney's fee cannot be allowed to a disinterested trustee when specially provided for in the deed of trust, we see no reason upon which it can be allowed to a mortgagee without proof of necessity or authority in the mortgage.

In the case at bar the complaint has no prayer for relief, but we think that it sets out the plaintiff's cause of action with sufficient clearness to indicate the proper relief. The complaint alleges that the defendant mortgagee has sold the mortgaged premises for more than (42) enough to pay his debt, and upon demand refuses to pay the surplus to the plaintiff in satisfaction of his docketed judgments. As there is no question as to legal exemptions, the evident relief is to require the defendant to pay over the surplus. The fact that the purchase price is in notes and not in money compels the intervention of a receiver to carry out the judgment. This is fully as much for the benefit of the defendant as for the plaintiff, as a resale of the land may be necessary, and the defendant would be entitled to the full payment of the principal and

interest of his mortgage debt before anything is paid to the plaintiff, if necessary, even to his entire exclusion.

It has been repeatedly held by this Court that no prayer is necessary where the appropriate relief sufficiently appears from the allegations of the complaint. In *Knight v. Houghtalling,* 85 N. C., 17, *Ruffin, J.,* speaking for the Court, says: "We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of the contract. But we understand that under The Code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied." In *Demsey v. Rhodes,* 93 N. C., 120, *Merrimon, J.,* speaking for the Court, says: "Indeed, in the absence of any formal demand for judgment, the Court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs." See, (43) also, *Harris v. Sneeden,* 104 N. C., 369; *Gattis v. Kilgo,* 125 N. C., 133; Clark's Code, sec. 233 (3).

While a formal prayer for relief may not be necessary, we would, however, advise our brethren of the bar to comply with the express requirements of section 233 of The Code, as there is always a certain element of danger attending experimental pleading. The judgment of the court below is

Affirmed.

Cited: Bryan v. Canady, 169 N. C., 582; *Public Service Co. v. Power Co.,* 180 N. C., 348.

SMITH v. JOHNSON.

(Filed 30 November, 1904.)

1. Processioning—Boundaries—Laws 1893, Ch. 22.

In this action to establish boundaries the evidence of title of plaintiff and the location of the boundary lines was sufficient to be submitted to the jury.

2. Processioning—Superior Courts—Clerks of Courts.

Where, in processioning, the defendant denies the title of the plaintiff as well as the location of the boundary lines, the clerk should transfer the case to the Superior Court for the trial of the issue as to title.

3. Processioning—Superior Courts—Clerks of Courts.

Where, in a processioning action, the defendant denies the title of the plaintiff as well as the location of the boundary lines and there is an appeal from the decision of the clerk on both issues, the Superior Court should try both issues by a jury.

ACTION by W. P. Smith and others against Taylor Johnson and another, heard by *Neal, J.*, at Spring Term, 1904, of ALEXANDER.

This is a special proceeding under chapter 22, Laws 1893, to establish a boundary line, begun before the Clerk of the Superior Court of ALEXANDER. The plaintiffs alleged that they were the owners of a certain tract of land fully described and that the defendants were (44) the owners of adjoining land, and that the dividing line between the land of the plaintiffs and defendants was in dispute, the plaintiffs setting out their contention and asking that a survey be ordered and the true line established in accordance with the provisions of the statute. The defendants deny the material allegations of the complaint and set forth the lines of the land claimed by them. They deny that plaintiffs own any land adjoining them. They also allege that they and their ancestors have been in possession of the land claimed by them, under known and visible boundaries, for more than fifty years. Upon the filing of the answer the clerk directed a survey to be made showing the contentions of both parties. Pursuant to the order the surveyor duly filed his report, setting forth that he had surveyed the lines in controversy. He sets out in detail the several lines, showing by a map the contention of each party. The report is clearly and intelligently made. The clerk thereupon heard the cause upon the report, hearing evidence and argument of counsel, and adjudged that the plaintiffs are entitled to have the line in controversy established as asked for in their petition, and on the report of the surveyor he adjudged the true line to be from the points set out in his judgment as indicated on the map and ordered that the county surveyor go upon the lands, mark and establish the line as located by him. From this judgment the defendants appealed. The case came on for trial in the Superior Court upon said appeal. The case on appeal states that "After reading the pleadings as set forth in the record, upon issues submitted as shown by the record, the plaintiffs introduced the following evidence." Following this statement the evidence is set out in full. Whereupon the following judgment was rendered: "At the conclusion of the plaintiffs' evidence the defendants moved for a nonsuit against the plaintiffs, for that in no aspect of the case on the plaintiff's evidence, when the plaintiffs rested, were plaintiffs entitled to the relief demanded. After argument on both sides upon this motion to nonsuit the plaintiffs, and the whole (45)

record, it is considered and adjudged by the court that the motion of the defendants to nonsuit the plaintiffs is sustained. From this judgment the plaintiffs appealed.

McIntosh & Burke for plaintiffs.
No counsel contra.

CONNOR, J., after stating the case: Neither the record nor the case on appeal states upon what ground the motion for judgment of nonsuit was based, and we are not favored with any argument or brief on the part of the defendants. The plaintiffs' brief states that the following issue was submitted to the jury: "What is the true boundary line between plaintiffs and defendants?"

Chapter 22, Laws 1893, provides "That the owner of land, any of whose boundary lines are in dispute, may establish said line or lines by special proceedings. . . . The owner shall file his petition stating facts sufficient to constitute the location of said line or lines, and making defendants all adjoining owners whose interest may be affected by the location of said line. If the answer deny the location set out in the petition, the clerk shall issue an order according to the contention of both parties and make report of the same, with a map. . . . The cause shall then be heard by the clerk and judgment given determining the location thereof." Provision is made for an appeal.

This Court said in *Williams v. Hughes,* 124 N. C., 3: "We do not think it was intended to try title to land under this statute, but to pro-
(46) cession, locate, and establish the lines between adjacent landowners. It gives the right to the *owners* of the land and provides that the *occupancy* of land by the petitioner shall be sufficient evidence of *ownership* to entitle the petitioner to relief under this act." In that case the issues were confined to the ownership of the land by the plaintiff, and the inquiry whether the true boundary lines between the plaintiff and defendant were those set out in the complaint. The Court, referring to the issue, said: "And for this purpose it seems to us that it would be better to broaden the second issue by allowing the jury to locate the boundary line, whether it was where the petitioner alleged it to be or not." The two questions presented by the record in this case, both of which should have been submitted to the jury, are, first, whether the plaintiffs were the owners of the land described in the complaint, and, second, what was the true dividing line between them and the defendants. There was certainly some evidence to go to the jury upon the first question. The plaintiffs testified that they were in possession of the land described in the map. In the absence of any map we must

assume that they referred to the same land which is referred to in the judgment of the clerk. If the jury found that the plaintiffs were the owners—and for that purpose it was sufficient to show that they were in the occupancy of the land—the only question for them to determine was the location of the true boundary line between the plaintiffs and defendants. In *Williams v. Hughes, supra,* the court charged the jury "That upon all the evidence they could say where the line was." This instruction was approved by this Court. The purpose of this special proceeding, as set forth in the statute and frequently held by this Court, is not to try the title to the land, but only to ascertain the boundary lines, *Midgett v. Midgett,* 129 N. C., 21; *Vandyke v. Farris,* 126 N. C., 744, in which it is expressly held that the title was not in issue, the Court saying that by pursuing the provisions of the act the lines between (47) the parties may be established, but this did not prohibit either party from asserting his rights to the title of the same land—the *Chief Justice* saying: "What benefit the act confers to the citizen it is not our province to say." In *Parker v. Taylor,* 133 N. C., 104, it is held that the judgment of the clerk determining the location of the line is conclusive upon parties and privies to the action. It would seem that from what is said by the present *Chief Justice* in that case that upon the issue raised by the answer upon plaintiff's first allegation the cause should have been transferred to the Superior Court for trial as in other cases of special proceeding. If the jury had found that the plaintiff was the owner of the land described in his complaint, the case would have been remanded with direction to the clerk to proceed to have the line in dispute settled; if he was not the owner, the proceeding should have been dismissed.

As the clerk proceeded to direct the survey before trying the issue, and the whole cause without objection went to the Superior Court upon appeal, the two questions should have been tried there before the jury. We presume that this was his Honor's view, and that in his opinion the plaintiffs failed to show ownership or occupancy of the land claimed by them. Without the benefits of a map, it is impossible for us to see exactly how the matter was, but as the judgment is of nonsuit, the testimony must be taken most favorably for the plaintiffs. We assume that in saying "I am in possession of the land on plat, blue 1, 2, 3, 4, to 1," . . . he referred to the land described in his complaint. While in many cases the judgment of nonsuit, where it clearly appears that in no aspect of the testimony the plaintiff is entitled to recover, is proper, it is the better practice to submit the questions raised by the pleadings to the jury under proper instructions, so that a verdict may be rendered settling matters in controversy. (48)

We think upon examination of the entire record that there was error in the judgment of nonsuit. There was some evidence to go to the jury upon the question of ownership evidenced by occupancy.

Error.

Cited: *Stanaland v. Raybon,* 140 N. C., 204; *Davis v. Wall,* 142 N. C., 452; *Woody v. Fountain,* 143 N. C., 69; *Green v. Williams,* 144 N. C., 63; *Brown v. Hutchinson,* 155 N. C., 207; *Whitaker v. Garren,* 167 N. C., 661; *Rhodes v. Ange,* 173 N. C., 27.

ERWIN v. MORRIS.

(Filed 30 November, 1904.)

1. Interest—Usury—Contracts.

A contract for usury is void.

2. Injunction—Mortgages—Usury.

A vendee of mortgaged land agreed with his grantor, the mortgagor, to pay the mortgagee what was actually due on the debt. The mortgage note called for usurious interest, and the vendee sued to restrain a sale under the mortgage, he alleging a tender of the amount actually due. The injunction should have been continued to a final hearing to determine whether the words "actually due" meant the face of the note or the amount legally due.

ACTION by J. A. Erwin against Z. A. Morris, heard by *McNeill, J.,* at May Term, 1904, of CABARRUS. From an order vacating a restraining order the plaintiff appealed.

Montgomery & Crowell for plaintiff.
Osborne, Maxwell & Keerans for defendants.

CONNOR, J. This is an appeal from an interlocutory order dissolving a restraining order and refusing an injunction to the hear-
(49) ing. The complaint, considered as an affidavit, set forth that at a sale of the land described therein Laura E. Moss, who afterwards intermarried with C. W. Swink, purchased the same for the sum of $3,884; that not having the money to pay therefor, the defendants' intestate, P. M. Morris, agreed to furnish it and take her note, secured by mortgage on the land; that he did furnish the sum of $3,884 and took from Laura E. a note, dated December, 1894, for $4,780, carrying interest at 8 per cent payable semiannually—$900 being added to the

amount furnished as a bonus for the loan of the money; that no other consideration passed from Morris to Laura E. for the promise to pay said amount; that Laura E. executed a mortgage on the land to secure the note. Thereafter certain payments were made on the note. Laura E. Moss, on 23 March, 1903, tendered the defendant Z. A. Morris, one of the executors of said P. M. Morris, the full amount due, less the sum of $900 charged as a bonus, in full payment of the note, which he refused to accept. "That the said Laura E. Moss has sold and conveyed, for valuable consideration, by deed duly recorded 1 April, 1904, the said tract of land to plaintiff under a contract that plaintiff is to pay defendants whatever amount is actually due the defendants on account of the note and mortgage, together with all the rights, interests, and equities of the said Laura E. Moss in said land under said mortgage." That the plaintiff is ready, able, and willing to pay the defendants the amount actually due on the same, and tenders such amount; that defendants, pursuant to the power contained in the mortgage, have advertised the land for sale. *Shaw, J.*, granted a temporary restraining order, with notice to the defendants to show cause. *McNeill, J.*, upon the return of the order, vacated the restraining order and refused the injunction. The plaintiff appealed.

The case is before us upon the plaintiff's affidavit, defendants not having filed any answer thereto. The question presented, whether the grantee of the mortgagor may avail himself of the (50) plea of usury included in the debt secured by mortgage or make the usury the basis for an action for equitable relief, has never before been presented to or decided by this Court. It is well settled by our decisions that, under the statute prohibiting the charging of usury, the promise to pay the usurious interest is void and cannot be enforced. *Moore v. Beaman,* 111 N. C., 328; *s. c.,* on rehearing, 112 N. C., 558. The question presented upon this appeal is whether the defense is confined to the debtor, or, when the land is sought to be subjected, may be set up by the grantee of a mortgagor. The allegation is that the plaintiff took the title to the land upon a promise to pay what was "actually due" on the debt. It is not made clear what the real agreement was; if by the term "actually due" is meant due on the face of the note—that is, in consideration of the conveyance of the land for a fixed price, the face value of the note was reserved by the plaintiff, with a promise to pay it to the defendant—it would seem that such an agreement amounted to an application by the mortgagor of so much of the purchase money as was necessary to pay the note. If, however, the plaintiff simply assumed the position of the mortgagor, treating the word "actually" as meaning legally due, another and very different question would be presented. The authorities from other courts are not in harmony. In the present

condition of the record we prefer not to decide the question. The injunction should have been continued to the final hearing, when the contract between the plaintiff and mortgagor can be ascertained. *McCorkle v. Brem,* 76 N. C., 407; *Marshall v. Comrs.,* 89 N. C., 103.

Error.

Cited: Cobb v. Clegg, post, 162; *Elks v. Hamby,* 160 N. C., 22; *Elliot v. Brady,* 172 N. C., 829; *Seip v. Wright,* 173 N. C., 16.

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(51)

TROXLER v. BUILDING COMPANY.

(Filed 30 November, 1904.)

1. **Evidence—Corporations—Cancellation of Instruments.**

   In an action to set aside a deed to a corporation for fraud and misrepresentation, evidence that fraud was practiced on the State in procuring the charter is competent as tending to sustain the charge of fraud.

2. **Vendor and Purchaser — Evidence — Cancellation of Instruments — Fraud.**

   In this action to set aside a deed to a corporation for fraud and misrepresentation the evidence is sufficient to be submitted to the jury.

3. **Cancellation of Instruments—Fraud—Vendor and Purchaser.**

   Where a vendor is induced to sell land to a corporation upon the false representation that the purchaser would erect buildings thereon, and the purchaser fails to do so, the contract will be rescinded.

4. **Vendor and Purchaser—Damages—Contracts.**

   Where a vendor sells land upon an agreement that the purchaser will erect buildings thereon, and the purchaser fails to do so, the vendor may recover the damages he sustains by breach of the contract, there being no fraud in the transaction.

5. **Deeds—Cancellation of Instruments—Fraudulent Conveyances—Fraud.**

   Where plaintiff sued to rescind a sale of land for fraud, he was not entitled to have the property sold if he should fail to comply with the condition of a decree setting aside the sale on repayment by plaintiff of a part of the price received by him.

ACTION by G. H. Troxler against the New Era Building Company and others, heard by *Cooke, J.,* and a jury, at May Term, 1904, of ALAMANCE.

Plaintiff alleged that prior to 31 July, 1903, he was the owner of a lot in the city of Burlington on the southeast corner of Main and
(52) Davis streets, and on said day he was the owner of other ad-

joining real estate, and had caused to be erected several small wooden buildings on said lot, which were rented to tenants at a monthly rental, also a livery stable and a dwelling, both of which were rented; that early in the year 1903 he was contemplating the erection, upon the lot first described, of such a building as would be desirable for business firms and corporations of said city, and had partly agreed with a contractor for the erection of such building, his purpose being to render more valuable the property adjacent thereto, owned by him as aforesaid; that at the suggestion of said contractor plaintiff saw defendant Murray, who broached the matter of the purchase of the property, being the first described lot, by a corporation known as the "New Era Building Company," and the said Murray, acting as agent of said company, requested plaintiff to sell the lot to the company, representing to plaintiff that if he would do so the company would at once proceed to have erected a building upon the property; that Murray described said building and stated that it would be of pressed brick with solid glass fronts on both Main and Davis streets; that upon the corner was to be a room or rooms which were to be occupied by the Alamance Loan and Trust Company, the leading bank in Burlington, and that upon the first floor, in addition to the bank, were to be three up-to-date and well-appointed storerooms; that the second floor was to be for lodge rooms and offices, and that the building was to cost from $12,000 to $15,000. Murray represented that the company was able to and would have the building erected, and by his statements led the plaintiff to believe that the only thing needed was the procuring of plaintiff's said real property at a low price; that in said conversations Murray's attention was called to the fact that the lot which was owned by plaintiff would be (53) greatly enhanced in value by the erection thereon and the moving into the vicinity of said bank, of merchants, of business men, and the like; that the charter of the corporation of the company showed that it had a subscribed capital stock of $6,000—$1,000 of which was subscribed for by the defendant Murray, $2,000 by defendant Anderson, a man of character and means, and $3,000 by defendant Hay, a man reputed to be worth a considerable sum. By reason of these representations of Murray, acting as agent of defendant company, after much persuasion plaintiff agreed to sell the property to the building company for $2,000 in cash, $500 in stock in the company, and for the further consideration of the erection upon the lot of the building described by Murray; that at the time of signing the contract, Murray, representing the company, paid plaintiff the sum of $500 cash in part of the purchase money, said amount being paid by the check of W. E. Hay, who was consulted by Murray before he closed the trade. Thereafter plaintiff had several conversations with Murray, who said that the company was certainly

going to erect a building, and that on one occasion he exhibited drawings showing how it would look when completed; that at the time plaintiff was to convey the property under the contract Murray stated that the company did not have money in hand to make the cash payments; the defendant Hay asked the plaintiff to take a check payable in twenty days for the balance of the money. Plaintiff asked for his $500 in stock and was told that it was ready for delivery, but plaintiff never saw or had possession of said stock. Plaintiff asked Murray if the stock was legal and all right, whereupon Hay expressed doubt as to its legality; that by reason of the representations and inducements as to the financial ability of the company by Hay and Murray, plaintiff was induced to execute a deed for the property to the company for a recited consideration of $2,500, of which he had received $500 in cash,
(54) taking the check of Hay payable in twenty days for the balance.

Between the date of the deed and the time the check became due, the company, without consulting plaintiff and without his knowledge, conveyed the property to a company known as the "Piedmont Building Company," organized and promoted by the defendants Murray and Hay, and in which the defendants Holt, Rose, and Mayfield were the charter members, and that the consideration of the deed was $3,500; that at the expiration of twenty days plaintiff demanded of Murray his stock in defendant company and was informed by him that there was no such company as the "New Era Building Company," but tendered him stock in the "Piedmont Building Company," which he refused to take. Murray informed him that he must take this stock or take the $500 or nothing. Defendant Hay, president of said company, has announced his intention of going out of business and has had the property advertised for sale; that the New Era Building Company was never legally organized and did not have three *bona fide* subscribers to its capital stock; that Anderson did not agree to take $2,000 worth of stock therein, but signed a subscription list agreeing to take $100 stock if after investigation he thought it was going to be a valuable investment; that Anderson was told by Murray at the time that it was merely a formal matter and did not bind him to take stock; that he had never received any money; that there was never one cent paid to said company; that all the money it ever had was amount advanced by the defendant Hay to pay for plaintiff's land; that said company never had any prospect of being able to erect said building; that by and through the representations of Murray the deed was procured by fraud and misrepresentation at about one-half the real value of the land; that at the time the conveyance was made the company had no idea of erecting such building as that described by defendant Murray and was financially unable to erect a building
(55) of any kind, and that at that very time it intended to convey the

property to the Piedmont Building Company, whose organization had been procured only a few days before by Murray, acting for himself and Hay; that all of these facts were concealed from plaintiff; that the Piedmont Company is in reality the successor of the New Era Company, and was organized to take this property from the latter company to make difficult the procuring of justice by this plaintiff; that those who signed themselves as charter members of the Piedmont Company acted under the same misapprehension and representations as the said Anderson in the New Era Company, and that none of them have ever paid one cent into said company; that W. K. Holt, one of the signers, upon finding out what the company was up to, immediately withdrew from it and refused to have anything more to do with it, and that he was never such a *bona fide* subscriber to its capital stock as is required by law for the legal procuring of a charter; that the whole matter was a scheme on the part of Murray and Hay to procure the property of plaintiff for a consideration vastly less than its actual value, and, as plaintiff is informed and believes, the true facts were known only to these two of the personal defendants, and the other personal defendants had nothing to do with it, but their names and signatures were sought to give to the transaction the stamp of approval which their names would give, and that the use of their names was procured through misapprehension and by concealing from them the true nature and real purpose of the organization of the said corporations; that the entire interest in said real property is now owned by Hay, and that this was the end which was sought by him and Murray from the beginning; that neither of said companies were properly or legally organized nor capable of taking or holding any real property; that the conveyance of the property by plaintiff was obtained by fraud and misrepresentation and for a totally inadequate consideration; that since the execution of the conveyance (56) the property has been greatly damaged by the removal therefrom of all the buildings formerly located thereon, and by the cutting of the trees situated thereon, and plaintiff has been further damaged by failure to receive any rent therefrom. Plaintiff is ready, willing and able to pay defendant Hall the whole of $2,500, and hereby tenders the same and prays that the deed may be canceled.

Defendant denied all charges of fraud and misrepresentation, either in respect to the organization of the several corporations or procuring the conveyance of the plaintiff's property. They deny that it was not the purpose of the New Era Company to erect the building, or that the building thereof entered into the consideration of the conveyance. They say that the city refused to grant a permit to the company to erect the building. They further say that the property was not at the time of the conveyance worth more than the amount paid therefor. They deny

that they refused to issue to the plaintiff the shares of stock in accordance with the contract, but, on the contrary, plaintiff refused to accept the stock.

By leave of court plaintiff amended his complaint so as to allege "That at and before the time of the execution of the contract to convey and of the deed conveying the property hereinbefore described, defendants W. E. Hay and J. W. Murray represented and agreed that they would have erected upon said lot the building hereinbefore described, and that said representation and agreement was held out as and did act as an inducement to plaintiff to execute said deed and contract, and that said building has never been erected, and that said failure to erect (57) said building has endamaged plaintiff in the sum of $1,500," which defendants denied.

The defendants tendered issues, which the court declined to submit. Defendants excepted. The court thereupon submitted the following issues:

1. Was the execution of the contract to sell the land in controversy from Troxler to W. E. Hay and associates, and the deed from Troxler to the New Era Building Company, procured by fraudulent and false representations on the part of said Hay and J. W. Murray? Ans.: "Yes."

2. Is the Piedmont Building Company a purchaser for value and without notice of said property? Ans.: "No."

3. What damage, if any, has Troxler sustained by the removal of buildings, cutting of trees, and the loss of rent from the property? Ans.: "$216."

4. Was it agreed by Murray, acting for himself and as agent of Hay, at the time of the execution of the contract and up to and at the time of the execution of the deed and as a part of the consideration therefor, that a brick building containing rooms for stores, bank, opera house, and offices, should be erected upon said lot? Ans.: "Yes."

5. Has the building been erected? Ans.: "No."

6. What damage, if any, has Troxler sustained by reason of the failure to erect the building? Ans.: "$250."

7. Did Troxler accept $500 in cash in place of the stock in the New Era Building Company? Ans.: "Yes."

8. What damage, if any, has Troxler sustained by his failure to get said stock? Ans.: "$200."

Defendants excepted, and from a judgment upon the verdict appealed.

Parker & Parker and W. H. Carroll for plaintiff.

J. T. Morehead and G. S. Ferguson, Jr., for defendants.

CONNOR, J., after stating the facts: This record contains (58) ninety-one pages, with twenty-two exceptions directed to every phase of the case from the amendment of the complaint to the form of the judgment. The case involves not only property rights, but the conduct and character of the parties. It was contested at every point by learned and able counsel. We have given to the exceptions a careful examination and consideration and will endeavor, as briefly as is consistent with clearness, to give our reasons for the conclusion reached. Both parties submitted a large number of prayers for special instructions, a portion of which were given and others refused. His Honor set aside the verdict on the eighth issue, and an examination of the judgment shows that it is based upon the findings upon the first and second issues. The issues numbered four to seven inclusive were submitted by his Honor to enable him to render a proper judgment if the jury had found for the defendant upon the issue in regard to the alleged fraud, and found that the defendants had broken their contract in regard to the erection of the building. His Honor's action in this respect was in accordance with the theory of The Code system of practice, by which, upon special findings, the court is enabled to give such judgment, either of a legal or equitable character, as the parties may be entitled to. Under the former system the plaintiff would have been compelled to bring an action at law to recover damages for breach of contract, or, if he wished to avoid the deed for fraud entering into consideration, file a bill in equity. That legal and equitable causes of action may be joined, and that such judgment may be rendered as will protect the legal and equitable rights of the parties, is well settled. *Lee v. Pearce,* 68 N. C., 76; *Hutchinson v. Smith,* 68 N. C., 354; *Bank v. Harris,* 84 N. C., 206; *Benton v. Collins,* 118 N. C., 196. It is true that the plaintiff does not, as good pleading would suggest, state separately his several causes of action, but if, upon the facts stated, the court can see that more than one cause of action is stated, it will submit such issues as (59) are raised by the pleadings. In this case, the jury having found the first issue for the plaintiff, the other finding, except the second, became immaterial. It therefore becomes unnecessary to discuss the exceptions pointing to rulings of the court, which apply only to the other issues. The exceptions in regard to the issues and the amendments of the complaint cannot be sustained. The exceptions to the evidence tending to show that the New Era and the Piedmont companies were not organized in accordance with the statute and that a fraud was practiced upon the State in procuring the charters cannot be sustained. It was not offered for the purpose of attacking or invalidating the charters. This could not be done collaterally. *R. R. v. Newton,* 133 N. C., 132. It

was competent upon the first issue as tending to sustain the charge of fraud and misrepresentation.

The contention of the plaintiff is that, by a series of acts and declarations, the defendants Murray and Hay procured the title to his property; that the formation of the corporation constituted a part of what is called a scheme to accomplish their purpose. It is elementary learning that in the trial of an issue of fraud much latitude is allowed, and any fact which tends to show the intent of the parties is relevant and competent.

Ruffin, J., in *Knight v. Houghtalling,* 85 N. C., 17, says: "Fraud rarely lurks in the written agreement of the parties entered into at the end of their negotiations with each other, but almost universally precedes it, and consisting, as it must necessarily do in such a case, of acts and declarations merely, it can only be exposed by allowing the conduct of the parties, their words and deeds throughout the entire treaty, to be shown to the jury. The declarations of Murray were clearly competent. The defendant Hay cannot take advantage of his nego-
(60) tiations leading up to the conveyance without assuming the burden incident thereto. There is evidence for the consideration of the jury that Hay knew of and ratified Murray's promise to have the building erected. *Lee v. Pearce, supra.* There was evidence fit to be submitted to the jury upon the first issue. The only question, therefore, for our consideration is whether there was error in the instructions given or in refusing to give those requested.

His Honor, at the request of the defendants, instructed the jury as follows: "The jury are instructed that on the first issue the burden of proof is upon the plaintiff, and he must satisfy you by the preponderance of the evidence that the execution of the deed and contract was procured by false and fraudulent representations of Hay and Murray; and unless the jury find from the evidence that at the time the representations were made there was no intention or purpose on the part of the New Era Building Company to erect the building described in the complaint on the lot mentioned therein, then the representations were not false and fraudulent, and the jury will answer the first issue 'No.'" And at the request of the plaintiff, as follows: "If you find from the evidence that at the time of the execution of the contract to Hay and associates, and up to and at the time of the execution of the deed to the New Era Building Company, that Murray and Hay represented and agreed that they would erect a building of the kind referred to in the written contract on said property, and that the erection of the building was held out to and accepted by Troxler as a part of the consideration moving and inducing him to execute the contract and deed, then I charge you to answer the fourth issue 'Yes.' If you should find from the evidence that at the

time of the execution of the contract to convey the property Murray represented that a company could and would be formed which could and would erect said building, when it was not in fact intended to form a company for that purpose, but that the whole matter was a scheme to get the title to this property out of the hands of Trox- (61) ler, and if you should further find that such misrepresentation moved Troxler to execute the contract, then I charge you to answer the first issue 'Yes.' If you should find from the evidence that at the time of the execution of the contract Murray represented that a company could and would be formed which could and would erect said building, when, in fact, he did not know and had no reasonable ground to believe such to be the fact, and that this whole matter was being worked to get the title to the property out of the hands of Troxler, and if you should further find that such representations moved and induced Troxler to execute the contract, then I charge you to answer the first issue 'Yes.' If you should find from the evidence that at the time of the execution of the contract to convey the property it was represented that a company could and would be formed which could and would erect the building thereon, when in fact it was never intended to organize such a company, but that the whole matter was a scheme to get the title to this property into the hands of W. E. Hay, and if you should further find that such representations moved Troxler to execute the contract, then I charge you to answer the first issue 'Yes.'"

The instructions given are amply sustained by the text-writers and opinions of this and other courts. If, as the jury find, the plaintiff was induced by the representations and promises of Murray, representing the proposed corporation, that a building was to be erected thereon which would enhance the value of his other property, and at the time of making the representation and of accepting the deed the parties did not intend to erect and had no means for erecting such a building, or if Murray made the representation having no reasonable ground to believe that such was the intention, and that the purpose of Murray and Hay was by this means to get the title to the property, he is entitled to relief in a court of equity. If, having an honest purpose to carry out (62) their contract, the defendants obtained title to the lot and were thereafter unable to do so, the extent of the plaintiff's remedy would have been such damages as he sustained by the breach of the contract. It must be conceded that it would be difficult to fix the measure of such damages. Mere speculative damages could not have been recovered. The fraud consists in the fact found by the jury, that the defendants, at the time of making the representation and promise which constituted the inducement to make the deed, did not intend to make good such representation and promise. It has been frequently held that when per-

sonal property has been obtained by such means the vendor may recover his goods. *DesFarges v. Pugh,* 93 N. C., 31; 53 Am. Rep., 446; *Hill v. Gettys,* 135 N. C., 373. It is equally well settled that a court of equity will cancel a deed obtained by such means. The charge fully and clearly presents the case in all of its aspects. His Honor properly told the jury to answer the second issue in the negative if they answered the first for the plaintiff. The judgment directs the reconveyance of the property upon the payment by the plaintiff to the defendants of the amount received by him, less the sum of $216 assessed by the jury as damages, etc., in response to the third issue. This we think correct, and is what the plaintiff expresses his readiness to do. The judgment further directs the sale of the property if the amount is not paid by a day fixed. The equity invoked by the plaintiff is rescission. He is entitled to be put back in his original position in respect to his property as near as may be. We do not think that he is entitled to have a sale. In this respect the judgment should be modified.

Affirmed.

(63)

BOARD v. COMMISSIONERS.

(Filed 30 November, 1904.)

Sheriffs—Schools—Taxation—Commissioners—The Code, Secs. 567, 723, 2563—Laws 1903, Ch. 251, Sec. 92—Laws 1901, ch. 4.

A sheriff is entitled to commissions for the collection of the school tax.

ACTION by the Board of Education of Iredell County against the Board of Commissioners of Iredell County and others, heard by *Ferguson, J.,* at May Term, 1904, of IREDELL. From a judgment for the defendants, the plaintiff appealed.

Armfield & Turner and R. B. McLaughlin for plaintiff.
W. G. Lewis and J. B. Armfield for defendant.

MONTGOMERY, J. This is a controversy without action submitted under section 567 of The Code. The facts agreed upon present for our determination the question whether or not a sheriff is allowed to retain a commission out of the school taxes collected by him. The defendant Sumners was sheriff of IREDELL and paid to the treasurer of that county the whole amount of the school taxes levied for the county for the year 1903, less 5 per cent commissions as compensation for himself for collecting the school taxes, and also less the amount of insolvents. The

plaintiff, the Board of Education of IREDELL, contend that under a proper construction of the law the sheriff should have paid the whole amount levied for school purposes, less the insolvents, and that he had no right to deduct therefrom any commissions for collecting the taxes. The sheriff contends that the settlement he made with the treasurer was a proper one, and that he had a right to deduct his commissions from the school taxes collected by him. (64)

The plaintiffs base their contention on section 2563 of The Code, in which it is provided that the sheriff of each county shall pay annually, in money, on or before 31 December of each year, the whole amount levied, less such sum or sums as may be allowed on account of insolvents for the current year, by both State and county, for school purposes. The insistence is that the language of that statute is clear, that the words used are unambiguous, and that therefore there is nothing left to be done by way of interpretation by the courts. They further contend that results that may flow from the statute, the motives of the legislators and policies of the law, cannot be considered, and that common sense and good faith should be chiefly used here, as in every instance, as the great canon of interpretation.

In the briefs filed by counsel for both the appellant and appellee the fact that section 2563 of The Code is brought forward, word for word, in section 54, chapter 4, Laws 1901 (an act to revise and consolidate the public school law), except that the money is payable to the treasurer of the county school fund instead of to the treasurer of the county board of education, was overlooked.

There is no fault to be found with the principles of interpretation for which the plaintiffs contend, but it is nevertheless to be understood that the object of all interpretation of statutes is to carry out the intention of the lawmakers, and when the intention is ascertained, that it must always govern. And it is also a well-known principle of construction that for the proper interpretation of a statute other statutes *in pari materia* may and ought to be considered in connection wtih the statute under review.

Upon a reading of section 2563 it is seen that no commission is (65) allowed the sheriff for collecting the school taxes of the counties, in so many words. Yet in the same section pains and penalties are put upon the sheriff and his bondsmen subjected to civil actions if he should fail to collect and pay over the taxes. If that section is to be liberally construed, then we have the State requiring onerous and responsible duties to be performed by one of its citizens, no more interested in the cause of public education than others, without compensation and with the dread of penalties and forfeitures hanging over him and the fear of harassment to his bondsmen in a civil suit if he should fail to perform

such service for the Commonwealth. Such construction of that statute would be a harsh one and would work great injustice to the tax collectors of the State.

Now, if there are other statutes or laws of our State *in pari materia,* that is, statutes concerning the revenues, the officers who collect them and the compensation to which they are entitled for their services, fair dealing and common sense require that they be considered in connection with The Code, sec. 2563 (sec. 54, ch. 4, Laws 1901).

It is provided in section 723 of The Code that the county taxes shall be collected by the sheriff of the county, who shall be entitled to the same commissions and subject to the same rules and regulations in respect to his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the Treasurer of the State. Now, what are these rules and regulations which the law makes applicable to the settlement of State taxes? In section 92, ch. 251, Laws 1903, among other deductions which the auditor is required to make in the settlement of the State taxes with the sheriff, is one of 5 per cent commissions on the amount collected.

If the three statutes, section 723 of The Code, section 54, chapter 4, Laws 1901 (section 2563 of The Code), and section 92, chapter
(66) 251, Laws 1903, be construed together, it seems to be clear that the defendant in this controversy is right in his contention, that is, that he is entitled to 5 per cent commissions on the amount he collected of the school taxes, unless it be, as the plaintiffs contend, that the words "county taxes" in section 723 mean only taxes to be disbursed for general county purposes and exclude the school taxes which are collected by the sheriff and paid to the treasurer of the county. We are of the opinion that so far as this action is concerned the word "county taxes" include all amounts levied by taxation and which are to be used in the counties where they are collected, and where they are paid to the county treasurer.

We are not inadvertent to the fact that all taxes levied for school purposes are known as "State taxes," because they are assessed and levied by the counties by the direct mandate of the General Assembly and the rate of taxation fixed by that body. But the ordinary taxes levied for school purposes under sections 2 and 3 of chapter 247, Laws 1903, are collected by the sheriff of each county and paid to the treasurer thereof. Laws 1901, ch. 4, sec. 54. And the amount is apportioned by the county boards of education among the various townships of the county, and paid out by the county treasurer upon orders signed by at least two members of the school committee and by the county superintendent. The State Board of Education has no hand in the apportionment of that money. It is the work entirely of the county board of education. There is a school fund,

however, derived from the sources mentioned in section 4, chapter 4, Laws 1901, which the State Board of Education does apportion annually among the several counties of the State, as an additional amount to that apportioned by the county boards of education among the several townships.

But, in addition to what we have said, if section 54, chapter 4, Laws 1901 (The Code, sec. 2563), be carefully read, it will appear that the intention of the lawmakers was more to fix the time when the (67) sheriff should pay over the school taxes than to prescribe a method of settlement. It is a matter of common information that those who conduct the public school system of our State, knowing that the spring and summer months of the year constitute the most favorable season for farm and outdoor work, and that most of our working people are engaged in such work, have recognized the fall and winter months as the most propitious time for the conducting of the public schools. Collection of the money for such purposes, therefore, must be made at an early date after the beginning of the public school term to meet the necessary expenses; and therefore it was enacted by section 2563 of The Code (Laws 1901, ch. 4, sec. 54) that the sheriffs of the several counties should collect and pay over the whole of the school taxes by 31 December of each year. At the time of the passage of the act (Laws 1881, ch. 200, sec. 35), which is brought forward in The Code as section 2563, the Revenue Law allowed, as does the law now in force, sheriffs until the first Monday in February of each year to make their final settlement of county taxes, and until the second Monday in January to settle their State tax accounts with the boards of commissioners, and to pay afterwards the amount to the State Treasurer in such manner or at such place as he may direct.

It is to be observed that there is no provision made in the Machinery Act (Laws 1903, ch. 251) by which sheriffs are allowed a commission for collection of county taxes. Section 97 of that act bears upon that subject, and commissions on amount collected of county taxes are left out. They can only be allowed under section 723 of The Code. His Honor gave judgment upon the facts agreed in favor of the defendant, and we affirm the judgment.

Affirmed.

Cited: Pullen v. Corporation Commission, 152 N. C., 558; *Board of Education v. Comrs.,* 167 N. C., 117; *Trust Co. v. Young,* 172 N. C., 476.

(68)

HUTCHINS v. DURHAM.

(Filed 30 November, 1904.)

Schools—Vaccination.

Where a school board has entire and exclusive control of the public schools they may require vaccination as a prerequisite to attendance.

ACTION by J. W. Hutchins against the School Committee of the Town of Durham and others, heard by *Bryan, J.*, at chambers, in GREENSBORO, N. C., 28 October, 1904. From a judgment for the defendant, the plaintiff appealed.

Manning & Foushee and Boone & Reade for plaintiff.
J. Crawford Biggs for defendant.

CLARK, C. J. This is an application for a *mandamus* to the defendant public school committee to admit the daughter of the plaintiff to the public schools. The sole question presented is whether the following resolution is a reasonable exercise of the powers of the school committee of the ctiy of Durham:

"Whereas, from the report and recommendation of Dr. N. M. Johnson, Superintendent of Health of Durham County, in the judgment of this committee general vaccination of teachers and children attending the schools is desired and required for the public safety; now, therefore, be it

"*Resolved,* That no teacher or pupil be allowed to attend any school of the city of Durham, after 1 April, 1904, who does not present to the principal of such school a certificate of a physician of the city, showing that such teacher or pupil has been successfully vaccinated within three years from that time, unless such person has been vaccinated within ten days preceding the date he or she presents himself or herself for
(69) such attendance, and this resolution shall be a permanent regulation of the schools."

The graded schools of the city of Durham are under the exclusive control, care, supervision, and management of the defendant the school committee of the town (now city) of Durham. Laws 1887, ch. 86. Among other things it is enacted in said act of 1887, creating and making a body corporate the defendant, as follows:

"Sec. 5. That the school committee provided by this act shall have entire and exclusive control of the public school interests and property in the town of Durham; shall prescribe rules and regulations for their own government not inconsistent with the provisions of this act; shall employ and fix the compensation of officers and teachers of the public

schools or graded public schools annually, subject to removal by the said committee; shall make an accurate census of the school population of the town as required by the general school law of the State, and do all other acts that may be just and lawful to conduct and manage the public school interests in said town: *Provided,* all children resident in the town of Durham, between the ages of six and twenty-one years, shall be admitted into said schools free of tuition charges."

An epidemic of smallpox prevailed in the city of Durham and its suburbs last spring, not less than 1,000 persons being attacked, and the above resolution was passed as a protection to the 2,500 children in the schools of that city, the attendance in which had fallen off 40 per cent by reason of the fear of contagion. These facts are averred in the answer and found to be true by the judge. In our judgment the resolution was a proper and reasonable exercise of the powers of the defendant.

This is not a question of compulsory vaccination under legislative authority. That matter was before us and settled in *S. v. Hay,* 126 N. C., 999, 78 Am. St., 691; 49 L. R. A., 588; but simply whether (70) if a child is not vaccinated the school board can as a precautionary measure exclude all such from the school, by a resolution, under the power given in the charter to "have entire and exclusive control of the public school interests and property in the town of Durham, prescribe rules and regulations, . . . and do all other acts that may be just and lawful to conduct and manage the public school interests in said town."

A similar resolution passed by the St. Louis board of public schools was held reasonable and valid (*In re Rebenack,* 62 Mo. App., 8), the Court saying: "In the nature of things it must rest with the boards to determine what regulations are needful for a safe and proper management of the schools and for the physical and moral health of the pupils entrusted to their care. If said regulations are not oppressive or arbitrary the court cannot or should not interfere." The same ruling was made as to a similar resolution in *Duffield v. Williamsport,* 162 Pa., 476, 25 L. R. A., 152; the Court holding: "A school board has power to adopt reasonable health regulations for the benefit of pupils and the general public, and has the right to exclude from the schools those who do not comply with the regulations of the city authorities and the school board requiring a certificate of vaccination as a condition of attendance." To the same purpose it is said in *S. v. Zimmerman,* 86 Minn., 353, 58 L. R., A., 78, 91 Am. St., 351: "The welfare of the many is superior to that of the few, and as regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred therey are primary and superior to the rights of any pupil to attend the public schools."

In *Blue v. Beach,* 135 Ind., 121, 50 L. R. A., 64, 80 Am. Rep., 195, it is pointed out that the constitutional guarantee that tuition shall be free and the schools equally open to all is necessarily subject to reasonable regulations to enforce discipline by expulsion of the disorderly
(71) and protection of the morals and health of the pupils. The above cases are cited with approval in *S. v. Hay,* 126 N. C., 999. To same purport is *Sherman v. Charleston,* 8 Cush., 160, where *Shaw, C. J.,* says: "The right to attend is not absolute, but one to be enjoyed by all on reasonable conditions."

The plaintiff relies upon *Potts v. Breen,* 167 Ill., 67, 39 L. R. A., 152, 59 Am. St., 262, that in the absence of express legislative power a resolution requiring vaccination as a prerequisite to attending schools is unreasonable, when smallpox does not exist in the community and there is no reasonable ground to apprehend its appearance. We are not inclined to follow that authority. With the present rapid means of intercommunication, smallpox may make its appearance in any community at any moment without any notice given beforehand, and incalculable havoc be made, especially among the school children, which cannot be remedied by a subsequent order excluding the nonvaccinated. "An ounce of prevention is worth a pound of cure." Besides, that case is not in point here, where smallpox had been epidemic and was still threatening. The language of the resolution making it "permanent" will not prevent its repeal, if upon the subsidence of the danger the school board of that day shall deem it proper to repeal. If the action of the board is not satisfactory to the public, a new board will be elected who will rescind the resolution.

The fact that it would be dangerous to vaccinate the plaintiff's daughter, owing to her physical condition, would be a defense for her to an order for general compulsory vaccination (*S. v. Hay, supra*), but is no reason why she should be excepted from a resolution excluding from the schools all children who have not been vaccinated. That she cannot safely be vaccinated may make it preferable that she herself should run the risk of taking the smallpox, but it is no reason that the
(72) children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children are vaccinated, there are always some whose vaccination is imperfect, and danger to them should not be increased by admitting those not vaccinated at all. Besides, a rule not enforced to all alike will soon cease to be a rule enforcible at all.

No error.

Cited: Durham v. Cotton Mills, 141 N. C., 645; *Morgan v. Stewart,* 144 N. C., 428.

CANNADY v. DURHAM.

(Filed 30 November, 1904.)

1. Municipal Corporations—Streets—Sidewalks—Questions for Jury.

In an action against a city for injuries resulting from a defective sidewalk, whether or not the city had established a sidewalk at the point where the accident occurred was a question of fact.

2. Municipal Corporations—Streets—Sidewalks.

A street commissioner of a city has no power to appropriate and take charge of land for a sidewalk for the city.

3. Contributory Negligence—Municipal Corporations—Harmless Error.

In an action against a city for injuries from a defective sidewalk, an instruction that the plaintiff knew of the dangerous place, if erroneous, is harmless where the further instruction as to the degree of care which the plaintiff should exercise is the same as if the plaintiff did in fact know of the danger.

4. Contributory Negligence—Harmless Error.

An erroneous instruction on the issue of contributory negligence is harmless if the jury finds that the plaintiff was not injured by the negligence of the defendant.

DOUGLAS, J., dissenting.

ACTION by E. W. Cannady against the city of Durham, heard (73) by *Cooke, J.*, at March Term, 1904, of DURHAM. From a judgment for the defendant, the plaintiff appealed.

Winston & Bryant for Plaintiff.
Manning & Foushee for defendant.

MONTGOMERY, J. The plaintiff brought this action to recover damages from the defendant, the city of Durham, on account of personal injuries sustained by himself through the alleged negligence of the defendant. In his complaint the plaintiff alleged that the defendant permitted, for an unreasonable time, a branch five or six feet wide and about three feet deep to run across and through the sidewalk on West Pine Street and to remain uncovered by a bridge or other device, and that on a dark night, there being no lamp or railguard at the point, while going along the sidewalk he fell in and hurt his knee. The defendant in its answer denied that the city had established a sidewalk or walkway at the point where the plaintiff was hurt, and also set up against the plaintiff's cause of action the plea of contributory negligence.

There was no exception made to any part of the evidence. The plaintiff requested twelve instructions. His Honor gave five as they were

asked, refused to give three, and modified four of them. He gave six special instructions at the request of the defendant and then submitted the charge in chief. The plaintiff excepted specifically to every sentence of his Honor's charge; he excepted to the giving of the six special instructions requested by the defendant and he excepted to the refusal of his Honor to give the plaintiff's three special requests, one, five, twelve, and to the modification of his four requests numbered two, three, four, and six.

The exception by the plaintiff to everything the judge said on the trial has, of course, caused us to read all that he said to the jury,
(74) with care; and, after having done so, we think none of his exceptions ought to be sustained; and we think it only necessary to consider two of the questions raised on the appeal; one concerning the instructions given in connection with the evidence bearing on whether or not the city had established a sidewalk at the point where plaintiff was hurt, and the other upon the question of the alleged contributory negligence of the plaintiff.

If the city had established a sidewalk on the west side of Pine Street down to the branch a few feet below Hight's house, where plaintiff was hurt, then the plaintiff would have been entitled to instructions one and five, asked by him. Whether or not the city had established a sidewalk at that point was a question of fact to be settled by admission in the answer or by evidence on the trial. In the answer it was denied by the defendant. Several witnesses testified that there had been no conveyance of the land to the city, no condemnation of the land, or any appropriation or control of the same by the city; and several testified that no work had ever been done on the street by the city. The only evidence relied on by the plaintiff to show either appropriation of the strip of land as a street or that the city had ever had control of it was the testimony of Elliott and John B. Christian. Elliott said that in 1897 or 1899 he sold the property bordering on Pine Street, where the plaintiff was hurt, after having divided it into lots, and that there were no sidewalks there when he sold it, and that the only work the town had ever done was to make a little water-drain or ditch on the sides of the street and to keep the ditch cleaned out. He said further that after he sold the land on Pine Street "the purchasers built upon their lots, and that of course made the sidewalk."

The witness Christian said that he had been a street commissioner of the city of Durham for many years; that the town never laid off
(75) any sidewalk on Pine Street and had never done any work there from Proctor Street, and that the walkway was of the make of the travelers; that the city had built and worked the street at that point. He said he did not remember that either of the street committee had ever

visited that part of the city, and that he took his orders from the chairman of the street committee. He said further that when Sam Hight was building his house he was there and directed him to move it back from the sidewalk, because he was building it too near, and that Hight did move it back further from the sidewalk.

The fifth prayer of the plaintiff for special instructions (which his Honor declined to give) was in these words: "If you believe the evidence in this case you will answer the first issue (whether the plaintiff was injured by the negligence of the plaintiff) 'Yes.'" That instruction was based on the testimony of Christian, that he ordered Hight when he was building his house to move it back from the sidewalk, and that Hight obeyed the order; and upon the plaintiff's testimony, that while walking along the smooth even walk just south of Hight's house on his way home he stepped into the branch, the bank of which was perpendicular on his side, and hurt his leg. The contention is that Christian, the street commissioner, was acting for the city of Durham, and also that as street commissioner he had the power to appropriate and take charge of the land for a sidewalk for the city. We cannot admit that any such powers reside in a street commissioner.

The first prayer for instructions asked by the plaintiff (which was declined by his Honor) was in these words: "It was the duty of the city of Durham to repair the streets and sidewalks of the city and to make and keep them reasonably safe and convenient for persons traveling to and fro on them." The plaintiff insisted that that instruction should have been given, for the reason that it was alleged in the complaint that the city had established a sidewalk on the west side of Pine Street down to the point where he was hurt, and that that (76) allegation was not denied in the answer. Upon a reading of the answer it must be admitted that the defendant was very cautious in the wording of its denial. In fact, it may be said that it was ingeniously done, but still effectively so. As we have said, the main question of fact in the case was whether or not the defendant had established and assumed control of the ground, where the plaintiff was hurt, as a street. It was denied in the answer, and there was evidence that it had not been so established or appropriated. His Honor submitted that question fairly to the jury with proper instructions on the law as to the effect of their finding, as the following parts of his charge will show.

The plaintiff asked his Honor to instruct the jury: "If you find from the evidence that the defendant permitted the sidewalk on the west side of Pine Street, within the corporate limits of the city, to remain without any bridge or covering over a branch five or six feet wide and three feet deep, without a guard or rail, and that the north embankment of the branch was perpendicular or about so, and that defendant failed to light

the same, and permitted such conditions to exist for several years, this would be negligence; and if this was the proximate cause of the injury to plaintiff, you will answer the first issue 'Yes.'" In line with that instruction he told the jury: "If you find from the evidence that defendant had established the sidewalk, or that it had been used as a walkway for a considerable time with the knowledge of defendant, and that defendant had assumed control over it on the west side of Pine Street within the corporate limits of the city, and defendant permitted the same to remain without a bridge or covering over a branch five or six feet wide and three feet deep, without a board or rail, and that the north embankment of the branch was perpendicular or about so, and that defendant failed to light the same and permitted such conditions to exist for
(77) several years, this would be negligence; and if this was the proximate cause of the injury to plaintiff, you will answer the first issue 'Yes.'" He further instructed the jury that "If you find from the evidence that there was a sidewalk or walkway used with the knowledge of the defendant for a considerable time, and that defendant had exercised any control over the sidewalk and failed to place a bridge or other covering over the place where plaintiff alleges he was injured, that it was not lighted and remained in this condition for an unreasonable length of time, this would be negligence, and if it caused plaintiff's injury you will answer the first issue 'Yes.'" On the question of the alleged contributory negligence of the plaintiff, the court gave, at request of defendant, the following instruction: "If the jury believe the evidence of plaintiff, he well knew of the branch, of its location and dangerous character of the passway over the bridge traveled by foot passengers; that he had for two months frequently and almost daily traveled Pine Street, and was familiar with the location of the houses on the street, and where the sidewalk turned into the street and proceeded across the bridge; that he had seen and observed the danger of the branch for about two months almost daily; then the plaintiff was bound to act upon his information, and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it, and if the jury shall find that the defendant failed to exercise ordinary care, the jury will answer the second issue 'Yes.'" The plaintiff had testified that whenever he had been near where he was hurt he had turned off the sidewalk about five feet from the branch and just before reaching the branch had walked along the edge of the street and crossed the branch on the bridge just as other people did; and that
(78) before he was hurt he made one trip a day for a week and two or three times a week for the balance of the time. He said further that he had never been along there in the night before, and that he did not remember ever noticing the place at the branch before he was hurt.

The objection of the plaintiff to the instruction was that the court stated in substance that the point where the plaintiff was hurt was, to the knowledge of the plaintiff, a dangerous place, and that that was in direct contradiction of the plaintiff on this point, he having stated in his examination that he did not remember to have noticed the place where he was hurt before that occasion. We cannot see how the plaintiff's case was hurt by the instruction. The degree of care which his Honor laid down as the rule of conduct to be observed by the plaintiff when he failed to turn off from the branch where he was hurt and to follow the path over the bridge on the street, was exactly and precisely the same degree of care which his Honor should have instructed the jury that the plaintiff was to observe on account of the plaintiff's knowledge of the size and depth of the stream and the avoidance of it by himself and others in going along that way. It is to be observed that the plaintiff did not say that he mistook his way and went to the branch, and that he intended to turn off where he usually did, but the darkness of the night and the want of a light prevented him from doing so. He simply said that he followed the sidewalk. But even if the instruction had been a substantial error, it was harmless, because the jury had found that the plaintiff was not hurt by the defendant's negligence.

No error.

Douglas, J., dissents.

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(79)

SMITH v. BRUTON.

(Filed 30 November, 1904.)

1. Arbitration and Award—Husband and Wife—Const. N. C., Art. X, Sec. 6—The Code, Sec. 1832.

A married woman cannot bind herself by agreeing to arbitrate the question of title to land owned by her.

2. Pleadings—Consideration—The Code, Secs. 268, 178.

An allegation of new matter in an answer not relative to a counterclaim is deemed controverted by the plaintiff.

3. Husband and Wife—Deeds—Judgments.

A married woman can be bound only by her deed, duly executed with the written assent of her husband and with her privy examination, or by the judgment of a court of competent jurisdiction.

CLARK, C. J., dissenting.

ACTION by M. A. Smith against J. C. Bruton and others, heard by *O. H. Allen, J.*, at April Term, 1904, of MONTGOMERY. From a judgment for the defendants, the plaintiff appealed.

Shepherd & Shepherd for plaintiff.
Adams, Jerome & Armfield and H. M. Robbins for defendants.

MONTGOMERY, J. This action was brought by the plaintiff to recover possession of a tract of land of which she claims to be the owner. The defendants contest her claim on the grounds, first, that they and those under whom they claim have been in possession of the same for fifty years, and, second, that the plaintiff, before this suit was brought, had entered into an agreement with Adelaide Kron and Elizabeth Kron, who claimed title to the land, to enter into an arbitration to have
(80) settled the title thereto; that the arbitration was had and an award made and returned to court, in which the title to the property was adjudged to be in Adelaide and Elizabeth Kron; that the award was made a judgment of the court and that the plaintiff is estopped by that award and judgment from claiming the land. In their answer the defendants further averred that although the plaintiff was a married woman at the time of the submission of her case for arbitration, and has since that time been continuously a married woman, yet that she had been abandoned by her husband at the time she entered into the agreement and had not been living with him for more than ten years, and has not since lived with him; that she was at that time and has ever since been a free trader. In her reply the plaintiff said that she had not been abandoned by her husband "as alleged in the answer."

The main question in the case, then, is: Can a married woman without joinder of her husband consent to have the title to her real estate determined by the award of arbitrators? The defendants contend, however, that it will not be necessary to decide that question in this case. Their counsel insist that that statement in her reply, wherein she says that her husband has not abandoned her "as alleged in the answer," is not such denial of the defendant's averment as is required by The Code, and that therefore it is to be taken as true that her husband had abandoned her, by her own admission; and that that being so, she had a right not only to consent to the arbitration, but even to convey the land by deed without the written assent of her husband, if she wished to do so. If it should be conceded that the plaintiff's reply, in the respect complained of, was not sufficient to amount to a denial of the charge of abandonment by her husband, yet it is to be remembered that no reply
(81) on that question on the part of the plaintiff was necessary. The matter averred on the part of the defendants was not a counterclaim, and was deemed to be controverted by the plaintiff as upon a direct denial or avoidance. The Code, sec. 268.

The arbitrators in their award had nothing to say about whether or not the plaintiff had been abandoned by her husband. They declared that she was a married woman during the period of the arbitration and award, and had children, and the court held that she was estopped in the present action by the judgment rendered in the Superior Court upon the award of the arbitrators.

The defendants further contend that as the plaintiff admitted in the agreement to arbitrate that she was a citizen of this State, and in her declaration to become a free trader she stated that her husband was a citizen of Arizona, she had the right to convey her land by deed under express decisions of this Court; and, therefore, if she had a right to convey the land by deed, she would have a right to submit to arbitration the settlement of her title. But the decisions of this Court which counsel rely upon do not sustain their position. We were referred to *Hall v. Walker,* 118 N. C., 380, and *Levi v. Marsha,* 122 N. C., 565. In the first-mentioned case the Court said: "The sole question is whether section 1832 of The Code was constitutional. That section is as follows: 'Every woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, . . . and she shall have power to convey her personal property and her real estate without the assent of her husband.'" In the case just above referred to the plaintiff's husband had deserted and abandoned her for five years, had been continuously out of the State, had not been seen or heard from by the wife, and he had in no way contributed to the support of herself or her family. In the case before us there (82) was no such evidence offered, and no finding by the arbitrators in their award of abandonment or desertion, failure to support, or cruelty on the part of the husband.

In *Levi v. Marsha, supra,* the husband resided in Syria, and had never been in the United States either as a resident or as a visitor. The wife contracted a debt with the plaintiff, and the sole question was whether she was liable on her personal contract.

A married woman in North Carolina can be bound as to her land in only two ways: By her deed duly executed with the written assent of her husband and with her privy examination, or by the judgment or decree of a court of competent jurisdiction. As to the requirements of the first method, the decisions of this Court are very numerous, and we will only mention those of *Scott v. Battle,* 85 N. C., 184, 39 Am. Rep., 694; *Farthing v. Shields,* 106 N. C., 289; and *Smith v. Ingram,* 130 N. C., 100, 61 L. R. A., 878; and as to the latter method, *Green v. Branton,* 16 N. C., 500; *Smith v. Ingram, supra.* But it may be asked, Does

not the present case fall within the decisions of the two last-mentioned cases? Was there not a judgment and decree against the plaintiff in a court which had jurisdiction of her person and of her property; and, if so, was she not bound by that decision and judgment? Undoubtedly, a married woman would have the right under section 178 of The Code to bring an action, without the joinder of her husband, to have settled the title or any right connected with her separate real estate, and if, upon the regular trial and disposition of that suit, a judgment or decree of the court should be rendered against her, she would be bound by it, and the judgment would be thereafter a matter of estoppel by record in any subsequent claim she might make to the property. The reason for that is that the married woman's interests are under the eye of the
(83) court, and its judgment or decree is based upon the law as it is written and applied to the conditions and facts brought out and developed in the case.

In an arbitration the matter is entirely different. Arbitrators are not bound to make their award according to law, nor are they bound to weigh the evidence; and the court will make a judgment of the award, if it is regular on its face and there are no evidences of fraud, without any inquiry as to how the arbitrators arrived at their conclusion. So it is perfectly evident that if a married woman could dispose of her real estate, without the joinder of her husband, by submitting her title to arbitrators, that part of section 6, Article X of the Constitution which ordains that a married woman, with the written assent of her husband, may convey her real estate, would be a dead letter. If such were the law, married women, from design or by means of fraud and deceit, might by arbitration be deprived of their real estate and the husband deprived of his rights therein before he had knowledge of the matter, or the power to prevent it in either case. If a married woman could dispose of her real estate through arbitration, she would be enabled by an indirect method to do that which the Constitution and the laws prohibit, and that will never be allowed.

That the plaintiff was a free trader can make no difference. As we have said, there are only two ways by which a married woman can dispose of her real estate—one by deed, with the written assent of her husband with her privy examination, and the other by decree or judgment of a court of competent jurisdiction. However, the question of the right of a free trader to charge her separate estate does not arise in this case, for the record shows that the matter involved here did not concern any transaction other than the settlement of the ownership of the land. It does not appear that she had any creditors or owed any
(84) debts.

We omitted to state in the beginning of this opinion that the defendant's counsel state in their brief that the appellant has filed no exceptions to the judgment of the court below.

The plaintiff took a nonsuit after an intimation of his Honor that she was estopped by the award and judgment. We do not understand how this statement crept into the brief of the defendants. We know, however, that it was an inadvertence. There was a statement in the judgment that the nonsuit was taken by the plaintiff because of his Honor's intimation, and from the judgment the plaintiff appealed. Besides, the assignment of error (and there is only one) is in these words: "That the court erred in holding that the record set up in the answer was *res adjudicata* or an estoppel against the plaintiff, and that the plaintiff could not recover upon the admission of the plaintiff that she could not recover if such record did constitute an estoppel or was *res adjudicata.*"

Reversed.

WALKER, J., took no part in the decision of this case.

CLARK, C. J., dissenting: This is an action for the recovery of land. The only exception in the record is to the ruling of the court that a former judgment between the same parties for the same cause of action is an estoppel upon the plaintiff in this action. The plaintiff brought an action for the recovery of a tract of land heretofore, and in its prosecution she submitted to an arbitration, as a rule of court, which embraced also the subject-matter of this action. In that action it was adjudged in the Superior Court, at Spring Term, 1891, after reciting both matters in controversy as stated in the agreement therein to arbitrate under rule of court, "that the plaintiff take nothing by this action, and judgment is rendered against plaintiff . . . for costs." The award was made by Marmaduke S. Robbins and S. J. Pemberton, (85) with Kerr Craige, umpire, and was approved by the court without objection from her. She could hardly have suffered any injustice; but, if so, she should have objected then, not now.

The Code, sec. 178 (1), provides: "When the action concerns her separate property she (a married woman) may sue alone." This action concerns the plaintiff's separate property, and she brought the former action (as she also brings this) without joining her husband. "If she may sue, she must be bound by a judgment in her favor; if it is against her, she must be bound by it also." Herman on Estoppel, sec. 174. In the former action she entered into an agreement of arbitration, the award to be a rule of court, and upon the coming in of the award judgment was entered thereon as above stated, the plaintiff making no exception nor taking any appeal. As she was a party to the action alone and *sui juris* then

(as she is now), by virtue of the statute, she is bound by orders in the cause assented to by her or not excepted to, and especially by the final judgment which referred to and adjudged the finding of the arbitrators. If she had any objection to the award, either for misconduct of arbitrators or any alleged incapacity in her, a party to the action, to consent thereto, she was certainly under no incapacity to raise that objection then to judgment being entered thereon; and not having done so, she is bound by the judgment like any other person bringing an action in her own right. If she was not bound by the arbitration and award, she was in court and should have said so. She is certainly bound by the judgment thereon. When that judgment was interposed as a bar to this action, the court properly held that the judgment was an estoppel, "it being admitted that these lands are the *same lands* described in the plaintiff's complaint in the former action"—thus recognizing the agreement to arbitrate as an amended complaint, which it was in effect. A (86) judgment cannot be thus collaterally attacked. The plaintiff should bring a direct action to set the former judgment aside, and though in such action a prayer for recovery of the land might be joined, there is in this complaint no allegations impeaching the former judgment, nor indeed any reference even thereto.

Objection is made that the former action as originally brought did not embrace this cause of action. But this, as well as the other cause of action, concerned only her separate property, and she could have sued for this as well as that, without joining her husband. The Code, sec. 178 (1). She could have put both into the complaint when first stating her cause of action. By leave of court or by consent of parties the complaint could have been amended to embrace it. This was in effect done when both parties in a written agreement set out the matters in controversy referred by them to the arbitrators under rule of court. This, as to parties *sui juris,* would certainly be conclusive as to all matters embraced in such agreement, award, and judgment thereon, for after judgment it cannot be objected that no complaint at all was filed. *Robeson v. Hodges,* 105 N. C., 50, and numerous other cases cited in Clark's Code (3 Ed.), p. 190. Here the agreement in writing carefully recited the matters in controversy, as did the award which was approved by the judgment of the court. As to this matter, which is an action concerning her separate property, the *feme* plaintiff is made *sui juris* and authorized to "sue alone" without joining her husband—The Code, sec. 178 (1)—and hence is bound by the judgment as fully as any one else who is authorized to sue.

The former prevailing notion of the inferiority of married women to *femes sole* was based upon the fact that originally wives were bought or

captured in war and were chattels. Shakespeare, who usually stated the English law of his time with accuracy, makes Petruchio say of his wife: (87)

> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my anything.

But in England any distinction between the property or other rights of a married woman and her single sister has long since been abolished, root and branch, as has been done in the English colonies and in most of the states of the Union. In this State the distinction as to property rights between *femes sole* and *femes covert* was abolished by the Constitution of 1868, Art. X, section 6, save that as to conveyances of realty by a married woman the written assent of the husband was required. *Vann v. Edwards,* 135 N. C., 661. It should be noted that this requirement is not any lingering idea of the inferiority of married women to single ones, or intended as a protection for a half-emancipated class, but is a provision for the exactly opposite purpose of protecting the husband's curtesy (if not abolished by legislation) and is merely a correlative of the wife's joining in the husband's conveyances to bar dower. Accordingly, the statute empowers a woman to sue alone for her separate property, and the statute of limitations runs against her if she does not sue. Thus she was *sui juris* in the former litigation, competent to amend her complaint by the recital of any additional matters she wished to be passed upon and bound by the judgment upon the award. By no process of reasoning, nor of metaphysics, nor stretch of imagination, can a judgment against the plaintiff in an action of ejectment be called a "conveyance" (unless collusion was charged and shown). The wife must join in conveyances of the husband to bar dower, but if he suffer an adverse judgment in an action to recover land, the judgment is not invalid because she is not a party to the action. This case is stronger, for the wife is expressly empowered by statute to sue alone. Even if the judgment had (88) been broader than the complaint, or if there had been no complaint, the judgment, unappealed from, was binding upon her as upon any one else authorized to bring an action. This Court has often so held. Here the judgment was obtained in an action brought by the married woman. This Court has often held that a married woman is bound by a judgment even when she is brought into court as a defendant and against her will. In *Vick v. Pope,* 81 N. C., 22, *Smith, C. J.,* says that where a husband and wife are sued jointly it is the duty of the husband to set up the wife's disability, and if he fail to do so the wife cannot have the judgment against her set aside on the ground of her incom-

petency to contract. He says that a judgment against a married woman appearing in the suit by counsel of her husband's selection is as binding as one against any other person, unless it be obtained by the fraudulent combination of the husband with the adverse litigant. He pertinently added at page 26: "If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? If she is disabled from resisting a false claim, how can she prosecute an action for her own benefit when nothing definite is determined by the result? It is no sufficient answer to say that the defendant's execution of the note with her husband did not bind her. The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat recovery. As, then, a married woman may sue, and with her husband be sued on contracts, they and each of them must at the proper time resist the recovery as other defendants, and their failure to do so must be attended with the same consequences." This case has often been cited with approval (89) on this point, among many other cases, in *Jones v. Cohen,* 82 N. C., 80; *Grantham v. Kennedy,* 91 N. C., 156; *Williamson v. Hartman,* 92 N. C., 242; *Neville v. Pope,* 95 N. C., 351; *Wilcox v. Arnold,* 116 N. C., 711; *Strother v. R. R.,* 123 N. C., 198.

This is a stronger case, for here the plaintiff brought the former action *sui juris,* as authorized by the statute; she selected her own counsel, agreed to the arbitration as a rule of court, and made no objection to the judgment upon the award, which she was fully as competent to do in that action as she is in this, which is likewise brought by her suing alone. In the former proceeding, the court unquestionably had jurisdiction, and if there was any defect it was by error in entering judgment upon the award, and that was cured by failing to object and appeal. *Neville v. Pope, supra,* at p. 346.

In *Vick v. Pope, supra, Smith, C. J.,* cites as authority *Taylor, C. J.,* in *Frazier v. Felton,* 8 N. C., 231, and *Green v. Branton,* 16 N. C., 504, in which the elder *Ruffin* says: "Married women are barred by judgments at law as much as other persons, with the sole exception of judgments allowed by fraud of the husband in combination with another. . . . She must charge and prove that she was prevented from a fair trial at law by collusion between her adversary and her husband, preceding or at the trial."

In *Neville v. Pope, supra,* judgment had been taken against a married woman before a justice of the peace, and it was (unlike this) a direct action to set aside the judgment, the plaintiff laying stress upon *Daugherty v. Sprinkle,* 88 N. C., 300, in which it had been held that such action could not be maintained; but that ground was overruled. *Judge*

Merrimon, following the three *Chief Justices* above named (*Taylor, Ruffin,* and *Smith*) and speaking for a unanimous Court (*Smith, C. J.,* and *Ashe, J.*), said: "It may be that if the plaintiff in this case had made defense, pleaded her coverture, and appealed from the adverse judgment given against her, she would have been successful; but she did not make defense at all, and as there was judgment against her (90) according to the course of the court, it must be treated as conclusive that the cause of action and the facts were such as warranted the judgment."

In *Grantham v. Kennedy, supra,* the same learned Court said: "Married women and infants are estopped by judgments in actions to which they are parties in the same manner as persons *sui juris.*" Yet in none of the above cases did the married woman waive her coverture, but, being in court and not excepting to the judgment, she was held bound by it. But here the plaintiff went further and voluntarily went into court, waiving her coverture by suing alone, as the statute authorized her to do and as she is doing in this present action. This is not a motion to set aside the former judgment for excusable neglect or mistake, nor for irregularity, nor is it an action to impeach it for fraud. The judgment was taken according to due course upon an arbitration entered as a rule of court, signed by the plaintiff, and judgment was entered upon the award without objection from her or her counsel. After an acquiescence of nine years, this new action is brought for the same land whose title had been adjudicated by the former judgment. As our adjudications are uniform that "married women and infants are estopped by judgments in actions to which they are parties in the same manner as persons *sui juris*" (*Grantham v. Kennedy* and other cases cited, *supra*), his Honor below correctly so held.

Cited: Witty v. Barham, 147 N. C., 482; *Council v. Pridgen,* 153 N. C., 446; *Ricks v. Wilson,* 154 N. C., 287; *Jackson v. Beard,* 162 N. C., 107; *Williams v. Hutton,* 164 N. C., 223; *Warren v. Dail,* 170 N. C., 416; *Sills v. Bethea,* 178 N. C., 318; *Elmore v. Byrd,* 180 N. C., 127.

(91)

EARNHARDT v. CLEMENT.

(Filed 30 November, 1904.)

1. Parties—Husband and Wife—Specific Performance—The Code, Secs. 178, 183.

In an action by a married woman to compel the conveyance of bank stock, her husband is not a necessary party.

2. Witnesses—Examination of—Trial—Judge—Questions for the Court.

Allowing the examination of a witness before the introduction of evidence to show the competency of his testimony is within the discretion of the court.

3. Nonsuit—Waiver.

An exception to refusal to nonsuit at the close of plaintiff's case is waived by introduction of evidence by defendant without renewal of the motion at the close of all the evidence.

4. Instructions—Issues—Trial—Jury.

Instructions that on a certain state of facts "plaintiff cannot recover" are properly refused.

5. Specific Performance—Estoppel—Contracts—Stocks—Wills.

Where a testator contracted to bequeath certain securities to the plaintiff, but instead bequeathed them in trust for her, the reception of the dividends for a number of years did not estop her from suing for specific performance of the contract.

6. Wills—Trusts—Contracts.

A bequest of property in trust is not a substantial compliance with a contract to bequeath it absolutely.

7. Limitations of Actions—Husband and Wife—Laws 1899, Ch. 78.

The statute of limitations of three years does not run against a married woman until she becomes of age.

8. Specific Performance—Wills—Trusts—Contracts.

The specific enforcement of a contract to bequeath certain personalty in return for personal service is not unjust, where the contract is for a valuable consideration, not procured by undue influence or any imposition, is faithfully performed, and the decree will not result in hardship.

9. Evidence—Trusts—Parol—Questions for the Jury—The Code, Secs. 413, 590.

In an action for the specific performance of a contract, whether certain evidence is clear, strong, and convincing is for the jury.

ACTION by A. E. Earnhardt and wife against L. H. Clement, executor of Tobias Kestler and others, heard by *Justice, J.*, and a jury, at May Term, 1904, of ROWAN. From a judgment for the plaintiffs, the defendants appealed.

Overman & Gregory for plaintiffs.
Burton Craige and L. H. Clement for defendants.

CLARK, C. J. This is an action for specific performance of a contract to bequeath the fifty shares of bank stock, which the testator then owned, to the *feme* plaintiff absolutely and in her own right, in consideration of services to be rendered by her to the testator. Her husband is joined as coplaintiff, but as he has no interest in the action it was unnecessary. The Code, secs. 178 (1) and 183. Upon issues submitted the jury found

that the testator so contracted, that the *feme* plaintiff faithfully and fully performed the services stipulated for, but that the testator bequeathed the said bank stock, not absolutely to plaintiff in her own right as agreed, but to a trustee for the benefit of plaintiff during her life and after her death to her children, and if she should die without issue, then to the grandchildren of the testator. The court having rendered judgment in favor of the plaintiffs, the defendants appealed, assign- (93) ing as errors:

1. The permission to examine a medical witness out of his order upon assurance that the preliminary evidence to make it competent would be introduced later, which was done. This exception was properly abandoned here. It was a matter in the discretion of the trial court. *Ripley v. Arledge,* 94 N. C., 467.

2. The exception for refusal to nonsuit at the close of plaintiff's evidence was waived by the introduction of evidence by defendant, without renewing the motion at the close of all the evidence. *Jones v. Warren,* 134 N. C., 392.

3. Exceptions to refusal to grant prayers concluding, "plaintiff is not entitled to recover," cannot be sustained under the present system, in which the jury does not render a general verdict, but responds to specific issues. *Witsell v. R. R.,* 120 N. C., 558; *Bottoms v. R. R.,* 109 N. C., 72, and cases cited. Besides, if in proper form, their instructions were properly refused. The first prayer asked an instruction that if the jury believed the evidence the plaintiff could not recover. The evidence was properly left to the jury. The second prayer, that the bequest in trust for life, etc., . . . was a substantial compliance with the contract alleged by the plaintiff, was properly refused, and needs no discussion. The third prayer was that the *feme* plaintiff, having received the dividends on the stock for seven years, had elected to take under the will and is estopped from claiming under the contract; and the fourth prayer is that the plaintiffs are estopped by accepting the dividends on the stock from claiming against the will.

It is true, as the defendant claims, that a party cannot claim benefits under the will and against it (*Brown v. Ward,* 103 N. C., 173; *Sigmon v. Hawn,* 87 N. C., 450), and that the estoppel thereupon arising can be enforced against *femes covert* and infants. *McQueen v. McQueen,* 55 N. C., 16; 62 Am. Dec., 205; *Robertson v. Stevens,* 36 (94) N. C., 247. But before the doctrine of election can arise "two things are essential: first, testator must give property of his own; second, he must profess to dispose of property belonging to his donee." 11 A. & E., 65; Adams Eq., sec. 93; *Price v. Price,* 133 N. C., 510. This is not the case here. There are no inconsistent benefits. By receiving the dividends on stock the capital of which she was entitled to have

absolutely, she only accepted part of what was her due, and nothing beyond her own. It put neither her nor the estate at a disadvantage. The statute of limitations was pleaded and is a different matter from an estoppel. The statute of limitations runs against a married woman since the passage of chapter 78, Laws 1899, but the *feme* plaintiff brought this action against the trustee within three years after becoming of age. The judge properly told the jury that the action was not barred, to which, indeed, the defendant did not except; and the mere receipt of the dividends on her own stock does not, as we have said, bar her claiming the stock itself.

The defendants moved for judgment on the verdict upon the ground that the decree of specific performance would be inequitable and unjust. The motion was properly denied. The contract was (*a*) for a valuable and fair consideration, (*b*) fair, just, and mutual, (*c*) not procured by undue influence *or* imposition, (*d*) plaintiff fully and faithfully performed her part, and (*e*) the decree is not oppressive, harsh, or inequitable, nor will it work hardship and injustice to any one. *Boles v. Caudle,* 133 N. C., 534. If, as the jury find, the contract was that the *feme* plaintiff should have this stock absolutely after the testator's death, and she rendered, as is found, the services agreed upon, there is no reason for requiring her to take merely the dividends thereon, nor is she estopped by having received only the dividends (less the trustee's commis-
(95) sion) for several years. There are dangers in litigation of this kind to set up alleged contracts with persons since deceased; but aside from the protection of section 590 of The Code, the following instruction of the court (which is unexcepted to) was fully as careful of the defendants' interests as they could ask. His Honor told the jury that "a person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained except upon the strongest evidence that it was founded upon a valuable consideration, and except upon strong, clear, and convincing proof." He was prohibited by section 413 of The Code from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. That was a matter for the jury, subject to the corrective power of the judge to set aside the verdict. *Jones v. Warren, supra; Ray v. Long,* 132 N. C., 894; *Lehew v. Hewitt,* 130 N. C., 22.

No error.

Cited: Roberts v. Baldwin, 155 N. C., 282; *Lynch v. Veneer Co.,* 169, N. C., 173; *Wooten v. Holleman,* 171 N. C., 165; *Stockard v. Warren,* 175 N. C., 285.

(96)

PEOPLES v. RAILROAD.

(Filed 30 November, 1904.)

1. Negligence—Questions for Jury.

In an action for personal injuries, whether the defendant was guilty of negligence, and whether that negligence was the proximate cause of the injury, are questions for the jury.

2. Negligence—Burden of Proof.

In an action for personal injuries the burden of showing contributory negligence on the part of the plaintiff is on the defendant.

3. Contributory Negligence—Negligence—Questions for Jury.

Whether a plaintiff in an action for personal injuries was guilty of contributory negligence is a question for the jury.

4. Negligence.

In this action for personal injuries the instruction as to negligence of the defendant is correct.

ACTION by J. M. Peoples, administrator of J. B. Peoples, against the North Carolina Railroad Company, heard by *McNeill, J.*, and a jury, at June Term, 1904, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Burwell & Cansler and T. C. Guthrie for plaintiff.
George F. Bason for defendant.

CLARK, C. J. There is an irreconcilable conflict between the version given for the plaintiff and for defendant. His Honor submitted both phases of the evidence to the jury, and instructed them that if they should adopt the defendant's version of the facts they must answer the first issue "No." The only exceptions are to the refusal to give (97) three prayers for instruction asked by defendant, and fourthly to a paragraph in the charge, and are as follows: 1. Refusal to charge that if the jury believed the evidence to answer the first issue "No." This was properly refused. There was evidence that at the time the intestate was killed he was in the discharge of his duties as an employee of the defendant, with his mind absorbed in the attempt to mount a shifting engine coming toward him, with his back to the approaching box cars, which were giving him no warning of their approach and which were not properly manned with a lookout upon the leading car. The question whether or not the defendant was negligent in these particulars and whether such negligence was the proximate cause of the injury

was properly submitted to the jury. *Lassiter v. R. R.*, 133 N. C., 247; *Smith v. R. R.*, 132 N. C., 824.

2. The second exception was for refusal to charge that if the jury found that "the intestate was informed that the string of cars was to be added to his train, and that the time between the conversation at which he received this information and when the cars were actually dropped in was short, and he was walking on No. 4 track, it was his duty to keep a sharp lookout for this string of cars, and if he failed to do so the answer to the first issue should be 'No.'" This was properly refused, because the prayer assumed as a fact that intestate's failure to keep a sharp lookout was the proximate cause of the injury. Besides, this prayer was upon the first issue and seeks to throw upon the plaintiff the burden of proving, not that the defendant was guilty of negligence, but that the intestate was not guilty of contributory negligence. Such instruction would have been clearly erroneous, if given. *Fulp v. R. R.*, 120 N. C., 525.

3. The third exception is for refusal to charge, "If the jury believe the evidence the answer to the second issue shall be 'Yes.'" This (98) was properly refused for reasons given in considering the first exception. The plaintiff's evidence was that the intestate was not on the track, but between the tracks; that he was looking in the opposite direction towards his approaching shifting engine which he was preparing to mount; that on track No. 4, next to him and towards his rear, were some "dead cars," and that, without warning, the defendant "kicked" some cars onto track No. 4, striking the dead cars and rolling them down on him as he was making ready to get upon his engine, there being no one on the rolling cars, or dead cars, to give notice of danger.

4. The fourth exception is that the court charged that "if the intestate was standing between the tracks, and some sixteen cars were kicked on the track some two hundred yards or more from the place where the intestate was, and rolling down an incline they collided with two detached box cars with no engine attached and on the same track that the shifting cars were on, and forcing these two cars against the plaintiff's intestate in close position to the cars, if that was his position, and in consequence of that killing him, no signal was given and no agent in charge of this train, this was negligence on the part of the defendant, and if you are so satisfied that the plaintiff was injured in consequence of this want of care you ought to answer the first issue 'Yes.'" We find no error in this instruction. *Smith v. R. R.*, 132 N. C., 819. This was doubtless the defendant's own view, upon reflection, for he does not refer to this exception in his brief. *S. v. Register*, 133 N. C., 746. Indeed, his brief

is chiefly based upon the statement of facts averred by the defendant, and the court charged that if the jury found that to be the truth of the occurrence, to find the first issue "No," but the jury responded "Yes."

No error.

Cited: *Stewart v. R. R., post,* 691; *Alley v. Howell,* 141 N. C., 116; *Gaddy v. R. R.,* 175 N. C., 520; *Lea v. Utilities,* 175 N. C., 511.

(99)

CAMERON v. POWER COMPANY.

(Filed 30 November, 1904.)

1. Certiorari—Appeal—Case on Appeal—The Code, Secs. 412, 414.

A *certiorari* will issue to compel the trial judge to incorporate exceptions taken by appellant omitted by him in the case on appeal.

2. Certiorari—Judges—Appeal.

Where a *certiorari* is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with reference to the corrections, and counsel should be present at the settlement thereof.

3. Appeal—Case on Appeal—Judges—The Code, Sec. 550.

The requirement of the statute that the place appointed by a judge to settle a case on appeal must be in the judicial district wherein it was tried is mandatory.

ACTION by the Cameron-Barkley Company against the Thornton Light and Power Company. Petition by the plaintiff for *certiorari* to correct the case on appeal.

T. M. Hufham for petitioner.
E. B. Cline in opposition.

WALKER, J. This is an application by the plaintiff (appellant) for a *certiorari.* It is alleged in the petition that plaintiff served on the defendant a case on appeal and defendant filed a counter-case. That the judge who presided at the trial was requested to name a time and place for settling the case, and he appointed as the place a town which is not in the Thirteenth Judicial District and is at a great distance from the place of trial. The plaintiff further alleges that in the case on appeal as tendered by its counsel there were certain exceptions to the charge, and it complains that those exceptions were omitted by (100) the judge in his statement of the case by inadvertence. It is also alleged that some of the exceptions contained recitals of instructions

given by the court in its charge to the jury which are at variance with the charge set out in the case as settled and signed by the trial judge.

The statement of the judge in the case on appeal as to what occurred on the trial must be accepted in this Court as importing verity. We always take it as absolutely true. *S. v. Reid,* 18 N. C., 377; 28 Am. Dec., 527; *S. v. Gooch,* 94 N. C., 982. If there is any exception to this rule it has not yet been presented in any case which has come to this Court, though it must be true that if the case is tried and the exceptions are noted during the course of the trial, in accordance with the provisions of The Code, sec. 412 (2), the case will be heard here upon the exceptions as thus settled, for the statute virtually so directs. The Code, sec. 550. But the rule as first above stated does not extend to exceptions taken to the refusal of the judge to grant a prayer or to the granting of a prayer for instruction, nor to the assignments of error in the charge of the court, which alleged errors, by the express terms of the statute, are deemed to have been duly excepted to. Clark's Code (3 Ed.), sec. 412 (3). It follows from that provision of the law that the formal assignment of errors relating to such matters may be made for the first time in the case on appeal as tendered by the appellant, and it has so been frequently decided by this Court. *McKinnon v. Morrison,* 104 N. C., 354. See, also, Clark's Code (3 Ed.), p. 513, where the cases will be found fully collected and classified. The judge, therefore, has nothing to do with the appellant's assignment of errors, which is solely the act of the appellant and must be treated as *his* assignment. This being so, it is not, of course, subject to the control or revision of the judge. (101) The assignment of errors must appear in the case, and appear, too, as the appellant frames it, otherwise he may be deprived of a most important and valuable right given by the statute. The judge may say what the evidence was and also what was the charge when it was not in writing, but he may not say how the alleged errors in it shall be excepted to or assigned by the appellant, nor can he omit the assignment of errors from the case because he does not believe it was properly made or does not conform to the rulings upon the prayers for instructions or to the charge, provided it was set out in the case on appeal as tendered by the appellant. As to all matters concerning which the judge's statement is conclusive upon us we will not grant a *certiorari* for the purpose of having the case amended, unless it appears that an error or mistake has inadvertently been committed by the judge, and it appears further that there are reasonable grounds to believe that the judge will correct the case if he is afforded an opportunity to do so. *Porter v. R. R.,* 97 N. C., 63; Clark's Code (3 Ed.), pp. 935, 936. But in respect to an assignment of errors made in the appellant's case, he is entitled to have it stated in the case on appeal settled by a judge as matter of right.

Sometimes he may be put to this disadvantage: If the charge has not been reduced to writing by the judge, either voluntarily, or at the request of one of the parties under section 414 of The Code, and there is a conflict between the charge, or any part of it, as stated by the judge and as recited in the assignment of errors, we must be governed by the judge's statement of it, and the assignment must be disregarded. *Walker v. Scott,* 106 N. C., 56. When the charge is put in writing there should, of course, be no such discrepancy, as the assignment must necessarily be directed to the charge written.

While we decide that the plaintiff upon the foregoing principles is entitled to the writ of *certiorari* for the purpose of having his exceptions and assignment of errors, so far as they relate to the exceptions, given or refused, made a part of the case, the judge should, as a (102) general rule, have the opportunity of considering the case again with reference to the assignment, so that he may the more intelligently and explicitly state what was actually done and said, having in view the questions intended to be raised by the appellant as they appear from his assignment of errors. This is but fair to the judge and to the appellee, and will certainly conduce to a better understanding of the merits of the case by us; and, besides, it will not take from the appellant any advantage to which he is justly entitled. Counsel should present when the case is finally settled to protect the interest of their clients, unless their presence is waived, and if any change is made in the body of the case the appellant should be permitted to reassign errors so as to conform the assignment to the changes thus made.

The principles we have thus laid down are well supported by *Love v. Elliott,* 107 N. C., 718, in which the present *Chief Justice* pointedly states the law upon the subject. That case has since been approved. *S. v. Black,* 109 N. C., 856, 14 L. R. A., 205; *Broadwell v. Ray,* 111 N. C., 457; *Bernhardt v. Brown,* 118 N. C., 700; 36 L. R. A., 402; *Bank v. Sumner,* 119 N. C., 591. See, also, *Boyer v. Teague,* 106 N. C., 571, and *Whitesides v. Williams,* 66 N. C., 141.

It is alleged in the petition that the place appointed by the judge for settling the case on appeal was outside the district, and owing to this fact and the great distance from the place of trial to the place so appointed, counsel did not attend. This perhaps is the cause of the defect in the case, as counsel no doubt would have insisted on their right to have the assignment set out in the case if they had been present. The law requires the case to be settled within the judicial district where it was tried (The Code, sec. 550), and this must be done unless this provision is in some way waived, or counsel agree upon some place outside the (103) district. This requirement of the law is mandatory and should be strictly observed when a request to appoint a time and place to settle the

case is made (*Whitesides v. Williams* and *Walker v. Scott, supra; S. v. Williams,* 108 N. C., 864), and when the judge has not left the district. When he has so left, he may settle the case upon notice without returning to the district. The Code, sec. 550.

The writer of this opinion concurs fully in the views of *Justice Douglas* who files the concurring opinion, as to the right procedure in correcting cases on appeal by the writ of *certiorari,* and he also thinks that such rules of the Court only should be adopted as are necessary for the proper and orderly transaction of the business of the Court, and when adopted should be enforced, not harshly or too rigidly, but with due regard to the hearing of cases upon their merits. But he does not think the question is presented by this application, and for that reason it is not decided nor even discussed.

The answer to the petition does not meet its allegations in such a way as should induce us to withhold the writ. Pursuing the course, therefore, suggested in *Lowe v. Elliott, supra,* a *certiorari* will issue and the case be remanded so that appellant's exceptions and assignment of errors may be inserted in the case on appeal, and so that the judge may, not resettle the case (*Boyer v. Teague, supra*), but make such amendments and corrections in the same as he may deem proper.

To that end let a copy of the petition and the original case on appeal, tendered by the appellant and used as an exhibit in this Court, be transmitted to the judge with the writ for his information.

Petition allowed.

(104) CLARK, C. J., concurring: The rulings of this Court are uniform that a *certiorari* will issue to send up the exceptions to the charge if filed within ten days after adjournment of court, because filing such exceptions is the act of appellant and the exceptions are a part of the record. *Lowe v. Elliott,* 107 N. C., 718. But as to all matters transpiring during the trial, if counsel cannot agree upon a statement, the judges settle the case, and the case thus settled is conclusive. This Court has no power to examine witnesses and find the facts differently, nor can we command the judge to state the facts differently, for he acts under the obligations of his duty and oath of office. All we can do is to give him an opportunity, and it is but reasonable that we will do this only when it appears, upon affidavit, that there has been an inadvertence on the part of the judge. If this is denied by the other side, the matter is presumed to be as the judge has stated it, and the *certiorari* ought not to issue unless it appear by a statement from the judge that he will probably make the correction, if given the opportunity. This ruling has never been based upon any idea of courtesy to the judge, but upon the principle of *Magna Charta* that we "will not delay justice." If the appellant has shown any diligence

whatever he has always ample time—for the case must be docketed and printed at least a week before it is called for argument—in which to make the application to the judge and learn whether or not he will make the correction if given the opportunity. Certainly, if the appellant will not take the trouble to write a letter to the judge he ought not to get a delay of six months upon a suggestion of error in the judge's case on appeal when he was, or could have been, present when the case was settled and this averment of inadvertent omission is denied by counter-affidavit. To give such delays to an appellant upon a vague statement that he believes the judge will make a correction, when if there is the slightest diligence shown he can lay the judge's reply to his letter before us, would lead to the gravest abuse and a delay of several months (105) in almost any case in which delay was desired by a party. This ruling has been uniform. *Smith, C. J., Porter v. R. R.,* 97 N. C., 65, 2 Am. St., 272, and cases there cited; *McRae, J., Allen v. McLendon,* 113 N. C., 319, and case cited; *Broadwell v. Ray,* 111 N. C., 457; *Lowe v. Elliott,* 107 N. C., 718; *Bank v. Bridgers,* 114 N. C., 107, and very many other cases, both before and since Clark's Code (3 Ed.), p. 936. The ruling in this Court has been uniform (but there is no "rule of court" on the subject), and it seems to be the uniform practice in all other jurisdictions—and for the same reason. A contrary practice would be unjust to the appellant and fruitful of unnecessary delays and expense. By the slightest diligence the appellant can always ascertain whether the judge would probably make the correction, and lay that fact before us in making his application—in which case it is always allowed.

DOUGLAS, J., concurring: I concur in the opinion of the Court, and I am glad that the practice has been so fully and so clearly stated. There is, however, one point of practice in this Court that has never met my approval, and it is its refusal to consider an ordinary petition for *certiorari* unless the judge below has already signified in writing his willingness to amend the record in accordance with the wishes of the petitioner. Such a course does not seem to be in accordance either with the dignity of this Court or the rights of the petitioner, nor is it required by the courtesy due to the judge below. If any error has occurred through no fault of the petitioner, he is entitled to have it corrected as a matter of right. The question is not whether the judge is willing to correct the error, but whether the error has in fact occurred. We may rely upon the willingness of the upright gentlemen who hold our Superior Courts to correct in all places and at all times any error (106) they may have committed when called to their attention; and there is no reason why the matter should not be brought to their attention by this Court in due forms of law, as well as by counsel in private interviews. When a party under oath asserts that there are errors in

the record, and points them out with such particularity that they can be easily ascertained one way or the other, I see no reason why a *certiorari* should not be granted, and the judge who tried the case asked in a respectful manner whether or not the petitioner's allegations are true. The judge's statement would import just as much verity then as it does now; and would be just as final. It would not be the slightest reflection upon him in any way, and would relieve him from the private and *ex parte* importunities of counsel now unavoidable under the practice of this Court.

Another matter I deem proper to mention: As long as our judges retain their independence of thought and action—and I trust they always will—there will be radical differences of opinion in the decision of cases. Similar differences may exist as to the adoption of rules of practice, but in such cases custom does not permit any written dissent. It follows that the adoption of a rule does not imply its unanimous approval by the members of this Court, but simply that it met the views of a majority. In conclusion, I can only say, with the utmost respect for the Court, that there are many of its rules that received neither my vote nor my approval. After their adoption they become the rules of the Court, binding upon me as well as upon others; and as such have received recognition and support.

Cited: Barber v. Justice, 138 N. C., 23; *Cameron v. Power Co., ib.,* 365; *Slocumb v. Construction Co.,* 142 N. C., 351, 354, 355; *Buckner v. R. R.,* 164 N. C., 203; *Paul v. Burton,* 180 N. C., 47.

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(107)

SPENCER v. RAILROAD

(Filed 6 December, 1904.)

1. **Railroads — Consolidation of Corporations — Corporations — Laws (Private) 1901, Ch. 168—Laws 1835-'36, Ch. 25.**

   Under Laws (Private) 1901, ch. 168, certain railroads are authorized to consolidate.

2. **Railroads—Corporations—Consolidation — Eminent Domain — Stockholders.**

   An act authorizing the consolidation of certain railroad corporations upon a vote of a majority of the stockholders, allowing a stockholder actual value for his stock in lieu of taking stock in the consolidated company, is valid.

3. Railroads—Consolidation of Corporations.

Where the Legislature provides a method for assessing the value of stock owned by persons who do not desire to take stock in a consolidated company in lieu thereof, the mode prescribed is exclusive and must be followed.

4. Railroads—Corporations—Laches—Equity.

Where a stockholder fails for two years to bring an action to annul a consolidation with another corporation, and meanwhile third persons have obtained interests in the consolidated company, a court of equity will not grant the relief demanded.

DOUGLAS, J., dissenting.

ACTION by R. P. Spencer and another against the Seaboard Air Line Railway Company and another, heard by *Brown, J.*, at February Term, 1904, of WAKE. Appeal by the plaintiffs from a judgment upon a demurrer *ore tenus* at October Term, 1904, of the Superior Court of WAKE.

Busbee & Busbee for plaintiff. (117)
Day & Bell, T. B. Womack, Shepherd & Shepherd, and Murray Allen for defendant.

CONNOR, J. The plaintiff attacks the validity of the contract of consolidation or merger whereby the Raleigh and Gaston Railroad Company, together with a number of other companies owning and controlling connecting lines, became a part of the Seaboard Air Line system, upon several grounds which it will be convenient to consider in the order in which they are discussed in the very excellent brief of her counsel. It is, of course, conceded that as the cause was disposed of by his Honor in the Superior Court and is before us upon a motion to dismiss as upon a demurrer *ore tenus,* every allegation made in the complaint, with such construction thereof as is most favorable to the plaintiff, must be taken as true. This, of course, is so for the purpose of drawing the legal conclusions therefrom. The plaintiff says that certain acts of the defendant are *ultra vires.* This is a conclusion of law to be drawn from the facts stated. It is also to be noted that although the complaint makes no reference to the several statutes enacted by the General Assembly, which, being private acts, do not come under our cognizance unless referred to and proven, his Honor's judgment expressly refers to at least one of them, and in the argument before us counsel treated them as being properly before us. The plaintiff says that a careful analysis of chapter 168, Private Laws 1901, fails to show that any authority is conferred upon the Seaboard Air Line Railway Company to consolidate, merge with, or purchase from any other railroad than the Sea- (118)

board and Roanoke Railroad Company. That the statute conferring such extraordinary power upon railroad corporations should be clear and explicit—leaving nothing to construction or doubt. Why that single corporation should have been named in conferring the power and other railroad companies referred to in general terms does not very clearly appear. We think, however, that by a fair and reasonable interpretation of the language of the act the Raleigh and Gaston Railroad Company is included among those companies with which the Seaboard Air Line Company is empowered to consolidate, "and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the States thereof." In conferring power upon other companies to consolidate the language is equally comprehensive—"power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the General Assembly of the State of North Carolina," etc. The Raleigh and Gaston Railroad Company certainly comes within this classification. It would seem to follow that the other provisions of the act, unless otherwise expressed, must be construed as referring to all companies thus included in the class upon which the power is conferred to consolidate. Any other construction would render nugatory the power conferred. The plaintiff next insists that no consolidation can take place unless the power to so consolidate is expressly conferred upon both consolidating corporations. This proposition is sustained by the authorities cited. The reasons therefor are manifest. 10 Cyc., 293. We think that such power is conferred upon both corporations. Chapter 168, section 1, expressly confers upon the Seaboard Air Line Railway Company the power, "with the approval of two-thirds in amount of its stockholders, etc., to lease, operate, consolidate with, or otherwise acquire," etc.

(119) As we have seen, the power is conferred upon the Raleigh and Gaston Railroad Company to enter into the contract of consolidation, etc.

The evident purpose of the Legislature was to enable the Seaboard Air Line Railway to form by consolidation, merger or purchase a system of transportation through the State connecting with railroads in Virginia and South Carolina. The legislation in this State, together with that in Virginia, in regard to the Seaboard Air Line Company, which is expressly referred to in the preamble to chapter 34, Laws 1899, and chapter 168, Laws 1901, shows this to be the purpose and scope of the several statutes. This being ascertained, the principle by which we should be guided in interpreting the statute is thus stated: "Every statute is to be construed with reference to its intended scope and the purpose of the Legislature in enacting it, and where language used is ambiguous or admits of more than one meaning, it is to be taken in such

a sense as will conform to the scope of the act and carry out the purpose of the statute." Black on Interpretation of Laws, 56 Endlich, 73.

It is settled that the power to consolidate may be conferred either in the charter or by a general enabling act. 10 Cyc., 289. The plaintiff next contends that, assuming that the statute confers the power upon the Raleigh and Gaston Railroad to consolidate, that such power can be exercised only by the unanimous consent of the stockholders. That a dissenting stockholder cannot be compelled to surrender his stock in the corporation and accept in lieu thereof stock in another company. That unless such power is conferred upon the majority of the stockholders in the charter, or by amendment thereto made before the subscription of the dissenting stockholder, an act of the Legislature conferring such power would be invalid as impairing the obligation of the contract between the stockholders. This proposition is amply sustained upon principle and authority. The Supreme Court of the United (120) States in *Clearwater v. Meredith,* 68 U. S., 25, discussing a statute permitting a consolidation of several railroad companies, says: "The power of the Legislature to confer such authority cannot be questioned, and without the authority railroad corporations organized separately could not merge and consolidate their interests. But in conferring the authority the Legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. . . . When any person takes stock in a railroad corporation he has entered into a contract with the company that his interest shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purpose and character at the will and pleasure of a majority of the stockholders, so that new responsibilities and, it may be, new hazards are added to the original undertaking. He may be willing to embark in one enterprise and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit." *Botts v. Turnpike Co.,* 88 Ky., 54, 2 L. R. A., 594; *McCrary v. R. R.,* 9 Ind., 358. The defendant, conceding this to be the law, says that the statute conferring the power upon the several railroad companies consolidating, expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent domain and condemning the stock for a public use by making compensation therefor. The plaintiff contends that at the date of the charter

(121) of the Raleigh and Gaston Railroad Company (1835), no power to amend charters of corporations was reserved by the Constitution of this State, and that under the decisions of this Court they come within the protection of the doctrine of the *Dartmouth College case.* That all of the stock was issued prior to the adoption of the Constitution of 1868, by which such power was reserved. He also says that no general statute was in force in this State authorizing such consolidation. This contention is undoubtedly correct. It will be noted, however, that chapter 168, Laws 1903, does not undertake to amend the charter of the company or to do more than empower a majority of the stockholders to consolidate with the other companies. It is an enabling act and imposes no duty or obligation upon the corporation or its stockholders. It must be conceded, also, that the act of the majority of the stockholders does not change the relation of the plaintiff towards the corporation. The Legislature in the exercise of its power confers upon the majority of the stockholders the power to consolidate with the other constituent companies and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the Legislature. The Legislature having decided that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain it empowers the corporation to condemn the stock of such dissenting stockholder when it cannot otherwise be acquired. This power is entirely distinct from the power to amend the charter. The right of eminent domain which resides in the State is defined to be "The rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for (122) the public benefit as the public safety, necessity, convenience or welfare may demand." Cooley Const. Lim., 524; 1 Lewis on Em. Domain, 1; 10 A. & E., p., 1048. This right or power is said to have originated in State necessity and is inherent in sovereignty and inseparable from it. It is a part of the sovereign power of every State. *R. R. v. Davis,* 19 N. C., 451. When the State incorporated the Raleigh and Gaston Railroad Company a contract was entered into with the corporation, the obligation of which could not be impaired. The State did not in respect to the property of the corporation or its shareholders divest itself of or in any degree impair its right of eminent domain. The Legislature could not divest itself of a power so essential to the integrity of the State. *Mr. Justice Daniel,* in *Bridge Co. v. Dix,* 47 U. S., 531, says: "No State, it is declared, shall pass any law impairing the obligation of contracts, yet with this concession constantly yielded it cannot be

justly disputed that in every political sovereign community there inheres necessarily the right and the duty of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of the Government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the Government, and those last are held in subordination to this power and must yield in every instance to its proper exercise. . . . A correct view of this matter must demonstrate, moreover, that the right of eminent domain in nowise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other." 10 A. & E., p. 1050. "The Legislature has the power to authorize the consolidation of railroad (123) and other *quasi*-public corporations, without the unanimous consent of their stockholders, when it makes provision for appraising and paying for the stock of dissenting stockholders. This power is entirely unaffected by the constitutional prohibition against impairing the obligation of contracts and is based upon the sovereign power of eminent domain. Corporate shares, as well as other property, are subject to the paramount necessities of the State for the promotion of public interests." Noyes on Intercorporate Rel., 51; *Black v. Canal Co.*, 24 N. J., Eq., 469. "In this busy age of restless activity and enterprise, when the brain of man is exhausting itself in his struggle with time and space, the two forces that most oppose his progress, the taking of private stock in such corporations to advance any of the purposes above indicated must be regarded as the taking of it for public benefit. There can be no doubt that a railroad company may be empowered to extend their road beyond the point to which it was built under the original grant, if proper compensation is provided for stockholders who may resist it, and I can see no difference in principle, whether the original company, in order to secure a through route under one management, is authorized to take the lands of individuals or to take the property which individuals have in the stock of an existing road. In the first case, for the purpose of establishing a through route, one kind of private property, to wit, the lands of individuals, are taken by the corporation; in another case another kind of property, to wit, the shares of stock of individuals in an existing company, are authorized to be condemned. . . . The same rule applies to both cases, unless property in stock can claim a superior right to protection. This, with all other private rights, is held under the dominant right of eminent domain."

In a very able opinion by *Bigelow, J.*, in *Bridge Corp. v. Lowell,* 70 Mass., 481, it is said: "Nor is the principle thus recognized any
(124) violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose the Legislature does not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary in the exercise of such rights and privileges to take and appropriate a franchise previously granted. If such were the rule great public improvements rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants, which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the Legislature for the compensation of those whose property or franchise is acquired, there is no violation of public faith or private right. The obligation created by the original charter is thereby recognized."

We have in the history of the Raleigh and Gaston Railroad Company a striking illustration of the operation of the principle so clearly stated by *Justice Bigelow.*

The right to take private property by condemnation proceedings for the purpose of constructing a railroad was first asserted, recognized, and enforced by this Court in *R. R. v. Davis,* 19 N. C., 456. *Ruffin,*
(125) *C. J.*, wrote for a unanimous Court an able and exhaustive opinion, tracing the power to its source and giving it the application asserted by the defendant in this case. This opinion has always been cited and approved in this Court as settling the law in this State. The same public convenience or necessity which would have justified taking the land of the citizen to open and construct a highway to meet the needs of the public in 1800 was invoked for taking the same land to meet the needs as they existed in 1836 to construct a railroad. The advancing needs and changed conditions in regard to transportation and travel is deemed by the Legislature to demand the formation of a great trunk line or interstate system of railroad in 1901. If the Seaboard Air Line

Company had, instead of consolidating with the Raleigh and Gaston Railroad Company, constructed a separate line or track from Ridgeway to Raleigh, every foot of land on the route necessary therefor could have been condemned for that purpose. We can see no reason why, in the exercise of the same inherent sovereign powers, the Legislature may not empower the corporation to condemn the plaintiff's stock. Whether the power is in this respect wisely conferred or exercised is beyond our province to say. This is a question for the decision of the Legislature. We have examined with care all of the authorities cited by the plaintiff's counsel. In those cases where the consolidating acts are declared invalid, no provision is made for assessing the value and paying for the dissenting stock. We find no more difficulty in holding that the condemnation of plaintiff's stock is for a public use than did *Ruffin, C. J.,* and his learned associates in finding that the railroad was originally constructed for such use. Clark and Marshall on Private Corp., 1051; *R. R. v. R. R.,* 83 N. C., 489. We are of the opinion that the Legislature had the power to confer on the corporation the right to condemn the dissenting stock, and that upon a reasonable interpretation of the statute it has done so. We find no valid objection to the mode pre- (126) scribed for ascertaining the value of the stock; it is expressly provided that the value so assessed must be paid before the stock is transferred. It would seem that the mode prescribed is exclusive and must be pursued. *R. R. v. McCaskill,* 94 N. C., 751. It seems to us to be the only practicable remedy. The mode of trial is free from any reasonable objection.

There is another view of this case presented by the defendant's brief which we think fatal to plaintiff's action. The board of directors of the Raleigh and Gaston Railroad Company on 29 April, 1901, met and adopted a resolution reciting that the consolidation would greatly facilitate the business and promote the interests of the company, etc. Thereupon a meeting of the stockholders was duly called and 20 May, 1901, fixed as the day for such meeting. Notice thereof was duly served on the plaintiff and she filed her protest setting forth that notice of the meeting and the purpose thereof had been served on her. At the meeting she appeared by her attorney and entered her protest. The tellers reported that all of the stock, 14,988 shares, represented voted for the consolidation. It appears that the consolidation was entered into by eight separate railroad companies traversing hundreds of miles and representing millions of dollars of capital. The consolidation became operative at once, and new stock, common and preferred, to the amount of one hundred million dollars, together with bonds secured by mortgage to the amount of many million dollars, were authorized to be issued and executed. It is a matter of general and public information, and known

to the Court by the records before us at each term, the published reports of the Corporation Commission, and other public and official sources that the consolidation of the roads forming the Seaboard Air Line system has become an accomplished fact, that vast private interests are involved and public duties assumed.

(127) The plaintiff, instead of asserting her rights promptly by an appeal to the preventive jurisdiction of the Court, waits more than two years before invoking the equitable power of the Court to declare invalid and set aside the consolidation. It is not to be understood that courts will refuse to protect the rights of a single stockholder if invaded by the majority, however large, or refuse relief against aggressions of consolidated capital, however powerful. The chancellor originally took jurisdiction in many cases because of the inability of the complainant to maintain his suit at law with his adversary because of his great power and large number of retainers. The question is not whether the plaintiff is without remedy, but whether the law has given to her an adequate remedy otherwise than by the exercise of the extraordinary power vested in the court. She demands that the court declare the charter of the Raleigh and Gaston Railroad Company forfeited; that the merger and consolidation be declared void as to her; that a receiver be appointed, etc.; that an accounting be had of the receipts of the company since the merger, etc. It is an elementary principle of equity jurisprudence that relief is granted to the vigilant and will be refused when there has been unreasonable delay amounting to *laches*. This is especially true where valuable rights have been acquired by innocent persons. This familiar principle was announced and enforced by this Court in *Pender v. Pittman,* 84 N. C., 372, *Smith, C. J.,* saying: "But this equity ought to be promptly asserted and not deferred until by a sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done and restore matters to their former condition." In that case it was held: "That an injunction against carrying out a contract of sale made under a power contained in a mortgage, will not be granted when the relief to which the plaintiff considers himself entitled is not

(128) sought until the sale has been made and the rights of a purchaser have intervened."

Mr. Noyes says: "Acquiescence for an extended period, during which time the interest of third parties have intervened, may itself constitute *laches* and prevent a stockholder from attacking a consolidation even on the ground of fraud." Intercorporate Rel., 49. The authorities upon this subject are uniform and abundant. As was said by *Sir John Romilly,* Master of the Rolls, "Shareholders cannot lie by, sanctioning or by their silence at least acquiescing in an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favor-

able and profitable to themselves, abide by it and insist on its validity, but if it prove unfavorable and disastrous, then to institute proceedings to set it aside." *Gregory v. Patchett,* 33 Beav., 595. The proposition is tersely stated by *Van Fleet, V. C.,* in *Rabe v. Dunlop,* 51 N. J., Eq., 48: "If he wants protection against an *ultra vires* act he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." *McVickers v. Ross,* 55 N. Y. Sup. Court, 247; *Watts Appeal,* 78 Pa. St., 370; *Kent v. Mining Co.,* 78 N. Y., 159.

We think that in any view of the case the plaintiff is not entitled to the extraordinary relief demanded. We are at a loss to see how it is practicable to preserve the status of the corporation, as she suggests, for her benefit. We notice that the defendant in its answer says that, notwithstanding the failure of the plaintiff to proceed to have the value of her stock ascertained within the time and by the method prescribed by chapter 168, Laws 1901, it is now willing to pay her the value thereof. His Honor granted to the plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained. He also directs upon the trial of that issue that the books of the corporation be produced, etc. We think that the order of his (129) Honor fully protects the rights of the plaintiff. She will have thirty days from the next term of the Superior Court to amend her complaint and proceed to have the value of her stock ascertained and judgment rendered therefor. Upon a full and careful consideration of the record, the agreement of counsel, and the authorities, we find no error in the judgment of His Honor.

No error.

DOUGLAS, J., dissenting: I wished to express my views more fully upon this case, but circumstances which I regret confine me to a few lines. I do not see how the right of eminent domain, one of the sovereign powers of the State, can be invoked in favor of a railroad consolidation where not a foot of additional road is built and nothing is added to the public convenience. Private property can be taken only for a public use. What use can the public make of the private stock of a corporation aside from its roadbed and other material property which are already devoted to the use of the public? Is it not establishing a dangerous principle to permit the consolidation of railroads without the consent of their minority stockholders—dangerous not only to private rights, but equally so to the great economic principle of railroad competition in which the public is so vitally interested?

Cited: *R. R. v. Olive,* 142 N. C., 260; *Thomason v. R. R., ib.,* 322; *Hill v. R. R.,* 143 N. C., 562, 584; *McLeod v. Comrs.,* 148 N. C., 86; *Pullen v. Corporation Commission,* 152 N. C., 558.

(130)

AVERY v. RAILROAD

(Filed 6 December, 1904.)

1. Negligence— Fellow-servants— Independent Contractor — Laws (Private) 1897, Ch. 56.

The statute providing that railroad companies shall be liable for injuries to employees by the negligence of fellow-servants has no application to injuries sustained by the servant of an independent contractor of a railroad company by reason of the negligence of a fellow-servant.

2. Contributory Negligence—Nonsuit—Independent Contractor.

In an action for injuries to a servant alleged to be in the employ of defendant railroad company, which claimed that its codefendant was an independent contractor, a nonsuit on the ground of contributory negligence, prior to the determination of the relationship between the defendants, is erroneous.

ACTION by Rufus Avery against W. J. Oliver and the Southern Railway Company, heard by *Justice, J.*, at June Term, 1904, of BURKE.

The plaintiff brought this action to recover damages for injuries to himself which he alleges were caused by the negligence of the defendants. The testimony tended to show that he was employed by one Walter Queen, foreman of defendant Oliver, the latter having been employed by his codefendant, the Southern Railway Company, to lower a grade on the line of its railway about one mile west of Morganton. In order to do the work it was necessary to remove earth and rock from a cut, which was carried in cars over the road of defendant company to a place where the grade was being raised by it about two miles east of Morganton and dumped there from the cars. While the plaintiff was thus employed Walter Queen ordered him and others to go behind one
(131) of the dump-cars, which was on a trestle, and knock the chains loose and dump the car which was loaded with earth and stone. He obeyed the order and tilted the car, but it would not dump the contents, and, on account of the greater weight of the earth and stone at the end of the car where he was placed, it fell back, caught and injured him. The cars were secured by chains on each side, and, when they were dumped, the stay-chains were unfastened on what appeared to be the lightest side, so that the car would dump from the other side by reason of the greater weight there. If it did not dump, the hands would go on the side where the chains were loose and push the car over, without unfastening the chains on the other side, which were intended to stay the car or to keep it in the proper position and to prevent it from rebounding and injuring the hands. The chains on the other side had been unfastened by one of the hands, Will Largent, and the plaintiff knew, at the time he attempted to dump the car, that the chains on that

side were loose, but did not think it was his business to have them fastened. If the chains on that side had been fastened the accident would not have occurred, and the plaintiff knew this at the time. "The right way to dump is to fasten the chains on the other or opposite side of the car and keep out of the way." There was further testimony tending to show that one Parsons, an engineer of the defendant company, was in charge of the work when Oliver was doing the grading. He showed how to make the grading and set pegs, and inspected the work. McDowell testified that Parsons was the resident engineer of defendant company and had charge as engineer of the work Oliver was doing, and everything was under his control. He would sometimes direct the work and the dumping. "He was all over the work." He would tell the hands where to dump the rock. Oliver had charge and employed his own hands, but Parsons directed the work. A freshet washed the piles away and Parsons directed the work of restoration. (132)

This is a sufficient statement of the evidence to present the view taken by this Court of the case. At the close of the testimony for the plaintiff the court, on motion of defendant, nonsuited the plaintiff, who excepted and appealed.

Avery & Avery and Avery & Erwin for plaintiff.
J. T. Perkins for defendant Oliver.
S. J. Ervin for defendant Southern Railway Company.

WALKER, J., after stating the facts: In an action for negligence the first issue always is, Was the plaintiff injured by the negligence of defendant? When contributory negligence is pleaded, the next issue is, Did the plaintiff by his own negligence contribute to his injury? And in a case like this one these are the only issues necessary to be submitted to the jury in order to ascertain whether the plaintiff has established his cause of action, as the third issue, sometimes submitted when the last clear chance to avoid the injury may have been open to the defendant, does not arise. The issue as to damages merely determines the amount of the recovery and does not affect the cause of action, for if the plaintiff succeeds in the action he is entitled to recover something, at least nominal damages. In this case the issues being those relating to negligence and contributory negligence, it was necessary before the latter issue could be reached, that the jury should have found with the plaintiff on the first issue, namely, that the plaintiff was injured by the negligence of the defendants. If the defendant Oliver was an independent contractor, employed by the railway to do the work specified in their contract, and not subject to the control and direction of the railway company, and the plaintiff was a servant in the employ of Oliver at the

(133) time he was hurt, the defendant company is not liable for the injury to him. If Oliver was an independent contractor, he is not liable to the plaintiff, because the injury was caused by the act of a fellow-servant, as appears by the plaintiff's own testimony, and there is none to the contrary. The direct cause of the rebound of the car, which struck the plaintiff, was the loosening of the chain on the north side, and this was done by Largent, who was in the same service with the plaintiff and actually coöperating with him at the time of the occurrence.

Again, it may be said if Oliver was an independent contractor the question of the assumption of risk by the plaintiff may arise, because, when the servant enters into the employ of the master, he assumes all of the ordinary perils and dangers of the service, though not those arising from the negligence of the master. It is incumbent on the master to furnish a reasonably safe place for the servant to perform his work, and reasonably safe machinery and appliances with which to do his work. *Marks v. Cotton Mills,* 135 N. C., 287; *Witsell v. R. R.,* 120 N. C., 557. When he has discharged this duty towards his servant, the latter then assumes all risks which may be incident to the service in which he is employed. These principles are of course modified, as to railway companies, by Private Laws 1897, ch. 56, but they apply to individuals and to other corporations. It has always been held that one of the risks ordinarily incident to the service is the negligence of a fellow-servant. If in this case, therefore, the injury was caused by the negligence of Largent, who was the plaintiff's fellow-servant, the defendant Oliver, if he was an independent contractor, is not liable to the plaintiff, and of course the other defendant cannot be, as its liability depends upon that of Oliver; and even if the latter was negligent and thereby caused the injury, the railway company would still not be liable unless Oliver was its servant, and not, as we have said, an independent contractor.

(134) It became necessary, therefore, to determine the relation of the defendants to each other. The court should have submitted this question to the jury with proper instructions as to the law, so that it might first be ascertained whether Oliver was an independent contractor, for if he was, and the negligence of Largent, a fellow-servant, caused the injury to the plaintiff, the act of 1897 would not apply, and the defendants would be acquitted of any and all liability, not because of any negligence on the part of the plaintiff which contributed to the injury, but for the reason that there was no negligence on the part of the defendants, as the law would attribute the injury to the negligence of the fellow-servant, which was one of the risks and perils of the service assumed by the plaintiff. The question of contributory negligence could not, therefore, arise in that state of the case.

The error of the court consisted in holding that the case turned in the present stage of it upon the contributory negligence of the plaintiff, whereas that question was not presented, unless there was prior negligence on the part of the defendants. The defendants, indeed, may have been negligent, and it may become necessary in the development of the case to consider the issue as to the plaintiff's negligence, but the evidence now before us is such as to require the jury to first decide whether there was any negligence of the defendants, upon the principles we have stated. The decision of the case by nonsuit upon the second issue was consequently premature.

We will not undertake to decide whether the evidence, taken in the most favorable light for the plaintiff, makes out a conclusive case of negligence on his part, which proximately caused the injury, but we will leave that question open for discussion if the case should again come before us. The evidence may be materially changed at the next trial. It is undoubtedly true as argued by counsel, that if a servant is ordered to do certain work, and he attempts to do it in a way that is unsafe, when there is a perfectly safe way to do it, or if he (135) does the work with a machine or implement which, in the language of the present *Chief Justice,* "is so grossly or clearly defective that the employee must know of the extra risk," he is deemed "to have voluntarily and knowingly assumed the risk," and if he is injured he cannot complain of his employer. *Lloyd v. Hanes,* 126 N. C., 359; *Whitson v. Wrenn,* 134 N. C., 86. The negligence of the servant which defeats his recovery depends not only upon the danger, but upon its obviousness. He is not permitted to do that which will necessarily result in injury to himself, and then hold his master responsible, because in such a case his act is willful and therefore voluntary, and no man can by his voluntary and wrongful act impose liability upon another. *Volenti non fit injuria.* What we have said is subject, of course, to the full operation of the act of 1897. If Oliver was an independent contractor, the act does not apply; if he was not, but was an agent or servant of the defendant company, it does apply. In the latter case, the question of contributory negligence will arise. It will also arise in the former case if the jury should find that Oliver was an independent contractor, but that the injury was not due to the negligence of a fellow-servant. If, however, they should find that it was caused by the negligent act of a fellow-servant it would not be necessary to consider the plaintiff's negligence. There was error in nonsuiting the plaintiff.

New trial.

Cited: Biles v. R. R., 143 N. C., 87; *Smith v. R. R.,* 151 N. C., 481; *Horne v. R. R.,* 170 N. C., 659.

(136)

QUANTZ v. RAILROAD.

(Filed 6 December, 1904.)

Negligence—Licenses—Railroads.

Where the public is licensed to pass through a railway station the railroad company is not liable for injuries sustained by a licensee who falls through a door located twelve feet from the passageway.

ACTION by S. O. Quantz against the Southern Railway Company, heard by *W. R. Allen, J.*, and a jury, at October Term, 1904, of MECKLENBURG.

The plaintiff reached Charlotte on defendant's train on the night of 10 May, 1904, at about 10 o'clock. The train stopped at the depot, the coach upon which defendant was being some distance below the end of the depot building. He went across the depot to a restaurant on Fourth Street, not on defendant's right of way. He drank some coffee or milk and, desiring to see a policeman, went from the restaurant towards Trade Street, which runs the other side of the depot and parallel with Fourth Street. In going towards Trade Street he passed along an open space on the defendant's right of way and just behind the depot building. This open space was unobstructed and was, with the permission of the defendant, used by the public in passing from Fourth Street to Trade Street. About halfway from Fourth Street the depot building becomes wider, including the office, waiting-room, dining-room, etc. At this point there is an open way between the telegraph office and the baggage-room. There is near this point, but not in the open way, a stairway. When plaintiff reached this point he turned to go through the depot building to find the policeman. He saw through a window a light burning; saw
(137) the stairway going up in the inside; he crossed the curbing and went to the door at the head of the stairway, being about twelve feet from the edge of the space. Finding the lattice door open, the plaintiff went in, and fell, whereby he was injured. Standing at the back of the depot building and looking through a window a person could see the stairway on the inside of the building. A map accompanied the case on appeal, showing the depot and surroundings. The defendant at the close of the testimony moved the court to dismiss the action as upon a nonsuit. Motion denied. Defendant excepted. The only portion of the charge to which there was exception is as follows: "If you find from the evidence in this case that that street or passway was used by the public; that they were in the habit of using it, or that persons who wished to become passengers upon the trains of the defendant were in the habit of using that passageway, then it became the duty of the defendant not to so construct its building, or not to leave its building in such condition

that there would be either on or near the passway a dangerous place, and not to construct it in such condition that one would be misled by the light in the building and induced to enter a dangerous place. And if you find from the evidence that the defendant has been negligent in that respect, has failed in the performance of its duty, and that that was the cause of the injury to the plaintiff, then you would answer the first issue 'Yes'; that the plaintiff was injured by the negligence of the defendant." From a judgment for the plaintiff, defendant appealed.

C. D. Bennett for plaintiff.
W. B. Rodman and G. F. Bason for defendant.

CONNOR, J., after stating the case: His Honor told the jury that the plaintiff had, at the time of his injury, ceased to be a passenger; in this we concur. We also concur in the opinion that he was not a trespasser. He was a licensee. His relation to the defendant, (138) growing out of the contract of carriage or the assumption of a public duty by the defendant, was at an end. The case, thus simplified, presents the question as to the measure of duty which the defendant owed the plaintiff as a licensee. The plaintiff's right to recover is dependent upon sustaining the proposition that the defendant owed to him a duty, and that there was a breech thereof which was the proximate cause of the injury. *Emry v. Navigation Co.*, 111 N. C., 94; 17 L. R. A., 699. It is conceded that the defendant did not owe to the plaintiff that high degree of care due a passenger. It is equally clear that it owed to him a higher degree of care than was due a trespasser. The authorities make a distinction between the degree of care due a mere licensee, one who by permission enters upon the premises of another, and one who does so by invitation. It is not always easy to say upon which side of this line a particular case falls. Assuming that the license given to the public to use this way to pass from Fourth to Trade Street amounted to implied invitation to the plaintiff to enter upon and pass over it, we next inquire the extent of the license. It was to pass from Fourth to Trade Street. The duty, therefore, of the defendant was to keep the way free from dangerous obstruction or pitfalls, either on or so near to the way that a person exercising ordinary care would not be injured. The plaintiff went over the way for his own purpose, having no connection whatever with the defendant's duty to the public as a common carrier. There is no suggestion that there was any obstruction to prevent the plaintiff using the way to the full extent of his license. He went twelve feet out of his way to go to the front of the depot to look for a policeman for the purpose of ascertaining the whereabouts of a person whom he wished to find. There is no suggestion that the open door was dangerously near to the

(139) open space. Certainly, the defendant was not required to so construct its depot, before the license was given, as to enable licensees to walk around, about, and enter it at all times by day or night for purposes entirely disconnected with the use for which it was built. The defendant owed no duty to the plaintiff to keep all of the doors of the depot building closed at night. No reasonable person would apprehend that in using the open space for the purpose of passing from one street to another a person would go twelve feet out of the way and step into an open door. We can see no breach of duty to the plaintiff. We have discussed the case upon the assumption that the plaintiff was an invited licensee. It is by no means clear that the license was more than permissive, in which case a lower degree of care is imposed.

In any view of the testimony the defendant was not liable. *Sweeney v. R. R.*, 10 Allen, 388; 87 Am. Dec., 644; *Redigon v. R. R.*, 155 Mass., 44; 14 L. R. A., 276; 31 Am. St., 520. "One who attempts to cross a platform at a railroad station for his own convenience as a short cut from one street to another is a mere licensee and cannot recover for an injury received by falling into a hole in such platform, although the railroad company had passively permitted the plaintiff and the public generally to use it." Elliott on Railroads, sec. 1251.

We are of the opinion that the motion for nonsuit should have been allowed.

Error.

Cited: Coleman v. R. R., 138 N. C., 363; *Peterson v. R. R.*, 143 N. C., 266; *Muse v. R. R.*, 149 N. C., 448; *Finch v. R. R.*, 151 N. C., 106; *Munroe v. R. R., ib.*, 376; *Ferrell v. R. R.*, 172 N. C., 689; *Money v. Hotel Co.*, 174 N. C., 512.

(140)

BLALOCK v. CLARK.

(Filed 6 December, 1904.)

1. Sales—Evidence—Telegraphs—Options.

In an action for the nondelivery of cotton, an option for the sale of which plaintiff had accepted by telegram, it was competent to prove the telegram by the testimony of the operator at the sending office, who, though not the operator who sent it, testified that he brought it from the file in his office.

2. Sales—Evidence.

In an action for the nondelivery of cotton, evidence that the plaintiff had to go on the market and buy cotton at an advance by reason of defendant's failure to comply with his contract was competent.

3. Evidence—Sales—Harmless Error—Issues.

The error, if any, in admitting in an action for nondelivery of cotton evidence that the plaintiff had to buy cotton on the market at an advance, was harmless, when the evidence was ruled out on the same issue of damages.

4. Sales—Evidence—Payments.

In an action for the nondelivery of cotton it was competent for plaintiff to state that when he went to get it he was prepared to pay for it.

5. Sales—Customs and Usages—Payments.

Where a contract for the sale of cotton was silent as to the mode of payment, it was competent to prove a general custom among cotton dealers as to the method of payment.

6. Nonsuit—Waiver—Trial.

A motion for a nonsuit at the close of plaintiff's evidence is waived if not renewed at the close of all the evidence.

7. Sales—Payment—Usages and Customs.

Before the plaintiff in an action for the nondelivery of cotton can recover he must show that when he demanded it he was able to pay for it in the method fixed by the custom among cotton dealers.

8. Sales—Questions for Jury.

Where a contract for the sale of cotton is silent as to time of delivery, the buyer has a reasonable time within which to demand it, and what is a reasonable time is for the jury.

9. Sales—Tender.

A refusal of a seller to deliver the article sold because the price has gone up, and on account of the buyer's delay, renders it unnecessary for the buyer to tender the price to maintain an action for nondelivery.

ACTION by U. B. Blalock & Co. against W. D. Clark & Bros., heard by *O. H. Allen, J.*, and a jury, at March Term, 1904, of STANLY. From a judgment for the plaintiff, the defendant appealed.

R. E. Austin, R. L. Smith, and Adams, Jerome & Armfield for plaintiff.

Shepherd & Shepherd, R. T. Poole, and J. A. Spence for defendant.

CLARK, C. J. This case was before the Court, 133 N. C., 306, where the facts are fully stated.

The first exception, to the admission of the telegram, is without merit. It was proven by the operator at the sending office, who, though he was not the operator who sent it, testified that he brought it from the file in his office. Besides, the defendant in his testimony admits its receipt by him. The second exception, to the evidence of plaintiff that he had to go on the market to buy other cotton, at an advance, by reason of defendant's failure to comply with his contract, was competent. (142) Even if error, it was harmless, as no price was given, and the court subsequently ruled it out upon the issue as to damages, to which

alone it was applicable. Nor was it error (third exception) for plaintiff to state that when he went to get the cotton he was prepared to pay for it. The defendant could have cross-examined him upon that point. The contract being silent as to the mode of paying for the cotton, it was competent for plaintiff to show a general commercial custom and usage among cotton dealers as to the method of paying for cotton in large lots. *Simpson v. Pegram,* 112 N. C., 541; *Brown v. Atkinson,* 91 N. C., 396; *Norris v. Fowler,* 87 N. C., 9; *Bank v. Williams,* 79 N. C., 129; *Moore v. Eason,* 33 N. C., 568. The defendant himself testified that he "never knew a large lot sold for spot cash; it is *always* sold for check or shipped with bill of lading attached to sight draft." The plaintiff testified that this was the well-established custom. To same purport is the testimony of McAuly and Efird. Exceptions 4, 6, 8, and 12, addressed to the competency of such evidence, are without merit, as is exception 5 to the testimony of plaintiff that he had made arrangements to pay in the customary mode. Nor was it error (exception 7) to admit testimony that defendant sold the cotton to McAuly. The defendant in his testimony stated the same fact.

The motion to nonsuit at the close of plaintiff's evidence was waived by not renewing it at the close of all the evidence (*Jones v. Warren,* 134 N. C., 392, and cases there cited); besides, the same point was presented and held adversely to defendant in the former appeal. There were several prayers for special instruction. The first eight were refused, but require no discussion, for so far as applicable to this case they were disposed of by the former decision.

Prayers 9 and 10, that as to conditions precedent the act of God would not excuse, the court charged were correct propositions of law,
(143) but properly held that they had no application to this case. The eleventh prayer was, "That before the plaintiff would be entitled to recover he must satisfy the jury by a preponderance of evidence that at the time he demanded the cotton he had then and there the money ready to pay for the cotton," which the court gave, but added, "or was able, ready, and willing to pay for the cotton according to the custom of the community in buying and paying for cotton in large lots of 160 bales or more, by giving valid checks for the same or by shipping with bill of lading attached to sight draft, if the jury shall find first by a preponderance of the evidence that there was a well-known and established custom in that community to pay for cotton in such lots in that way, and if the jury shall further find by a preponderance of the evidence that there was nothing said in the contract, or at the time of making it, about how the cotton should be paid for." The court further charged, after stating what is necessary to make a contract, "If you answer the first issue 'Yes,' you will then consider the second issue. In

contracts for products like cotton time is important in compliance with the contract, but the law gives the plaintiff a reasonable time to comply in a case like the one on trial; but it gives him a reasonable time only, and no more, and the jury is to be the judge, from all the circumstances, as to what is a reasonable time." So far there was no exception to the modification. ("If the contract was made, and the plaintiff came within a reasonable time, and was then ready and able to pay cash, or if not ready to pay cash, and if the jury find by a preponderance of the evidence that there was a well-known and established custom among persons in that section, embracing Troy, who bought and sold cotton in large lots, to pay in valid checks, or to ship with bill of lading attached to sight draft, and the plaintiff was ready to comply with this custom, and the defendant did not demand the cash, but refused to deliver the cotton because the price had advanced and because of delay, then (144) he would be entitled to damages, if the demand for the cotton was made within a reasonable time after 8 February.") That part of the above charge which is in parentheses was excepted to by the defendant. The court further charged, "If when the plaintiff went after the cotton on 12 February it was raining, and if the jury find from a greater weight of evidence that the cotton was out in the open and had to be weighed, and that the rain was his excuse for not complying with the contract on that day, that should be considered by you in determining whether he demanded the cotton in a reasonable time on 15 February. It is hard to give a rule as to what is a reasonable time. If a man is careless or negligent in complying, or offering to comply, said offer would not be in a reasonable time. If he goes and offers to comply as soon as a prudent man would under the circumstances, it is within a reasonable time," and plaintiff excepted, but we see no prejudice accruing to defendant from the two additions above excepted to.

The defendant in his testimony stated: "I refused to deliver cotton on the 15th *because cotton had gone up* and on account of plaintiff's delay." If so, there was no necessity to tender the money, and even if the custom to pay by check with bill of lading attached had not been shown, it was immaterial. This was held in the former appeal, 133 N. C., 308, citing *Smith v. Loan Assn.*, 119 N. C., 257, and *Grandy v. Small,* 50 N. C., 50. As to the other ground of reasonable delay, that was a matter for the jury, and upon proper instructions they found the issue in favor of plaintiff. *Blalock v. Clark,* 133 N. C., 308.

No error.

Cited: Claus v. Lee, 140 N. C., 554; *Medicine Co. v. Davenport,* 163 N. C., 300; *S. v. Lane,* 166 N. C., 336; *Neal v. Ferry Co., ib.,* 565; *Hay v. Ins. Co.,* 167 N. C., 85; *Holden v. Royall,* 169 N. C., 678.

(145)

BOND v. WILSON.

(Filed 6 December, 1904.)

References—Executions.

Where a judgment is rendered in a former trial of a case, and an execution issued thereon setting forth the judgment in full, the execution should not be withheld and a referee appointed to ascertain the amount due under such judgment, as such amount is a question of mathematical calculation.

ACTION by L. N. Bond and others against J. W. Wilson and another, heard by *Neal, J.*, and a jury, at October Term, 1904, of BURKE. From a judgment for the defendants, the plaintiffs appealed.

John T. Perkins and A. C. Avery for plaintiffs.
Avery & Ervin for defendants.

MONTGOMERY, J. This case is an old acquaintance. It has been several times before the Court. The action was commenced to recover the amount alleged to be due on two promissory notes, one for $2,000 and the other for $3,000, executed by the defendant to the plaintiffs. The defendant pleaded payment and the statute of limitations. The latter plea was found against him, and judgment being rendered for the plaintiffs, he appealed to this Court. A new trial was granted because of a failure of the judge to give certain instructions to the jury requested by the defendant on the question of the statute of limitations. *Bond v. Wilson,* 120 N. C., 387. On the second trial the defendant claimed several credits to have been made by him on the notes, but which were not indorsed upon the notes themselves, one of the credits being for the amount of $800 paid for a mill-wheel at the request of the agent
(146) of the plaintiffs, and the other was for the payment of $240 freight charges on the wheel. The jury returned a verdict to the effect that the notes had been paid in part, that the balance was not barred by the statute of limitations, and in answer to the second issue, "What credit is defendant entitled to on said notes or either of them?" they said, "All credits entered upon notes and all credits claimed by the defendant after 1 January, 1879; also, credit of $1,040 for mill-wheel, credited 1 January, 1876." The court in rendering judgment upon the verdict, after reciting the issues and answers of the jury thereto, further said:

"And the court having submitted to the jury all of the credits pleaded by the defendant prior to 1 January, 1879, as claimed by him upon trial, also all credits appearing upon the notes, together with the following credits, to wit, 5 April, 1879, $100; 5 September, 1879, $200; 4 July,

1879, $100; 10 May, 1880, $200; 1 September, 1880, $200; and having instructed the jury not to consider any other credits than those submitted, and also having instructed the jury that the credit of $600, growing out of the lot transaction, as pleaded by the defendant in his answer, was barred by the statute of limitations:

"Now, therefore, it is ordered and adjudged by the court that the plaintiff recover of the defendant such sum as may be found to be due by calculation on the notes sued upon, to wit: One note of $3,000, dated 1 January, 1875, bearing interest from date at 8 per cent, payable semiannually; and one note of $2,000, dated 1 February, 1875, bearing interest from date at 8 per cent, payable semiannually, subject to and reduced by the following credits, to wit, 1 January, 1876, $1,040; 1 January, 1877, $480; 1 January, 1879, by interest in full due on these notes to said date; 5 April, 1879, $100; 4 July, 1879, $100; 5 September, 1879, $200; 10 May, 1880, $200; 1 September, 1880, $200; 1 Sep- (147) tember, 1881, $500; 26 November, 1883, $2,500; 3 June, 1884, $509.04; 12 August, 1884, $154.90; 11 September, 1890, $310.03; 7 August, 1893, $258.21.

"That in ascertaining the amount due under this judgment, interest is to be computed at 8 per cent, payable semiannually. It is further adjudged by the court that the defendant pay the cost of this action to be taxed by the clerk."

Both parties appealed from the judgment, the plaintiff on the alleged ground and exception that there was no evidence to sustain the credit of $1,040 for the mill-wheel and because his Honor allowed the jury to return to their room and find the date of the credit of $1,040, they having failed to fix that date when they first returned the verdict; and the defendant for alleged misdirection by his Honor on the question of the statute of limitations. On the hearing in this Court it was declared in both appeals that there was no error in the conducting of the trial below. *Bond v. Wilson,* 131 N. C., 505. A rehearing of the case was had upon the petition of the plaintiff. The petition was dismissed, the Court being still of the opinion that there was more than a scintilla of evidence to support the finding of the jury as to the credit of $1,040. We could not pass on the weight of the evidence; it appeared to us to be very slight, and that the evidence offered on the other side was strong, but that was not a matter for us. It was for the jury. Upon the judgment the Clerk of the Superior Court of Burke issued to the Sheriff of McDowell County an execution against the defendant, in which execution the debt was described precisely and exactly as it was set out and described in the judgment, with each and every credit as to date and amounts particularly set out just as they were in the judgment. Upon a motion made by the defendant to recall the execution, the clerk of the court refused

to interfere, and denied the motion on the ground that the execution was issued in strict conformity to the judgment. The defendant
(148) appealed to the judge of the district. At the hearing of the matter C. D. Bennett, Esq., was made a referee "to calculate the amounts due on the notes and allow the credits according to the judgment." In that order of reference was included the following sentence: "The said referee to hear no evidence of any kind, but simply to calculate the amount due the plaintiffs according to said judgment." The referee reported, amongst other things, that "the entry 1 January, 1879, 'by interest in full due on these notes to said date,' was intended to and does cover the interest up to that date, without taking into consideration the $1,040 mill-wheel item directed by the judgment to be credited as of 1 January, 1876. This your referee finds from an inspection of the whole judgment." The referee further in his calculations of the amount due on the judgment does not credit the amount $1,040 as of date 1 January, 1876, as directed by the judgment, but credited on 1 January, 1879, with interest on the same, viz., $187.20 from 1 January, 1876. Upon the return of the report of the referee the plaintiff filed the following exceptions:

1. The judgment or order of *Judge W. H. Neal* directs the referee to ascertain the amount due on account of the judgment in this case by making the calculation of the interest and principal due thereon according to the provisions of the judgment in the case, and the said referee has allowed all the credits and entries on the two notes sued on to go in payment of the interest to 1 January, 1879, and instead of crediting the note sued on with the $1,040 on account of the mill-wheel on 1 January, 1876, as directed in the judgment, the referee calculated interest on the $1,040 from 1 January, 1876, until 1 January, 1879, and deducted the amount of $1,040 and interest thereon from the sum of $5,000 on 1 Jan-
(149) uary, 1879. The difference between the two methods of calculation amounts to more than $2,000 at the present time.

2. The plaintiffs except to the report of the referee, C. D. Bennett, for that he fails to enter the credit of $1,040 as of date 1 January, 1876, as directed by the order referring it and, as the plaintiffs contend, the judgment and the law direct.

Upon the report and exceptions, the exceptions were overruled and the report of the referee in all things affirmed; and a judgment rendered that the execution be set aside, that the amount due on the judgment was $2,354.32 and that execution might issue for the same. Costs were allowed against the plaintiffs, and they excepted to the judgment. The exceptions must be sustained. The judgment upon which the execution was issued was clear in its terms. The original notes sued upon were mentioned and described as to amounts, date of execution, maturity, rate

of interest, and time of its payment. The credits on the note were particularly set out, both as to amounts and dates. The execution which was issued upon the judgment, as we have said, was a recital of the judgment in every particular, and the amount due on the execution is a simple mathematical calculation. There was no necessity for the intervention of a referee, and he did not follow the judgment as to the credit of $1,040. As we have already said, the jury in allowing that credit when they brought in their verdict had failed to fix the date when it should have been credited on the notes.

They were instructed to return to their room and find the date. They fixed it as of 1 January, 1876. The plaintiff excepted to that procedure and appealed to this Court, but we held that it was a proper one.

His honor's order and judgment must be

Reversed.

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

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(150)

LASSITER v. RAILROAD.

(Filed 6 December, 1904.)

Negligence—Contributory Negligence—Questions for Jury—Laws (Private) 1897, Ch. 56—Last Clear Chance.

The question whether, notwithstanding the contributory negligence of an employee, in an action for his death, the defendant had the last clear chance to avoid the injury, and would have done so by the exercise of proper care, is not taken from the jury because of a rule of the company, in a book for which the employee had receipted, providing that "when a train is being pushed by an engine (except when shifting and making up trains in yards), a flagman must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger."

ACTION by Albert Lassiter against the Raleigh and Gaston Railroad Company and another, heard by *Brown, J.*, at April Term, 1904, of WAKE. From a judgment for the plaintiff, the defendant appealed.

Battle & Mordecai and N. Y. Gulley for plaintiff.
Day & Bell, T. B. Womack, and Murray Allen for defendant.

CLARK, C. J. This case was before this Court, 133 N. C., 244. The defendant appellant says in its brief that "the facts developed by the plaintiff's testimony on the second trial do not differ materially from those on the former trial," but adds that the defendant had put in evi-

dence Rule 404 of the Rule Book (for which book plaintiff's intestate had receipted), which reads as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger."

(151) The first exception for refusal to dismiss at the close of the plaintiff's testimony was waived by the introduction of evidence by the defendant. *Prevatt v. Harrelson,* 132 N. C., 251; *Jones v. Warren,* 134 N. C., 392, and, besides, is settled by the former decision in this case. The second exception is to the admission of evidence that greater care must be exercised in moving cars in a large town than in a small one. This is so held, *Arrowood v. R. R.,* 126 N. C., 631, and even if it had been error it would be harmless error. This is not a yard off to one side of the town, but it was a side-track in the main street of the town, and the town ordinance forbidding a higher rate of speed than six or eight miles was approved. The third exception for refusal to nonsuit at the close of all the evidence was properly refused upon the former ruling in this case. Any conflict created by the defendant's evidence was a matter for the jury. The fourth exception merely raised the same point by asking the court to instruct the jury that upon the whole evidence the plaintiff could not recover. The fifth exception is without merit, for the court in its charge did instruct the jury, as asked, that the plaintiff's intestate in any aspect of the evidence was guilty of contributory negligence, and the jury so found. Whether this did not conflict with what was said in *Smith v. R. R.,* 132 N. C., 824, is not before us on this appeal by the defendant.

Exceptions 6, 7, 8, 9, 13, and 16 depend upon the effect of Rule 404 and present really the only question in this appeal, the others having been decided on the former appeal. This rule can affect the right to recover only upon the assumption that it was a contract by the deceased, by implication, that "when shifting and making up trains in yards, a flagman need not be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger."

(152) If the intestate had entered into an express stipulation to that effect it would have been void. Private Laws 1897, ch. 56; *Coley v. R. R.,* 128 N. C., 537; 57 L. R. A., 817; *Mott v. R. R.,* 131 N. C., 234; *Sigman v. R. R.,* 135 N. C., 184. Whether or not, notwithstanding the contributory negligence of the plaintiff's intestate, the defendant had the "last clear chance" to avoid the injury, and would have done so by the exercise of proper care, was a question of fact properly submitted to the jury. The plaintiff was not, as defendant contends, barred of the right to have that question submitted to the jury by reason of Rule 404.

Exceptions 10, 11, 12, 14, 15, 17, and 20 were settled by the former decision of this case. Exception 18 is to the usual charge as to the "last clear chance," which was given in accordance with what was held in the former appeal, 133 N. C., near bottom of page 247. Exception 21 is to charge in favor of the defendant.

The appeal substantially presents the proposition that the court should have told the jury, as a proposition of law, that it was not negligence in the defendant, as to an employee, not to have some one stationed in a conspicuous place on the front of the leading car to immediately signal the engineer in case of danger, when shifting cars backwards on the side-track in Henderson. The court submitted to the jury the question whether there was negligence of the defendant in that respect upon the facts of this case, and whether, notwithstanding the contributory negligence of the plaintiff's intestate, such negligence of the defendant (if the jury found it to be negligence), was the proximate cause of the death of the plaintiff's intestate. In this there was no error of which the defendant could complain. *Smith v. R. R.*, 132 N. C., 824. A case exactly in point upon almost identical facts is *R. R. v. Boisseau,* 32 Canada, 424.

No error.

(153)

COBB v. CLEGG.

(Filed 6 December, 1904.)

1. Injunctions—Restraining Order—The Code, Sec. 338.

In an action to restrain the violation of an alleged covenant as to the use of a room in a hotel, there being a material conflict in the pleadings, the injunction will be continued to the hearing on the merits.

2. Pleadings—Complaint—Answer.

An answer must contain a general or specific denial of each material allegation of the complaint, or of any knowledge or information thereof sufficient to form a belief.

ACTION by Marion Cobb and another against W. F. Clegg, heard by *Bryan, J.,* at chambers, at Greensboro, N. C., on 19 September, 1904.

The plaintiffs brought this action to obtain an injunction restraining the defendant from using a room in the Hotel Guilford, which is situated in the city of Greensboro, as a café, restaurant, or eating place, contrary to the covenant contained in the lease of the said room to the defendant's assignor. They allege that on or about 11 April, 1904, they leased the room verbally to one Sam Chouris for one year, to be used by him as a fruit, candy, and ice-cream kitchen, and for no other purpose,

and that it was specially agreed at the time that the plaintiffs did not lease it for the purpose of being used as a café or restaurant, because of the offensive odors caused by such use, which were disagreeable to the guests of the hotel, it having once been used for that purpose and found to be objectionable, and the plaintiffs afterwards and before the lease to Sam Chouris having refused to lease it for use as a restaurant or café, though a much larger rent was offered than that proposed to be paid by Chouris.

It is further alleged that Chouris agreed to accept the lease upon
(154) the terms and conditions just stated, and expressly covenanted that he would not use the room as a restaurant or café, but as a fruit, ice-cream, and candy kitchen, which should be so conducted as not to emit therefrom any offensive odors and thereby render it objectionable to the hotel guests. That subsequently, on 16 April, 1904, Chouris requested the plaintiffs to give him a written memorandum of the lease, stating merely its duration and the amount of rent to be paid, and giving as his reason for wanting this memorandum that there had been frequent changes in the management of the hotel and that he would need it for his protection; that plaintiffs, for his accommodation, complied with the request, the plaintiff dictating a letter for Chouris, which was afterwards written and signed by the plaintiffs and accepted by Chouris in writing over his signature. The letter described the premises leased with some particularity, and also certain changes to be made by Chouris at his own expense in the arrangement of the room and the adjoining hall, but did not contain any reference to the alleged stipulation that it should not be used as a restaurant or café. It is then charged that the defendant, who is a business rival of the plaintiffs, well knowing, or having the means of knowledge, that said agreement had been made, and refusing to investigate the matter, in July, 1904, bought the lease from Sam Chouris, who had leased the room only for a candy kitchen, or from his brother John Chouris, to whom a pretended sale had been made, and announced his purpose to establish a restaurant and café at the place, whereupon the plaintiffs immediately notified him of said covenant of Sam Chouris not to use it for such a purpose, and insisted that the assignment to him was void and that any use of the room as an eating-

place was clearly prohibited by the original lease, and he was
(155) forbidden to devote it to any such purpose, but that defendant, notwithstanding the notice and protest from plaintiffs, began at once to make the necessary changes in the room to adopt it to said use as a restaurant, furnished and equipped it for that purpose, and has since conducted a restaurant in it to the great annoyance and irreparable damage of the plaintiffs. It is alleged in the second, third, and fourth sections of the complaint that the agreement not to use the room as a restaurant, while contemporaneous with the making of the lease, was

wholly independent of and collateral thereto, and that, even if in any sense an integral part of the contract, it was not intended to be inserted in the written memorandum or to be reduced to writing at all, but to remain in parol and in that way to be a binding covenant or stipulation between the parties to the lease. Each of those sections of the complaint is denied by the defendant as follows: "The defendant has not sufficient information to form a belief as to the allegation contained in (said) paragraph of the complaint, and therefore denies the same to be true." There were other allegations made in the complaint and denied in the answer, but it is not necessary, in the view of the case taken by the Court, to set them fourth. The defendant averred in his answer that he bought the lease from John Chouris, assignee of Sam Chouris, for full value and without any notice of the alleged covenant, and that he has conducted a restaurant at the place in an orderly and cleanly manner and without any annoyance to the plaintiff's guests. Affidavits were filed by the respective parties in support of their allegations, but we need do no more than state that a careful examination tends to show that, as the case now stands, the proof preponderates decidedly in favor of plaintiff's contention that there was a covenant between Chouris and themselves to the effect stated above. Upon the complaint filed *Judge Shaw* granted an order to the defendant to show cause why an injunction should not issue as prayed for, and in the meantime restrained the de- (156) fendant from conducting a restaurant in the room contrary to the alleged covenant, and at the hearing of the motion for an injunction before *Judge Bryan,* upon the return of the order to show cause, his Honor continued the injunction to the hearing, whereupon the defendant, having duly excepted, appealed to this Court.

Fuller & Fuller and King & Kimball for plaintiffs.

W. P. Bynum, Jr., Scales, Taylor & Scales, and G. S. Ferguson, Jr., for defendant.

WALKER, J., after stating the case: The plaintiffs contend that the contract or lease was not one required to be in writing, and that, as the entire agreement was not reduced to writing and not intended to be, but a distinct and independent part of it remained in parol, the plaintiffs are not forbidden to show the existence of the unwritten stipulation by oral evidence. They admit that when parties reduce their agreement to writing it is a rule of evidence that parol testimony is not admissible to contradict, add to, or vary it; for although there may be no law requiring the particular agreement to be in writing, yet the written memorial is regarded as the surest evidence. But they insist that this case is not within either the letter or the spirit of the rule, as the writing is not a

memorial of the whole agreement, which was severable into parts, one of the parts only having been committed to writing and the other stipulations and terms of the agreement having been left open to parol proof, and that in such a case the rule is that the stipulations may be proved orally, unless the contract is one required to be in writing. They have cited numerous authorities to sustain their contention, and among them the following: *Twidy v. Saunderson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 360; *Johnson v. McRary,* 50 N. C., 369; *Kerchner v. Mc-*
(157) *Rae,* 80 N. C., 219. Counsel also insisted that the rule they rely on applies even when the contract is an entire one, for which position they cited *Braswell v. Pope,* 82 N. C., 57; *Ray v. Blackwell,* 94 N. C., 13, and *Terry v. R. R.,* 91 N. C., 236, in the last of which cases the Court cites *Hawkins v. Lea,* 8 Lea (Tenn.), 42, for the following proposition, which is therein stated: "When it is not intended that a written contract should state the whole agreement between the parties thereto, evidence of an independent verbal agreement is admissible." In the last edition of Clark on Contracts, which was recently published, the principle is thus stated: "Where a contract does not fall within the statute the parties may at their option put their agreement in writing or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitute one entire contract." Clark on Contracts (2 Ed.), p. 85.

The defendant's counsel, on the contrary, argued that the above stated rule, upon which plaintiff's rely, does not apply to the facts of this case, and that parol evidence is not competent, as its effect will be, not to prove an independent part of the agreement which was not reduced to writing, but to vary and contradict the contract as written by the parties, and which the law presumes contains all the provisions by which they intended to be bound. In support of their view they cited *Parker v. Morrill,* 98 N. C., 232; *Meekins v. Newberry,* 101 N. C., 17; *Bank v. McElwee,* 104 N. C., 305, and especially relied on *Moffitt v. Maness,* 102 N. C., 457, in which the Court, through *Shepherd, J.,* admonishes us that the rule against the admissibility of parol testimony to vary the terms of a written instrument has perhaps been relaxed too much,
(158) and that the farthest limit has been reached in admitting such testimony, beyond which it will not be safe to go. The Court sounds the alarm and warns us against the dangers ahead. It may be better, we admit to trust to the writing—the memorial selected by the parties for preserving the integrity of their treaty—than to confide in human memory for the exact reproduction of the facts, for, says *Taylor, J.,* "Time wears away the distinct image and clear impression of the

fact, and leaves in mind uncertain opinions, imperfect notions, and vague surmises." *Smith v. Williams,* 5 N. C., 426, 4 Am. Dec., 555. But whether this salutary principle does apply and should control in this case is a question which must be left open for future adjudication. We have stated the contentions of the respective parties for the purpose of showing the impracticability of deciding upon the ultimate merits of the controversy in this the preliminary stage of the case. This Court should, when feasible, always avoid expressing an opinion which will anticipate the decision of the case at the final hearing, and when the facts have not been found by the tribunal appointed by law to pass upon them. The practice in this respect seems to have been long since well settled in applications for injunctions. It was based at first upon the distinction between a common and a special injunction. The former was granted in aid of or as secondary to another equity, as in the case of an injunction to restrain proceedings at law in order to protect and enforce an equity which could not be pleaded, and is issued, of course, upon the coming in of the bill, without notice. As soon as the defendant answered he could move to dissolve the injunction, and it was then for the court, in the exercise of its sound discretion, to say whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction should be dissolved or continued to the hearing. If the facts constituting the equity were fully and fairly denied, the injunction was dissolved unless there was some special reason for continuing it. Not so with a special injunction, which is granted (159) for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case.

The principles we have attempted to state are, we think, well supported by the authorities upon this subject. 1 High on Injunctions (3 Ed.), sec. 6; *Jarman v. Saunders,* 64 N. C., 367; *Heilig v. Stokes,* 63 N. C., 612; *Blackwell v. McElwee,* 94 N. C., 425; *Purnell v. Daniel,* 43 N. C., 9; Bispham Eq. (6 Ed.), sec. 405. The cases of *Marshall v. Comrs.,* 89 N. C., 103; *Lowe v. Comrs.,* 70 N. C., 532, and *Capehart v. Mhoon,* 45 N. C., 30, would seem to be directly in point. In the first of these cases the Court says: "The injunctive relief sought in this action is not
(160) merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon a preliminary hearing upon the pleading and *ex parte* affidavits; but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action." *Mr. Justice Bynum,* for the Court, in the second case cited, says: "The injunctive relief sought in this action is not auxiliary to another and main relief, but is the main relief itself and the object of the action, and therefore the dissolution of the injunction would be equivalent to a dismissal of the action. In such cases, where a reasonable doubt exists in the mind of the Court whether the equity of the complaint is sufficiently negatived by the answer, the Court will not dissolve the injunction, but continue it to the hearing. Much must depend upon the sound discretion of the court to whom the question of dissolution is referred." While the principle as stated in the last quotation is in itself sufficient to sustain our decision, we think the able and learned justice had in mind the rule of practice in the case of a common injunction, which was dissolved upon the answer, unless the equity was confessed or the answer was evasive or the equity was not sufficiently denied. *Capehart v. Mhoon, supra.* This will appear clearly from the following language of the Court, speaking by *Nash, J.,* in *Troy v. Norment,* 55 N. C., 318: "In applications for special injunctions (and this is such a one) the bill is read as an affidavit to contradict the answer; and where they are in conflict, and the injury to the plaintiff will be irreparable if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing, to enable the parties to support by proofs
(161) their respective allegations. Justice demands this course. When there is nothing before the court but oath against oath, how can the chancellor's conscience be satisfactorily enlightened?" It will also appear by what is said by *Pearson, J.,* for the Court in *Purnell v. Daniel,* 43

N. C., 9: "This is not the case of an ordinary or common injunction in aid of and secondary to another equity; but it is the *point in the cause*—it is to prevent irreparable injury (as is alleged), and to dissolve the injunction decides the case; or, to dissolve it allows the act to be done. By way of illustration, take the case of an injunction to stay waste in cutting down ornamental or shade trees; if the injunction be dissolved on bill and answer, and the trees are cut down, the damage is done; for the trees cannot be made to grow again. To dissolve this injunction before hearing the cause on proof, the defendant must show that the plaintiff has no case fit to be heard, and if, from the answer, it appear that there is any question of doubt on a matter that should be further inquired into, the injunction will be continued until the hearing." In *Capehart v. Mhoon, supra, Pearson, J.,* states the difference between common and special injunctions with great clearness.

The injunction sought in this case is special, and we must be governed by the established rule applicable to that class of injunction in deciding the question now presented. The Code provides expressly for such an injunction. The Code, sec. 338 (2). *Judge Bryan* has merely granted a provisional injunction to the hearing, so that the controverted matters may then be settled by a jury and the plaintiff's right to a perpetual injunction be thus determined upon the merits. As said by *Justice Bynum* in *Lowe v. Comrs., supra:* "The novel and important questions raised by the pleadings and ably discussed before us do not come up for decision now." We decide nothing upon the merits, but simply hold that the facts should be found in the ordinary way, (162) so that we may consider and decide the case, if it again comes before us, on all of the facts as ascertained, and not merely upon facts now disputed, which may never be found by the jury. Before taking leave of the case it may be well to state that the answer does not contain any denial of the second, third, and fourth sections of the complaint, which comprise the main allegations of the plaintiff. The Code requires that the answer shall contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Instead of such a denial as is required by The Code, the defendant simply disavows any information of the facts alleged. This, of course, is not a denial even on information, nor is it in any respect a compliance with The Code. *Durden v. Simmons,* 84 N. C., 555; *Fagg v. Loan Assn.,* 113 N. C., 364; *Bank v. Charlotte,* 75 N. C., 45. In other words, unless the defendant denies on knowledge, or on information (which is held to be sufficient to raise an issue, *Kitchin v. Wilson,*

80 N. C., 192), or unless he wishes to be considered as admitting the truth of the allegation, he must disclaim both knowledge and information of the matter alleged. *Durden v. Simmons* and other cases *supra.*

Without passing upon the controverted facts, we are of the opinion that in the present state of the pleadings and proofs there was no error in the ruling of the court below and the injunction should be continued to the hearing. This is in accordance with the practice in such cases as stated in *Erwin v. Morris, ante,* 48.

No error.

Cited: *Ward v. Gay, post,* 400; *Evans v. Freeman,* 142 N. C., 66; *Woodson v. Beck,* 151 N. C., 146, 148; *Kernodle v. Williams,* 153 N. C., 479; *Zeiger v. Stephenson, ib.,* 530; *Person v. Person,* 154 N. C., 454; *Stancil v. Joyner,* 159 N. C., 619; *Pierce v. Cobb,* 161 N. C., 344; *Sutton v. Sutton, ib.,* N. C., 667; *Wilson v. Scarboro,* 163 N. C., 385; *Richards v. Hodges,* 164 N. C., 188; *Sykes v. Everett,* 167 N. C., 605; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Little v. Efird,* 170 N. C., 189; *Potato Co. v. Jenette,* 172 N. C., 5; *Hales v. R. R., ib.,* 107; *Seip v. Wright,* 173 N. C., 16; *R. R. v. Thompson, ib.,* 264; *Farquhar Co. v. Hardware Co.,* 174 N. C. 373; *Sumner v. Lumber Co.,* 175 N. C., 657.

(163)

WALKER v. RAILROAD.

(Filed 13 December, 1904.)

1. Carriers—Penalties—Laws 1903, Ch. 590.

The act providing a penalty for a delay of four days in the transportation of goods refers to a delay in starting the goods from the station of their receipt, and does not require a delivery at their destination within the time specified.

2. Carriers—Penalties—Burden of Proof.

In an action against a railroad company to recover a penalty for a delay of more than four days in the transportation of goods the burden of showing where the delay occurred is on the plaintiff.

3. Commerce—Interstate Commerce—Penalties—Constitutional Law.

An act allowing a penalty for failure of a carrier to ship goods within a certain time is valid.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by D. M. Walker and another against the Southern Railway Company, heard by *Cooke, J.,* at May Term, 1904, of ALAMANCE.

This action was brought to recover the penalty for failure to transport freight, given by chapter 590, section 3, Laws 1903. Plaintiffs alleged that there had been a delay of four days and demanded judgment for $40, that is, $25 for the first day and $5 per day for the next three days of delay. The material portion of the evidence was as follows:

(1) Bill of lading issued by the defendant bearing date Cumnock, N. C., 27 May, 1903, for a car-load of lumber, to be transported to the plaintiffs at Graham, N. C. J. R. Burns was the shipper.

(2) The receipt of the plaintiff for the said freight, bearing date Graham, N. C., 4 June, 1903.

D. M. Walker, one of the plaintiffs, testified: That he and J. C. (164) Walker constitute the firm of Walker Bros. The witness identified the bill of lading and freight bill hereinbefore referred to and said the dates as therein stated were correct. The plaintiffs operated a sawmill situated about 160 feet from the main line of the North Carolina Railroad Company, some 300 or 400 yards east of the station at Graham in Alamance County, and were accommodated by what is ordinarily known as an industrial or spur track, running from the main line into their yards, which are inclosed. When they receive freight by the carload the car is placed by the defendant on this spur track and unloaded in the mill-yard of the plaintiffs. The car in question was delivered to them in their yards on 4 June, 1903. The bill of lading was received by the plaintiffs through the mails about May, 1903. Plaintiffs made demand upon the agent of defendant at Graham. The spur or industrial track was put in at the instance of the plaintiffs, and operated, as witness supposed, for the accommodation of both the plaintiffs and defendant, as the cars could be unloaded sooner. No extra charge was demanded or made against the plaintiffs for shifting and carrying cars from the main track of the defendant into the yard of the plaintiffs by means of the spur track. The cars containing freight for other parties were not put upon the spur track of plaintiffs without their permission, nor carried inside the gate of plaintiff's yard. The witness did not know of his own knowledge when the car in question arrived at Graham station. The train passed, but he did not see it come.

The freight in question was brought in the car from Cumnock by way of Greensboro and from the latter place to Graham. There are four stations or stops between Greensboro and Graham, and ten stations between Greensboro and Cumnock. 31 May, 1903, was Sunday. Witness made demand on the railroad company for the car of freight in question, and at that time the car had not arrived in Graham. (165)

It was admitted by the parties that the defendant transported freight and passengers through several states, including this State, and

is engaged in interstate commerce, and it was admitted that Cumnock and Graham are stations on different roads, both of which are operated by defendant within this State.

Plaintiffs here rested their case. The defendant thereupon moved to nonsuit the plaintiffs under the statute, which motion was allowed and judgment was rendered accordingly. Plaintiffs excepted and appealed.

Long & Long for plaintiffs.
F. H Busbee and King & Kimball for defendant.

WALKER, J., after stating the facts: It is provided by Laws 1903, ch. 590, sec. 3, that any railroad company failing to transport goods received by it for shipment and billed to any place in this State for a longer period than 4 days after the receipt of the same, unless otherwise agreed between the parties, or allowing such goods to remain at any intermediate point more than 48 hours, shall pay to the party aggrieved a penalty of $25 for the first day and $5 for each succeeding day of unlawful delay or detention, if the shipment is in car-load lots, and if in smaller quantities, then a less sum, which is prescribed by the act. The plaintiffs claim that by the statute the defendant is allowed only 4 days to make the shipment, and any delay beyond that time subjects it to the penalty. We do not think that is the proper construction of the law. The word "transport" does mean to carry or convey from one place to another, but it also means to "remove," and this is one of its primary significations, according to the lexicographers.
(166) Whatever may be the precise meaning of the word when considered by itself and apart from the special connection in which it is used, the context of the act under review clearly shows that the Legislature did not intend to be understood as requiring the entire transit to be made within four days from the receipt of the goods. Such a construction might produce serious results and impose upon transportation companies not only a very onerous duty, but one which, in some cases, it would be difficult, if not impossible, to perform. It has been said that in regard to laws, as in other cases, difficulties will arise, in the first place, from the disputed meaning of individual words, or, as it is usually expressed, of the language employed, and, in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context. This is due in large measure to the imperfection of language and its inadequacy in conveying our meaning. We must, therefore, regard the context and the general scope of the law as well as the mischief to be suppressed and the remedy provided for that purpose so as to arrive at the intention of the Legislature. "When we see what is the sense that agrees with the intention of

the instrument (or statute), it is not allowable to wrest the words to a contrary meaning. No text imposing obligations is understood to demand impossible things." Sedgwick Stat. and Const. Law (1857), ch. 6. pp. 225-235. Whenever the intention can be discovered it ought to be followed with reason and discretion in construing the statute, although it may not seem to conform to the letter. Sedgwick, *supra.* We have no doubt as to the true intention of the Legislature in passing this act. The very phraseology of the statute indicates clearly the purpose that the penalty shall be incurred if the company delays to begin the transportation or to start the goods on their journey within four days after they are received for shipment. The fact that the law provides against unreasonable delay during the course of the transportation at any intermediate station is conclusive evidence that the (167) neglect or omission to transport for a longer period than four days refers to a delay at the initial point or the place of departure. To hold it to have been contemplated that four days only from the time of receipt should be allowed for the shipment of the goods and their delivery at the place of final destination would impute to the Legislature an intention to adopt a harsh and impracticable rule, and therefore an unreasonable one, as the time allowed might not be sufficient in many cases for the transportation as thus understood. Having concluded that the four days must apply to the time of shipment, we find no evidence as to when the goods left Cumnock nor as to when they reached Graham; and even if there had been such evidence, we have failed to discover any proof as to the distance between Cumnock and Graham, or as to the time reasonably required to carry the goods from one place to the other. The burden was on the plaintiff to bring forward the proof necessary to establish his allegations and to make out his case, and in the absence of evidence we can raise no presumption in his favor. If the defendant has violated the law and incurred its penalty, the plaintiff must show it affirmatively. There is not in this case the slightest evidence as to the essential fact to be proved. The plaintiff in the case of a nonsuit is entitled to have the benefit, not only of every fact which the evidence tends to prove, but of every legitimate inference from the facts as well; but this does not mean that he will be permitted to recover upon mere conjecture. The court did not err in refusing to submit the case to a jury, as there was a total failure of proof. The nonsuit was properly entered.

In the answer the defendant sets up as a defense the unconstitutionality of the act, upon the ground that it interferes with interstate traffic. We were told by counsel in the argument before us that this defense was not relied on in the court below, nor did he insist upon it in this Court. We think the point was properly abandoned. (168)

The act cannot be successfully assailed upon this ground. It has been thoroughly settled that such legislation does not contravene the commerce clause of the Constitution. The most recent decision of this Court upon the subject is *Currie v. R. R.,* 135 N. C., 535. But other decisions on the point are abundant. *Bagg v. R. R.,* 109 N. C., 279; 14 L. R. A., 596; 26 Am. St., 569; *Smith v. Ala.,* 124 U. S., 465; *R. R. v. Fuller,* 84 U. S., 560; *Sherlock v. Alling,* 93 U. S., 99; *R. R. v. Dwyer,* 75 Tex., 572; 7 L. R. A., 478; 16 Am. St., 926. Numerous authorities sustaining the right of the State to pass such a law are collected in the cases we have cited. Legislation of a state which incidentally or indirectly affects commerce between the states, and especially such as is passed in the exercise of the police power, are not to be considered regulations of that commerce, within the meaning of the Constitution of the United States. Besides all this, it appears in our case that the traffic was to be conducted wholly within this State, and it connot, therefore, in any allowable view be regarded as interstate trade, nor can the statute, in so far as it affects that traffic, be held invalid as an attempt to usurp the power of Congress to regulate interstate commerce.

In deciding this case we have confined ourselves, as we should do in all cases, to the facts as they appear in the record. We have no right to supply any defect in the plaintiff's proof by assuming the existence of any fact which the testimony does not tend to establish. If the plaintiff has a good cause of action against the defendant, he must show it by legal evidence and not leave anything essential to its completeness to surmise or conjecture. This must be required of him and all others similarly situated, as we cannot in any other way decide safely (169) and with a due regard for the rights and interests of litigants, which must be determined by well-settled methods of judicial procedure applicable alike to all cases, and not by any arbitrary or capricious notion of what should be done in any particular case in order to mete out justice. By pursuing the latter course we would often base our judgments upon mistaken or misunderstood facts, and defeat the very purpose intended to be accomplished in all judicial investigations.

No error.

DOUGLAS, J., dissenting: I am not disposed to dissent from the principles of law so ably laid down by the Court in its opinion, as far as I understand them; but I fail to see the legal or logical connection between its premises and its conclusion. I do not think that the primary meaning of the word "transport" is simply to remove. It is from the Latin word *"transportare,"* compounded from the words *"trans"* meaning over or beyond, and *"portare,"* to carry. It does not mean simply to remove

from one place, but includes also the idea of carrying to another place. And yet I agree with the Court that the Legislature did not intend to impose the penalty where the transportation was begun but not completed within the 4 days mentioned in the statute. To my mind, its clear intention was that the transportation should be *begun* within four days, that is, within 96 hours after receipt of the goods, and should be continuously carried on and completed within a reasonable time. It certainly did *not* mean that the railway company could lawfully leave the goods at the initial point for 4 days, then transport them a mile or so and leave them there for 48 hours, and then transport them another mile or so with another 48 hours delay, and so on for perhaps a month. Neither did it mean that the railway company could keep the goods for a week or a month, and then say to the owner, "Prove, if you can, where the goods have been all this time." The railway company alone knows (170) where they have been, and alone has the means of proving it. To place the burden of directly proving it upon the plaintiff deprives him of all remedy for a substantial injury under guise of a rule of evidence. If the circumstances tend to prove the plaintiff's case it should be left to the jury, who alone can say what they do prove. If circumstantial evidence is sufficient to hang a man, I do not see why it is not sufficient in a civil suit to fasten upon a common carrier the just responsibility resulting from its breach of public duty.

The opinion of the Court says: "There is not in this case the slightest evidence as to the essential fact to be proved." I presume it refers to the delay at Cumnock. Let us see about that. There is evidence that the car-load of lumber was received for shipment by the defendant on 28 May, and was delivered to the plaintiffs on 4 June, 7 days thereafter. It is also in evidence that both Cumnock and Graham, the terminal points of the shipment, are within this State, and on roads operated by the defendant, and that there were only fifteen stations between them. Allowing 10 miles as an average between stations, but which is much above the average, there would be only 150 miles of transportation, which, at 20 miles per hour, would require only 7½ hours. I do not know to what extent this Court will take judicial cognizance of the geography of its own State. If it takes any, we will know that Cumnock is in Chatham County on the Sanford and Mounty Airy branch of the Southern Railway, 54 miles south of Greensboro, and Graham on the North Carolina division of said railway, 23 miles this side of Greensboro. The entire distance between Cumnock and Graham would therefore be 77 miles. It seems to us that, with or without such judicial cognizance, under the circumstances in this case, the fact that 7 days elapsed between the receipt and delivery of this (171)

lumber is sufficient evidence from which the jury might reasonably infer that it was not transported from Cumnock within the 4 days allowed by law. It is difficult to believe that it would require 3 days to transport an unbroken carload 77 miles, or that *one mile per hour* is a reasonable rate of speed over the greatest trunk line of the South. If there are other facts tending to exculpate the defendant they are peculiarly within its own knowledge and should be alleged and proved by it.

CLARK, C. J., concurs in the dissenting opinion.

Cited: *Summers v. R. R.*, 138 N. C., 299; *Stone v. R. R.*, 144 N. C., 222, 3, 7; *Furniture Co. v. Express Co., ib.*, 643; *Alexander v. R. R., ib.*, 95; *Watson v. R. R.*, 145 N. C., 238; *Efland v. R. R.*, 146 N. C., 138; *Rollins v. R. R., ib.*, 158; *Jenkins v. R. R., ib.*, 183; *Cardwell v. R. R., ib.*, 219; *Davis v. R. R.*, 147 N. C., 70; *Reid v. R. R.*, 149 N. C., 425; *S. c.*, 150 N. C., 758; *Garrison v. R. R., ib.*, 581, 592; *Lumber Co. v. R. R.*, 152 N. C., 73; *Reid v. R. R.*, 153 N. C., 492; *Carson v. Bunting*, 154 N. C., 534.

(172)

PINCHBACK v. MINING COMPANY.

(Filed 13 December, 1904.)

1. Reformation of Instruments—Mistake—Deeds.

A deed which by mistake does not include certain lots may be corrected.

2. Deeds—Corporations—Stockholders.

A deed by one corporation to another recited a resolution of the stockholders of the grantee that the corporation acquire all the property of the grantor, and a resolution of the stockholders of the grantor that a conveyance of all the property of the grantor be executed to the grantee, and all the property of the grantor was conveyed by appropriate recitals, but certain lots were excepted and reserved. On the face of the deed the grantor had no beneficial interest in such lots.

3. Parties—Corporations—Stockholders—Deeds.

Where a stockholder sued the corporation to compel it to sell lands and distribute the proceeds among the stockholders, but the defense was that the lands should have been included in a conveyance previously made by the corporation to another, but that by mistake the lands had not been included, the court should have made the grantee of the corporation a party to the suit.

4. Deeds—Evidence—Reformation of Instruments—Mistake.

Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, the stockholders are entitled to introduce parol evidence to show that the lands were not intended to be included in a conveyance previously made by the corporation.

5. Contracts—Corporations—Stockholders—Estoppel.

At a meeting between the stockholders of two corporations, statements of the spokesman for the corporation which had agreed to purchase all the property of the other could not have the effect of surrendering the rights of the purchaser as to certain lots belonging to the seller.

6. Receiver—Corporations.

The fact that a corporation has gone into the hands of a receiver, and that its property has been sold, has no effect as concerns the existence of the corporation.

7. References—Corporations—Stockholders—The Code, Sec. 423.

Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake, whereby an issue was raised as to the intention of the parties, it was a proper case for a reference.

8. Corporations—Contracts—Evidence.

Where there was a claim that a contract between corporations had been modified, it could only be substantiated by a showing that the modification was made by act of all the stockholders.

ACTION by J. A. Pinchback against the Bessemer Mining and Manufacturing Company, heard by *McNeill, J.*, and a jury, at May Term, 1904, of GASTON. (178)

The defendant asked the court to charge the jury: "If the jury shall believe from the evidence that the defendant company contracted to sell and to convey to the Bessemer Mining Company all of its property of every description; that it was represented to Major Guthrie and Mr. Cooley, the attorneys instructed to draw the deed, that the 26 lots described in the complaint had been sold; that by reason of this representation, which was made by the secretary of the defendant company, the said 26 lots were excepted from said deed; that but for this representation the said 26 lots would have been conveyed by said deed, the jury will answer the fifth issue 'Yes.'" This instruction was refused, and the defendant excepted. From a judgment upon the verdict the defendant excepted and appealed.

Osborne, Maxwell & Keerans and C. E. Whitney for plaintiff.
Burwell & Cansler for defendant.

CONNOR, J. The defendant was entitled to the instruction asked. It was not alleged that the officers of the defendant company did not know that the lots were excepted when they signed the deed, but that the insertion of the exception was the result of Mr. Smith's mistake in saying to the draftsman that the lots had been conveyed. It is clear how the mistake was made. Mr. Smith was evidently not advertent to the difference between the status of the 26 lots as it existed and the status of those which had been in fact conveyed. Major Guthrie testifies that if he had been informed as to the real condition of the title to the lots he would not have excepted them from the operation of the
(179) deed. If the jury accept his testimony there can be no question in respect to the equity for correction. If one sign a deed supposing it to convey black acre, and the insertion of white acre was purposely made by the draftsman, it is fraud in the *factum*. It is not the "act and deed" of the party signing. *Lee v. Pearce,* 68 N. C., 76. If the insertion of white acre was caused by the mutual mistake of the parties under an erroneous impression that it was included in the negotiation, equity will give relief, not upon the ground that both parties were ignorant of the fact that it was included in the description, but that *it was so included* by mistake. Ordinarily, the mistake will be shown by extrinsic evidence. When, however, the terms of the negotiation—the contract pursuant to which the deed is executed—are inserted in the deed as essential recitals, as for the purpose of showing the power vested in the person signing, and the description of the property is inconsistent with such recital, a court of equity will make the correction upon inspection of the deed. "When the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake; for then there is clear evidence in the instrument itself that it operates beyond its real intent. If, however, there is no recital of any agreement, but a mistake is alleged and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are most difficult to define. The prima facie presumption of law is that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be inconsistent with that contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected if it is admitted or proved to have been made in pursuance of a prior agreement by the terms of which both par-
(180) ties meant to abide, but with which it is in fact inconsistent, or if it is admitted or proved that an instrument intended by both parties to be prepared in one form has, by reason of some undesigned

insertion, or omission, been prepared or executed in another." Adams Eq., 109; *Vickers v. Leigh,* 104 N. C., 248; *Fort v. Allen,* 110 N. C., 183; (191.)

If the defendant had rested its defense upon the recitals in the deed and asked for correction, or relied upon the recitals as a defense to the plaintiff's demand, we are of the opinion that the court should have either made the Mining Company a party, so that the title should be settled before a decree was made, or dismiss the action. A court of equity will not compel a trustee to sell a doubtful title, especially where it is apparent upon the face of the bill that by bringing in other parties the title may be settled before decree. The plaintiff, however, was entitled to introduce evidence to show that in truth the recitals did not set forth the real contract, or that, as contended here, the contract set out in the recitals was modified and that the deed, taken in all of its parts, correctly expressed the purpose and intention of the parties. Certainly, either upon the face of the deed or upon Major Guthrie's testimony, if accepted by the jury, the defendant company had no beneficial interest in these lots.

The question thus arises, what effect Mr. Smith's testimony has upon the rights of the parties. He concurs with Major Guthrie in many respects, but goes further and says that he explained to the stockholders of both companies the status of these 26 lots—that the defendant company had made a contract with Runlet by which he had subscribed for certain shares, which when paid for entitled him to 26 lots; that Mr. Carrington suggested that the lots be excepted so that the company should be in a position to carry out the contract; that he gave the written contract with Runlet to the secretary of the Mining Company.

It would seem clear that under the contract expressed in the (181) resolutions the purchase money due by Runlet belonged, when paid, to the Mining Company. This was recognized by Mr. Smith when he delivered the writing to the secretary. The exception of the lots from the operation of the deed, from this point of view, left the legal title in the defendant company for the purpose of conveying to Runlett, when he complied with his contract, the purchase money going to the Mining Company. Runlett having failed to carry out his contract, it would seem that they should be conveyed to the Mining Company. Mr. Smith, however, says that it was understood that he was to transfer to Runlett, when paid for, some shares belonging to himself. It is not very clear what were the terms of this understanding, or what was done by Mr. Smith. He says, however, that Runlett never took the shares. Whether the contract made by the defendant company with the Mining Company was modified by the conversations testified to by Mr. Smith is not very clear.

While it is true, as contended by plaintiffs, that unless expressly required by the by-laws, it is not necessary that a written record of the proceedings of the stockholder's meeting be made, and that they may be proven by parol, it is also true that before the solemn acts of a corporation, especially when contractual, can be set aside, it must appear that a meeting was held and that the stockholders, acting as such, voted to do so. *Duke v. Markham,* 105 N. C., 131; 18 Am. St., 889. It would endanger the integrity of corporate contracts if, after being solemnly made and reduced to writing in the form of resolutions, they could be changed and modified by mere conversational statements of the stockholders. We should require very strong and satisfactory proof, both as to the manner and clearness of such conduct, before giving it such effect.

The remarks of Mr. Carrington could not be given the effect of surrendering the rights of the Mining Company in the property.
(182) It is true that Mr. Smith says that all parties assented to the exception of the lots. Major Guthrie says the same; but it is evident that they did not understand such consent in the same way.

It seems that the defendant corporation has gone into the hands of a receiver and its property sold. This of course, does not affect the existence of the corporation. The officers of the defendant corporation being, as they say, convinced that their corporation does not own any beneficial interest in the lots, very properly brought the facts to the attention of the court— they could not have done less when called upon by the plaintiff to sell property which they do not believe belongs to them. It is not material that Mr. Smith does not wish the defense made. They, in justice to themselves, could not have done otherwise.

There are a number of exceptions to the introduction of testimony which, in our view of the case, are not material. We are of the opinion that the judgment should be reversed and a new trial ordered.

If the defendant company wishes to have the deed corrected, we think, first, that in the absence of any parol evidence, sufficient appears on the face of the deed to entitle it to have a decree; second, that if the plaintiff seeks to repel this equity by showing by parol evidence that there was a modification of the contract by the stockholders of both corporations, he should be required to show clearly that such modification was made by the act of all of the stockholders; third, if the defendant company relies upon the equity to have the title settled before any sale is made, all parties in interest should be brought before the court. In the present condition of the title neither corporation can sell the lots for their face value. It would seem that this case is a proper one for a reference under the provisions of section 421, subsection 5, of The Code.

It was one of which a court of equity had exclusive jurisdiction (183) prior to 1868. The Mining Company should be made a party, to the end that a final decree may be made settling the title. In view of the peculiar condition of the appeal neither party will recover costs.

New trial.

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

DOUGLAS, J., concurs in the result only.

Cited: Printing Co. v. Herbert, post, 325.

HALL v. MISENHEIMER.

(Filed 13 December, 1904.)

1. Vendor and Purchaser—Receipts—Frauds, Statute of.

A receipt by the vendor of land, reciting that the purchaser (naming him) had made a payment, the receipt having been drawn at the instance of the purchaser, was sufficiently signed by the purchaser to bind him under the statute of frauds.

2. Frauds, Statute of—Vendor and Purchaser—The Code, Sec. 1554.

Under the statute requiring a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith, the purchaser cannot be held unless he has signed the required memorandum.

3. Vendor and Purchaser—Specific Performance.

The doctrine that part performance of a sale of land takes it from within the statute of frauds is not recognized.

4. Frauds, Statute of—Vendor and Purchaser—Specific Performance.

A memorandum of a contract for the sale of land is not good as against the purchaser unless it shows the price to be paid.

ACTION by J. A. Hall against M. J. Misenheimer, heard by (184) *Justice, J.,* at May Term, 1904, of ROWAN.

This is an action by the vendor against the vendee for the specific performance of a contract to convey land, or, stating it in another way, to recover the price agreed to be paid for the land.

The plaintiff testified that he agreed to sell the land to the defendant for $1,200 and the defendant, on the other hand, agreed to buy it at that price; that, afterwards, defendant presented to him a paper and said,

"The price is very high, but I will take the land. Here is a receipt that I have prepared; you sign it now and I will pay you $5," and the latter signed the receipt, which is as follows:

SALISBURY, N. C., 18 January, 1904.

Received from M. J. Misenheimer five dollars, part payment on one five-room house and lot, extending across Tar Branch, on Boundary Street, No. house, 630.

J. A. HALL.

Witness: M. D. LEFLER.

The receipt was written by M. C. Ruffty for the defendant, and at his request and dictation. Plaintiff surrendered the premises to defendant, who took possession thereof, but afterwards refused to pay the purchase money, though plaintiff tendered a deed for the land on 21 January, as defendant had requested him to do. Defendant alleges in his answer that he was to have until 20 January to decide whether or not he would take the lot, and he notified the plaintiff before the expiration of the time that he would not take it. At the close of plaintiff's testimony the court, on motion of defendant, nonsuited the plaintiff, who excepted and appealed.

(185) *Walter H. Woodson for plaintiff.*
Burton Craige and Walter Murphey for defendant.

WALKER, J., after stating the case: The argument in this Court proceeded mainly upon the question whether there had been a sufficient signing of the receipt, under the statute of frauds, to bind the defendant. Upon this point our opinion is with the plaintiff. It has been held in England, whose statute (29 Charles II.) has been substantially copied by us, that if the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by the said party, or by his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum, the statute not requiring that the name should be subscribed. *Evans v. Hoare,* 1 Q. B. (1892), 593. The principle, as thus stated, has been adopted by Clark on Contracts (2 Ed.), p. 89, and he cites numerous cases to sustain it. To those he cites may be added *Higdon v. Thomas,* 12 Md., 139. We think the same rule has been approved by this Court in *Plummer v. Owens,* 45 N. C., 254, in which case it appeared that the names of the vendor and the vendee were written at the top of the memorandum, the latter being in the

form of an account. The Court held that the memorandum would have been sufficient in other respects if the description of the land had been more specific. See, also, *Clason v. Bailey,* 14 Johnson, 484, and the other cases cited in Clark on Contracts (2 Ed.), p. 89, note 110. In our case the name of the vendee was inserted in the paper by his own direction, and it cannot be questioned that he fully intended thereby to bind himself by the receipt as evidence of a contract to buy the land, so far as a signing of the writing was necessary for that purpose. *Cherry v. Long,* 61 N. C., 466, seems to be directly in point. It was not contended that the defendant was not bound by what his agent did in writing the receipt, though the latter's authority was given by (186) parol. *Neaves v. Mining Co.,* 90 N. C., 412, 47 Am. Rep., 529.

But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent. The Code, sec. 1554. In order, therefore, to charge a party upon such a contract, it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto. *Gwathney v. Cason,* 74 N. C., 5, 21 Am. Rep., 481, especially at page 10, where *Rodman, J.,* states the rule. *Miller v. Irvin,* 18 N. C., 104; *Mizell v. Burnett,* 49 N. C., 249; 69 Am. Dec., 744; *Rice v. Carter,* 33 N. C., 298; *Neaves v. Mining Co.,* 90 N. C., 412; *Mayer v. Adrian,* 77 N. C., 83. Many other cases could be cited from our Reports in support of the rule, but those we have already mentioned will suffice to show what is the principle and how it has been applied. In commenting on the policy of the statute, so far as it affects the vendee, and answering a suggestion that the statute applies only to the vendor, who alone conveys the land or any interest therein, *Ruffin, C. J.,* for the Court, in *Simms v. Killian,* 34 N. C., 252, says: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it as that by similar means a feigned contract of sale should be established against the owner of the land. Hence, the act in terms avoids entirely every contract of which the sale of land is the subject, in respect of a party, that is, either party who does not charge himself by his signature to it after it has been reduced to writing." So in a case where a stipulation (187) that the vendee would open a street, which constituted a part of the price to be paid for the land, was not stated in the writing, it was held by this Court that the vendor could not recover for a breach of the stipulation, because, being a part of the price, it was also a part of the agreement, and was not evidenced by a writing which had been signed

by the defendant. *Hall v. Fisher,* 126 N. C., 205; *Ide v. Stanton,* 15 Vt., 685, 40 Am. Dec., 698. The fact that the defendant in this case paid $5 on the purchase money and took possession of the land does not change the result. The doctrine of part performance is not now recognized by this Court.

The party to be charged upon a contract, within the meaning of the statute, is the defendant in the action, or the party against whom it is sought to enforce the obligation of the contract. It is not the vendor, unless he occupies upon the record the position of the party who is called upon to perform his contract. "The object of the statute was to secure the defendant." *Pearson, J.,* in *Rice v. Carter,* 33 N. C., 298. See, also, *Mizell v. Burnett,* 49 N. C., 249, 69 Am. Dec., 744; *Love v. Welch,* 97 N. C., 200; *Green v. R. R.,* 77 N. C., 95; *Love v. Atkinson,* 131 N. C., 544. Anything said in *Taylor v. Russell,* 119 N. C., 30, in conflict with this view of the statute cannot, we think, be sustained. *Green v. R. R., supra,* which is cited in *Taylor v. Russell,* does not support the proposition that the vendee is not protected by the statute. In that case the plaintiff, who was the vendee, sued the defendant, who was the vendor, to recover the value of the wood which he agreed to give for the land at a stipulated price. The Court held merely that as the plaintiff had sued on the contract and the defendant had waived that statute he was bound by its terms and must recover, if at all, not the value of the wood, but the price agreed upon. He could not in such a (188) case repudiate his contract, when defendant was willing to perform it. In support of this ruling, the Court cited *Mizell v. Burnett, supra,* which case directly sustains the doctrine as we have stated it. The defendant, therefore, can avail himself of the statute as the party to be charged.

This Court has held, it is true, that the consideration of the contract need not be stated. *Miller v. Irvine,* 18 N. C., 104; *Ashford v. Robinson,* 30 N. C., 114; *Thornburg v. Masten,* 88 N. C., 293; but in each of those cases the vendor was the defendant and the party to be charged. There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter can be shown by parol, as at common law, and the writing, as said by *Ruffin, C. J.,* in *Miller v. Irvine, supra,* need not contain any matters but such as charge him, the vendor, that is, such stipulations as are to be performed on his part. He is to convey, and the writing must be sufficient to show that this duty rests upon him as one of the parties to the contract when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him. Clark on Contracts (2 Ed.), pp. 85, 86, and 87; *Williams v. Morris,*

96 U. S., 444. It must show the price, for, otherwise, the true contract of the vendee as to one of its essential terms would not be reduced to writing, and we could not see from the writing what it is, so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent. *Simms v. Killian, supra; Williams v. Morris, supra.*

The receipt in this case does not show the price. How, then, can the Court be informed as to what the price is, unless it admits parol testimony to prove the fact? To do so would be in direct violation of the statute—its letter and its spirit.

The judgment of nonsuit was properly granted in the court (189) below.

No error.

DOUGLAS, J., concurs in result only.

Cited: *Lumber Co. v. Corey,* 140 N. C., 468; *Dickerson v. Simmons,* 141 N. C., 327; *Miller v. Monazite Co.,* 152 N. C., 610; *Brown v. Hobbs,* 154 N. C., 548; *Bateman v. Hopkins,* 157 N. C., 473; *Leach v. Lumber Co.,* 159 N. C., 534; *Burriss v. Starr,* 165 N. C., 659; *Peace v. Edwards,* 170 N. C., 66; *Lewis v. Murray,* 177 N. C., 20.

(190)

HICKORY v. RAILROAD.

(Filed 13 December, 1904.)

1. Eminent Domain—Railroads—Laws 1854, Ch. 228.

The charter of the Western North Carolina Railroad gives it State land over which it runs, and contemplates payment for land belonging to private owners.

2. Eminent Domain—Railroads—Laws 1836, Ch. 47.

Under the charter of the Western North Carolina Railroad it is contemplated that an effort be made to purchase land of private owners before condemning it.

3. Railroads.

The locating of a railroad, as used in an act incorporating a railroad, means the actual building of the same.

4. Railroads—Presumptions—Burden of Proof.

Under the statute raising a presumption of a grant to a railroad two years after the location of its track, the burden of showing when the track was located is upon the defendant.

5. Railroads—Presumptions—Grants.

The presumption of a grant to a railroad raised by its charter cannot apply where a deed from the owner to the railroad is executed within two years after the location of the road.

6. Evidence—Admissions—Deeds.

A recital in a deed that it is executed and accepted as a duplicate of a former deed constitutes an admission of the execution of the former deed.

7. Railroads—Contracts—Officers—Right of Way.

In the absence of specific provisions in its charter to the contrary, the power of making and receiving contracts as to the right of way belongs to the president of a railroad.

8. Railroads—Ultra Vires—Trusts.

The act of a railroad in taking title to land in trust for the purpose of a public square around the depot, for the common use of both the railroad and the town, is not *ultra vires* and will not fail for the want of a trustee.

9. Railroads—Grants—Presumptions—Deeds.

Where a railroad acquired land by virtue of a deed, it could not, after forty-five years, repudiate that deed and rely on the presumption of a grant.

ACTION by the city of Hickory against the Southern Railway Company, heard by *Neal, J.*, and a jury, at May Term, 1904, of CATAWBA.

In 1859 the Western North Carolina Railroad Company constructed and erected its line of railway and depot on the land where the city of Hickory now stands, and began to operate its engines and cars, transporting freight and passengers thereon, and it and its successors have been in the continuous use and enjoyment of said railway and depot ever since.

At the time said line of railway was constructed and said depot erected there was no town where the city of Hickory now stands, there being at that time only three houses within the entire boundary of the present city of Hickory.

On 26 May, 1859, one Henry W. Robinson conveyed to the Western North Carolina Railroad Company a tract of land 400 feet wide by 500 feet in length, conveyance being in fee.

(191) This deed being lost, the said Henry W. Robinson on 10 March, 1880, executed a second deed to the Western North Carolina Railroad Company for a tract of land 400 feet wide by 500 feet in length, situate in the city of Hickory, which includes the roadbed and depot of the defendant, and which the defendant contends is the same land described in the first deed. This last deed recites the fact that it is executed as a "duplicate for a lost deed," but conveys the land "for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory, not to be built up or exclusively

occupied by any one to the exclusion of the public as a free common." While the description of the land in the first deed is indefinite, it appears from the testimony of J. W. Cline that the description includes the identical land conveyed by the second deed if the station-house called for in the first deed is the station-house located in Hickory. It appeared that this lost deed was accepted by J. W. Wilson, then president of the Western North Carolina Railroad Company, for the said road, he writing on the back thereof the words following:

The original deed having been destroyed without record, this deed is accepted in lieu thereof. JAMES W. WILSON,
President W. N. C. R. R. Co.

No authority on the part of James W. Wilson, president of the road, to accept the said deed was shown, and the minute-book of the board of directors of said company was offered in evidence, and this book showed no authority conferred upon him to accept said deed, and no ratification of his act in doing so.

The defendant contended that the said Wilson had no power to divest it or the Western North Carolina Railroad Company of any of the rights which it had acquired under the prior deed executed to it by the said Robinson.

It also contended that the said Wilson, acting as an officer of (192) said company, without an order of the board of directors, had no right to divest the company of the property which it had acquired under its charter by virtue of the location and construction of its railroad upon this land in 1859, and which was essential to the operation of the railroad, and that it was immaterial whether those rights were acquired under the deed or under the charter.

There was also testimony that since the location and construction of the said railway a large and populous town had sprung up upon the present site of the city of Hickory, which was first chartered in 1873, and that instead of three houses, now there are a large number and a population of nearly 4,000. That the streets of said town are so located near to the depot and across the track of the defendant that the passage of the defendant's trains interferes with the travel upon some of the streets, which is occasionally impeded and delayed by the movement of trains upon the defendant's track, and the construction and operation of the Carolina and Northwestern Railway Company through said town and the operation by it of a line of railway just north of defendant's depot prevents as convenient access to said depot as is desired by the citizens of said city. It was also in evidence that the noise, dust, smoke, soot, and cinders necessarily caused by the operation of defendant's trains and engines on its track and by the engines and cars of the Caro-

line and Northwestern Railway on its track was an inconvenience to the citizens of said city passing on the streets of said city near to defendant's depot and track, and interfered with the repose of those of its citizens who had constructed their dwellings, business houses, and churches adjacent thereto.

It was further in evidence that the Corporation Commission had ordered "that the Southern Railway Company and the Carolina and Northwestern Railway Company shall provide adequate and safe
(193) facilities for the handling of freight at Hickory, N. C., and that work to this end be begun within thirty days from this date," and that when this defendant began to obey this order by increasing its facilities for the handling of its freights, this action was begun against it alone, and it was enjoined and restrained from doing so.

Upon this state of facts, which substantially appears in the evidence and in the findings of fact made by the court, the court held that the plaintiff was not entitled to recover any of the land described in the complaint upon which the defendant's depot or track was built, or within 100 feet from the center of said track on either side thereof, and that on the other issues the plaintiff, on the evidence, was not entitled to a verdict. On this ruling and intimation from the court the plaintiff excepted and appealed.

The defendant further contended: The defendant is not a trustee for the plaintiff of the land described in the complaint upon which its railroad and depot is located, or within 100 feet on either side of the center of its track, for the following reasons:

(1) The Western North Carolina Railroad Company, by virtue of the location and construction of its roadbed and depot upon this land in 1859, became the owner under its charter (chapter 228, Laws 1854-'55) of all the land situated within 100 feet on either side of the center of its track, and entitled to use the same for corporate purposes whenever it desired to occupy the same; and the Southern Railway Company, as its successor, has succeeded to this right.

(2) The said company, by virtue of the deed of 26 May, 1859, became the owner of the whole of said land in fee, the vague description in the said deed being made definite by the specific description in the last deed, which refers to the former deed, reciting that it was executed in lieu thereof. The survey of the land shows that it is the same land.
(194) The deed before the Court is as follows:

STATE OF NORTH CAROLINA—*Catawba County.*

This deed, made this 10 March, 1880, by Henry W. Robinson (as a duplicate for lost deed) of Catawba County and State of North Caro-

lina, to the Western North Carolina Railroad (in trust as a "public square" to be used as a town common around the depot), Witnesseth:

That said Henry W. Robinson, in consideration of the purposes herein specified and the sum of $1 to him paid by the Western North Carolina Railroad Company, the receipt of which is hereby acknowledged, has bargained and sold and by these presents does bargain, sell, and convey to said Western North Carolina Railroad Company and its successors a lot of land in Catawba County, State of North Carolina, adjoining the lands of G. Marshall, Dr. J. R. Ellis, J. H. Burns, Hall Bros., and others, bounded as follows, viz.:

Beginning at a rock corner near the drug store now owned by Pink Warlick, 200 feet north of the center of the said Western North Carolina Railroad, and runs about south 400 feet, crossing the said railroad to a post or stake, corner of Dr. Ellis' and G. Marshall's lots; then west or parallel with railroad 500 feet to a stone or stake; then about north, crossing the railroad, 400 feet to a stone or stake 175 feet more or less east from Henry W. Link's corner, then east 500 feet to the beginning, for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory, not to build up or be exclusively occupied by any one to the exclusion of the public as a free common.

To have and to hold the aforesaid tract or lot of land and all privileges and appurtenances thereto belonging, to the said Western North Carolina Railroad Company in trust as aforesaid for the (195) public uses and purpose aforesaid.

And the said Henry W. Robinson covenants that he is seized of said premises in fee and has right to convey the same in fee simple; that the same are free from all incumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whomsoever.

In testimony whereof the said Henry W. Robinson has hereunto set his hand and seal, the day and year above written.

HENRY W. ROBINSON. [Seal.]

Attest: A. L. SHUFORD.

NORTH CAROLINA—Catawba County.

The execution of the foregoing deed from H. W. Robinson to the Western North Carolina Railroad Company was this 15 April, 1880, duly proved before me by the oath and examination of A. L. Shuford, subscribing witness thereto. Therefore, let said deed and certificate be registered.

M. O. SHERRILL,
Probate Judge.

The following statement of facts is taken from the defendant's brief:

Duplicate Deed. Henry W. Robinson to Western N. C. R. R. Co.
Deed—Consideration Public and $1. Dated 10 March, 1880.
Filed for registration 17 April, 1880, at 5 o'clock p. m., and registered in the office of the Register of Deeds of Catawba County, N. C., this 20 April, 1880, at 8 o'clock a. m., in Book 13 of Deeds, on pages 105-6.

GEORGE W. COCHRAN,
Register of Deeds.

(196) The original deed having been destroyed without record, this deed is accepted in lieu thereof.

JAMES W. WILSON,
President W. N. C. R. R.

The Western North Carolina Railroad Company, through which the defendant claims by succession, was originally chartered by chapter 228, Laws 1854-'55, of which sections 27 and 29 are essential in the consideration of this case. They are as follows:

"SEC. 27. *Be it further enacted,* That the said company may purchase, have and hold in fee, or for a term of years, any lands, tenements, and hereditaments which may be necessary for the said road, or the appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants or agents of the company, or for workshops or foundries to be used for the said company, or for procuring stone or other materials necessary for said company in the construction or repair of the road, or for effecting transportation thereon, and for no other purpose."

"SEC. 29. *Be it further enacted,* That when any lands for right of way may be required by said company for the purpose of constructing their road, or for any of the uses described in section 27 of this act, and for the want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the said company shall have the same powers to condemn all such lands to individuals or corporations as may be needed for the aforenamed purposes as were granted in and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions, and conditions as are prescribed in the charter aforesaid for the government of the said company; and the said company
(197) shall be entitled to hold in fee simple all lands belonging to the State, over and through which the said road may pass to an extent not exceeding 100 feet on either side of said road; and in the absence of any contract or contracts in relation to lands through which

said road may pass, it shall be presumed that the land over which said road may be constructed, together with 100 feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same so long as it shall be used for the purposes of said road, and no longer, unless the owner or owners shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road has been located; and in case the owner or owners shall not apply within two years from the time aforesaid, he, she, or they shall be forever barred from recovering the same or having an assessment or compensation hereafter: *Provided,* that nothing herein contained shall affect the rights of infants, *femes covert,* persons *non compos* or beyond seas, until two years after the removal of their respective disabilities, and the same and all the estate aforesaid shall be exempt from taxation until the dividends or profits of said company shall exceed 6 per centum per annum."

The North Carolina Railroad Company, referred to in the above sections, was chartered under the name of the "North Carolina Central Railroad Company," by chapter 47, Laws 1836-'37, reprinted in the Revised Statutes at page 405. Section 9 of said act is alone essential in the consideration of this case. It is as follows:

SEC. 9. *Be it further enacted,* That if the president and directors cannot agree with the owner of land through which it may be necessary to make the said railroad, as to the terms upon which the said railroad shall be opened through the same, then it shall be (198) lawful for the said president and directors to file their petition in the Court of Pleas and Quarter Sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed by law in laying off public roads; and upon the filing of said petition, the same proceedings shall be had as in cases of public roads; and when the jury shall have assessed the damages to be paid to the owners of the land through which the same shall be laid off, then it shall be lawful for the said president and directors, upon payment to the owner or owners of said land, his, her, or their guardian, as the case may be, or into the office of the clerk of the Court of Pleas and Quarter Sessions of the county wherein the land lies, the sum or sums so assessed, to enter upon the land laid off, and construct the road thereon; to make all necessary excavations and embankments, and all other structures necessary to the construction and preservation of said road; and to hold the said land to their use and benefit during their corporate existence; and in all things to have the same power and authority over said land so laid off, during their existence as a corporation, as though they owned the fee simple therein: *Provided,* that nothing in this act contained shall be

so construed as to give power to said company to lay off said road through the yard, garden, or burial ground attached, or appurtenant to the dwelling-house on any plantation through which it may be deemed necessary to lay off said road, without the consent of the owner thereof."

Section 11 gives the company the right to *purchase* lands not exceeding ten acres in any one tract. Section 27 confers the right to condemn "such quantity of ground, not exceeding one acre at any one place, as may be necessary for a tollhouse," etc., prescribing much the same method of condemnation as section 9. These are evidently the sections referred to in the charter of the Western North Carolina Railroad Company, and must be taken as an essential part thereof.

From the judgment the plaintiff appealed.

(199)

E. B. Cline, T. M. Hufham, and Self & Whitener for the plaintiff.

S. J. Ervin and A. B. Andrews, Jr., for defendant.

DOUGLAS, J., after stating the case: It is important that we should in the beginning ascertain the relief sought in this action. It is thus stated in the prayer of the complaint: "That the defendant, its agents, officers, employees, servants, representatives, and any person or persons acting by or under any contract or agreement with it, be perpetually enjoined from erecting any building, platform or any other structure whatever or any part thereof within that boundary of land in the city of Hickory, Catawba County, North Carolina, referred to and described in Exhibit 'A,' which is a part of this complaint." No other specific relief is demanded beyond the costs of the action. In our opinion the plaintiff was entitled thereto, irrespective of any question of nuisance, upon which we do not care to intimate an opinion. If that question is to be decided by this Court, it can be more clearly presented free from complications as to title to land.

The vital defect in the defendant's case is the assumption that its charter gives it a right of way including 100 feet of land on each side of its track. The charter does not and could not give any land whatever except such as belongs to the State. All that it does, or pretends to do, is to give to the company the right to acquire by purchase or condemnation such lands as may be necessary for its essential purposes. It does not prescribe any fixed width for its right of way, for the evident reason that the company might need more land at one place than another; and that where the land was valuable, the company would not care to pay for more than it actually needed. The charter gives to the company "in fee simple all lands belonging to the State

(200) over and through which the road may pass to an extent *not ex-*

ceeding 100 feet on either side of said road." Beyond this, it is evident that its charter contemplates that all lands taken but not freely given shall be paid for in full; and that an effort to purchase shall be made before condemnation. It expressly provides in section 29 that when the necessary lands "*cannot be purchased* from the owner or owners, the said company shall have the same powers to condemn all such lands belonging to individuals or corporations as may be needed for the aforementioned purposes as were granted to and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the *same extent* under the like rules, *restrictions,* and conditions as are prescribed in the charter aforesaid." The charter of the North Carolina Railroad Company gives it right of entry upon the lands so condemned only *after payment* to the owner of the land or into the office of the clerk of the court of the full amount of the assessed damages.

It is true, the charter of the Western North Carolina Railroad Company provides that "in the *absence of any contract or contracts* in relation to lands through which said road may pass, it shall be *presumed* that the land over which said road may be constructed, together with 100 feet on each side thereof, *has been granted* by the owner or owners to the company, and said company shall have good right and title thereto, and shall have, hold, and enjoy the same so long as it shall be used for the purposes of said road, and *no longer,* unless the owner or owners shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road has been located," etc. This creates the presumption of a grant, founded upon the idea that the continued failure of the owner for two years after the building of the road to bring an action for (201) damages would indicate that he had sold or voluntarily donated the land to the company. We think his Honor properly construed the word "location" as meaning the physical location of the road, that is, the laying of its track, and this construction does not seem to be doubted by counsel. Any other would lead to the most absurd results. We know that many roads are surveyed and located that are never built, or built long years thereafter. To say that a railroad company can, by a mere abstract location of its route, without building its road, come twenty-five or thirty years thereafter and take private property, without the pretense of compensation, under an irrebutable presumption resting merely on a row of rotten stakes, would be too great a strain upon judicial construction. However, this is not contended for by the defendant. It is admitted that the original deed was dated 26 May, 1859, and that the said line of railway was constructed and said depot erected during the same year, but during what month

does not appear. If this were material, the burden of showing when the road was built would rest upon the defendant, as the fact would necessarily be within its peculiar knowledge. But it is not material, as it is evident that the deed was, in any event, executed within two years after the building of the road, which prevents the presumption from ever arising under the express terms of the statute. The word "unless" used in the act is thus defined by Webster: "Unless; upon any less condition than (the fact or thing stated in the sentence or clause which follows); if not, supposing not; if it be not; were it not that." The Century Dictionary defines the same word as follows, omitting some secondary meanings: "If it be not that; if it be not the case that," etc. These definitions clearly indicate a negative condition precedent, as much so as the condition in a mortgage that "unless" the money is paid, or "if it be not" paid by a certain day the land may be sold.
(202) If the money is paid on or before the day limited, the mortgagor is in no default whatever and the power of sale never arises.

The defendant has placed itself in the peculiar position of claiming both under the deed and under the presumption. We have seen that if there is a deed there can be no presumption. These are not inconsistent defenses, but are inconsistent claims of right, under which it seeks to maintain its easement. It is admitted that the fee to the land was in Robinson, and if it did not pass out of him by virtue of the deed it must still remain in him or his heirs.

It appears that the original deed was lost and that the deed of 10 March, 1880, was executed and accepted as a "duplicate" thereof. This is expressly stated in the duplicate deed which was accepted by the defendant and filed for registration on 17 April, 1880. This is, of course, an admission of the execution of the original deed.

The defendant contends that (quoting from defendant's brief) "It was not in the power of the president of the road to part with the title which the road had acquired to the land under the first deed." It does not appear that he did so. The first deed is not in the record. On the contrary, it was admitted by the grantee to have been lost or destroyed, and a duplicate deed accepted in lieu thereof. Both the defendant and the original grantee were corporations—artificial persons who were utterly incapable of any action whatever except through agents. The law evidently contemplates that a railroad company shall have an agent to make and receive contracts as to the right of way, and in the absence of specific provisions to the contrary it seems to us that those powers would come peculiarly within the duties of the president, the official head and general representative of the company.

The defendant also contends that the original grantee acted
(203) *ultra vires* in consenting to act as trustee. We do not think so,

as it took the legal title in trust for itself as well as the public. It was not a naked trust, but one coupled with a beneficial interest that was in futherance of its essential purposes. But if it were otherwise it would not help the defendant, as no trust is permitted to fail merely for want of a trustee. This is common learning.

The record states that "The defendant in open court agreed that it did not claim any part of the land described in the deed and the plats, except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by the order of the court." It is difficult to discover what this means, unless it is an attempt to repudiate the deed under which the land was acquired, and, after thus holding it for over forty-five years, create *nunc pro tunc* a presumption of a grant, which by the express provisions of the statute can never arise in the face of a contract. This cannot be permitted.

We have cited no authorities, because the decision of the case depends upon the plain wording of the statute and of the deed. The defendant has nothing more than belonged to the original company, which, acquiring the land under a deed the mere existence of which prevented the presumption, holds in accordance with the terms of the deed, which is its only muniment of title. Consequently there was error in the intimation of the court below. As the facts are now presented to us, a permanent injunction should have been granted in accordance with the prayer of the plaintiff.

Error.

Cited: *S. c.*, 138 N. C., 313; *S. c.*, 141 N. C., 718, 719; *S. c.*, 143 N. C., 451.

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(204)

HARRIS v. QUARRY COMPANY.

(Filed 13 December, 1904.)

1. Negligence—Evidence—Questions for Jury.

In this action for personal injuries received while drilling out an unexploded blast in a rock, there is sufficient evidence of negligence to be submitted to the jury.

2. Appeal—Former Adjudication.

An appeal on a point decided on a former appeal is not allowable.

3. Pleadings—Master and Servant—Evidence—Negligence.

The employer is responsible for the negligence or incompetency of a vice-principal in the scope of his authority, and it need not be alleged that

he was vice-principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice-principal.

ACTION by I. G. Harris against the Balfour Quarry Company, heard by *Shaw, J.*, at May Term, 1904, of HENDERSON. From a judgment for the defendant, the plaintiff appealed.

Smith & Valentine for plaintiff.
Merrick & Barnard for defendant.

CLARK, C. J. This case was before us (131 N. C., 553) and a new trial was granted because, in the opinion of a majority of the Court, the pleadings were insufficient to justify the admission of evidence, and also that the evidence, as then sent up, did not show any negligence. The pleadings have since been amended to conform to the views then expressed by the Court, and the evidence is also fuller, and the case should have been submitted to the jury. The witness, who on the former appeal was not shown to be an expert, was on this trial found by the (205) court to be an expert, and testified in effect that it was dangerous and known to be dangerous to drill out an unexploded hole without ascertaining that it had actually fired; that it could be learned by proper examination whether or not it had been fired, and that it was carelessness not to make such examination before ordering the hole to be drilled; that it could be ascertained whether the charge had gone off, and ordinarily this was ascertained by using a battery. No battery was used on this occasion and there was no examination by the "boss" or any skilled operative. The evidence is that two laborers thought (after first differing about it) that the hole had been fired, the vice-principal in charge of the quarry, without making any examination himself or having it made by a skilled man, ordered the two men to clean it out; that they called the plaintiff to come and help them "churn" out the hole; that he did not go, whereupon the vice-principal ordered him to go; that the hole was cleaned out by "churning" (which is done by raising a steel drill and dropping it hard into the hole); that the plaintiff was employed to drill holes, and it was not the rule in the quarry for men who drilled holes to clean out the tamping; that while "churning" the boss told them to hurry up, and in so doing they raised the drill higher, when its fall exploded the charge, by which the plaintiff lost an eye and an arm, one of the other laborers was killed, and the third was badly injured. There was evidence of negligence, and the case should have been submitted to the jury, after opportunity to the defendant to show a different state of facts, if it could.

The ruling on the former appeal (131 N. C., 553), that in actions for negligence, where the negligence alleged is that of a vice-principal, the complaint must allege that the negligence was that of a vice-principal, that he was such vice-principal and that the employer had knowledge of his incompetency, cannot be questioned on this (206) second appeal in the same case (*Perry v. R. R.*, 129 N. C., 333), and if it could be it is not presented, because the pleadings have been amended in that particular and there is no exception presenting the point. We would not overrule any case upon an *obiter dictum.* We simply would not be understood by our silence as reaffirming the former opinion upon that point. The employer is responsible for the negligence or incompetency of a vice-principal in the scope of his authority, and it need not be alleged that he was vice-principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice-principal. His act is the act of the principal.

Error.

Cited: *Roberts v. Baldwin,* 155 N. C., 280; *Wilson v. R. R.,* 164 N. C., 183.

HELMS v. HELMS.

(Filed 13 December, 1904.)

1. Deeds—Conditions—Consideration.

Where a deed conveys lands in consideration of the support of the grantor for life by the grantee, and provides that the land shall stand good for such support, and if the grantee fails to support the grantor the deed shall be void, the support is not a condition precedent, but a condition subsequent.

2. Assignments—Reversions—Remainders—Deeds.

The bare possibility of a reverter under a condition subsequent in a deed is not assignable.

CLARK, C. J., and DOUGLAS, J., dissenting.

On a rehearing. Reported in 135 N. C., 164.

Adams, Jerome & Armfield for petitioners.
Redwine & Stack in opposition.

CONNOR, J. We directed a rehearing of this case upon the (207) question raised by the defendants' exception to the refusal to submit the issue in regard to the alleged mistake of the parties and drafts-

man in failing to insert in the deed certain parts of the contract. We have examined the authorities with care, and, with all possible deference to the learned gentlemen of the bar who differ from us, we are unable to see any error in our former decision. The counsel thus clearly state their contention: "Suppose the words alleged to have been omitted were actually in the deed, then we would have the stipulation that the deed is made in consideration of the support during the natural life of the party of the first part by the party of the second part, . . . and it is further understood and agreed between the parties that the above land shall *stand good* for the support and maintenance of the said Elmira Helms during her natural life, and if the said W. L. Helms fails to support her, then this deed is to be *void.*" This, they say, would clearly express the intention that the support was a condition precedent. We think that the contrary intention is manifest. The consideration is the support—the land is to "stand good," that is, to be charged with the support—and by the failure to support the grantor the deed is to be void. An estate is granted; apt and appropriate words are used for that purpose. The grantee is to do something in the future as the consideration. No words appropriate to making a condition precedent are used—as "if he shall support" or "provided he support"—but "in consideration of the support," that is, his undertaking to support. The charge is made, that is, the land is to "stand good," be liable for, etc. Then follow the words, if inserted, "If he fails to support, this deed is to be void." These are apt words to create a condition subsequent. If no title was to pass, then there was no necessity for declaring that the deed should be void.

(208) In *Nicoll v. R. R.*, 12 N. Y., 121, the deed was made upon the express condition that the grantee should build a railroad track, . . . and the Court said that "This was not a condition precedent, as was argued by plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition." *Marshall, C. J.*, said: "If the act on which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent." The deed is not made to take effect upon the happening of a certain event, but *in presenti,* and is to be divested by the grantee's failure to perform the condition.

Land was devised "provided a schoolhouse is built." *Held,* a condition subsequent. *Hayden v. Stroghton,* 22 Mass., 528. To construe the language as creating a condition precedent would lead to the singular result of postponing the vesting of any title until Elmira Helms died; hence a failure to support her to the last moment of her life

would prevent the estate vesting, because the rule is well settled that conditions precedent must be literally and punctually performed. 13 Cyc., 688. We fail to find any authorities supporting the position that such language creates a condition precedent.

While it is true that the intent must control, it is equally true that the intent must be gathered from the whole instrument. The defendants' counsel say, however, that the doctrine that none but the grantor can take advantage of the breach of the condition is no longer law. We find in 13 Cyc., 689, the law laid down as held by the Supreme Court of the United States as late as 1878: "If the condition subsequent is broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime and after his death by those in privity of (209) blood with him. In the meantime, only the right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger." *Rush v. R. R.*, 97 U. S., 613; 1 Jones on Conveyances, 728; *Nicoll v. R. R., supra,* where the question is discussed and decided. But where a fee simple without a reservation of rents is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said that such possibilities were assignable in equity; but those were interests of a very different character. *Chancellor Kent* says: "A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent." 4 Kent Com., 130.

While it is true that contingent interests and choses in action are assignable in equity, and under our Code actions may be brought in the name of the assignee, we find no case holding that a bare possibility of reverter comes within this principle. We have carefully examined the case of *Cross v. Carson* and notes, 44 Am. Dec., 742, and find nothing therein inconsistent with the trend of authority on the subject.

The petition to rehear must be dismissed.

Petition dismissed.

CLARK, C. J., dissenting: The written agreement was that the "lands shall stand good for the support and maintenance of said Elmira Helms during her natural life." This shows that the intention was that the land should stand good for Elmira's benefit. While inartificially drawn, it would seem clear that the title was not finally and irrevocably to pass from her, and the lands were not to become the property of the grantee until that condition precedent had been complied with. Otherwise, the lands could not "stand good" to secure her mainte- (210)

nance. This was but prudence, and the grantor evidently intended to be prudent by holding her grasp on the land till the consideration had been paid. Till then the lands "stood good," were still hers, notwithstanding prior words of conveyance, till the promised maintenance for her lifetime had been furnished. There is nothing unusual in this. Mortgages and deeds retaining vendors' liens are similarly written to retain a similar security. If the parties did not intend this, but that the grantee should get a full title, with no remedy to the grantor upon a breach, but a lawsuit, would this have been ordinary prudence on her part? And why, if such was the agreement, did the grantee not take possession?

Surely, the issue should have gone to the jury to ascertain whether or not, by mistake of parties and the draftsman, words to make this meaning clear had not been omitted. The issue is presented upon the pleadings, and the defendant has a right to have it passed upon by the jury. There was evidence offered that the deed had never been delivered, and that the plaintiff so admitted. That, coupled with the fact that the grantee did not take possession, was some evidence that the deed was not as favorable to the grantee as now claimed, and that words which the parties intended to be in the deed, and supposed to be there, have been omitted by ignorance or mutual mistake. Evidence was offered, and rejected at the instance of the plaintiff, that he has paid nothing for this property. How the deed got upon record has not been explained. The grantee, having abandoned the contract, should not recover this land against the defendant, to whom grantor Elmira conveyed it subsequently, in consideration of a maintenance fully rendered.

No case more powerfully appealing to a court of conscience could be presented, and reasoning, which might be properly based upon a (211) technical and accurate use of words when written down by a skilled draftsman, ought not to prevail against what is undeniably the right. A jury of "good men and true" should be allowed to pass upon the question whether the parties intended that the absolute title was not to pass till the support had been rendered, and whether by ignorance or mistake material words to express that intent were not omitted. The failure of the grantee to take possession and evidence tending to show nondelivery of the deed would be potent in that view.

In such circumstances as surround this transaction, subtle shades of meaning as to "conditions precedent" and "conditions subsequent," of which these parties doubtless never heard, are but "as the small dust in the balance." Elmira knew naught of technical differences between conditions precedent and subsequent, but she had no intention of her land passing from her till the consideration, her life support, had been paid for it. Whether a condition in a deed or will is a precedent or subse-

quent one depends upon the intention of the grantor or testator, to be gathered from the whole instrument. *Tilley v. King,* 109 N. C., 463. Whether they be precedent or subsequent is a question purely of intent, and the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates. *R. R. v. Brewer,* 67 Me., 295.

The deed upon its face showed that the consideration was something to be performed in the future, and that the lands "stood good for the future performance of this consideration." The lands, therefore, remained the property of the grantor, certainly at least until the grantee should accept the contract and trust; and he having failed to do this or to do anything toward carrying out his contract, and the grantor having remained in possession so that no reëntry was necessary, the legal title of the grantee never became complete, and the grantor could (212) make the subsequent conveyance.

The plaintiff, out of possession, suing to recover possession under the deed, the consideration of which is the subsequent support of the grantor, cannot recover without showing compliance with that agreement.

Driesbach v. Serfass, 126 Pa., 32, 3 L. R. A., 836, is exactly on all-fours with this case. In that case Peter Berger made a deed to his niece, Mrs. Serfass, the consideration being the future support of the grantor. Mrs. Serfass and her husband entered into possession and carried out the contract until the death of Mrs. Serfass, after which her husband abandoned the premises and refused to carry out the contract. Berger, finding himself abandoned, made a similar deed to Driesbach, who supported the grantor until his death. The heirs of Mrs. Serfass then brought an action to recover possession against Driesbach. The defendant on the trial offered to prove the failure of Serfass to carry out the contract to support, which evidence was excluded, the court below holding that Mrs. Serfass took a fee in the land which descended to her heirs at law, and that Berger had no right to make a second conveyance to Driesbach, his only remedy being an action of covenant against Mrs. Serfass for nonperformance. The Supreme Court of Pennsylvania, in reversing this ruling, says: "The right of Serfass to recover possession in this action depended upon whether the consideration agreed upon had been paid. Being out of possession, he could not recover upon the contract unless he could show performance. This he was not required to do. The defendant then proposed to take up the burden of proof that rested on the other side, and to show affirmatively the nonperformance of the contract under which alone the plaintiff could recover. This evidence should have been admitted. It would

(213) be contrary to the original intention of the parties, as well as against good conscience, to permit the vendee to recover possession of land from his vendor, or one holding his title, without rendering or offering to render the equivalent contracted for."

By the words "deed to be void," the grantor doubtless meant "to be void and of no effect" till the consideration was fully paid. This view was presented by the evidence offered and ruled out upon the plaintiff's objection. It should have been admitted. And if the defendant's pleading that the agreement was that "the deed should be void," technically construed, means a "condition subsequent," it is in conflict with the whole tenor of the evidence offered, and the defense intended, and the solemn interest of justice requires that the case should go back, that the evidence may be admitted, and a "condition precedent" pleaded in more technical language, according to the clear intent of the defense set up.

DOUGLAS, J., dissenting: Where the law is in doubt, my mind naturally turns to the great equities of humanity. These are all on the side of the defendant. The plaintiff is seeking to recover land under a contract which he repudiated and for a consideration which he never gave. He is seeking to get something for nothing, and take the land away from those who have done what he should have done, and have paid what he should have paid. I concur in the dissenting opinion of the *Chief Justice.*

Cited: Cuthbertson v. Morgan, 149 N. C., 79; *Winslow v. White,* 163 N. C., 32.

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(214)

BARKER v. RAILROAD

(Filed 13 December, 1904.)

1. Railroads—Ejectment—Evidence—Const. N. C., Art. IV, Sec. 8.

In ejectment for a strip of land adjacent to the railroad of the defendant, evidence of a charter granted in an adjoining State to a railroad of that State which afterwards by consolidation became a part of the lessor of the defendant, was admissible for the purpose of showing the history and original creation of defendant's lessor.

2. Eminent Domain—Railroad—Ejectment—Evidence.

In ejectment against a railroad company, the act of the General Assembly relating to the consolidation of a local railroad company with a company of an adjoining State—the consolidated company being the lessor of the defendant—is admissible, though the act confers no power to condemn land.

3. Railroads—Mortgages—Foreclosure of Mortgages — Easement — The Code, Sec. 697—Laws 1854, Ch. 229.

On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter.

4. Limitation of Actions—Presumptions—Railroads.

Where a railroad company enters upon and constructs its track on land and the owner does not institute an action therefor within two years, the railroad will be presumed to have acquired an easement.

DOUGLAS, J., dissenting.

ACTION by T. G. Barker against the Southern Railway Company, heard by *Shaw, J.*, and a jury, at May Term, 1904, of HENDERSON.

This was an action brought for the recovery of a strip of land described in the complaint as bounded by the main line of the Asheville and Spartanburg Railroad on the east, by W. H. Ray on the north, by the street leading from Anderson Avenue by the ma- (215) chine shops of the Henderson Lumber Company on the west, and by Henderson Avenue on the south. The plaintiff showed a chain of title from the State to himself. The defendant admitted that it was in possession of the *locus in quo*. It was alleged that such possession was held by virtue of the lease from the Asheville and Spartanburg Railroad Company; that the road claimed the right of possession as and for a right of way; that possession of the land was taken by the grantee of the company for railroad purposes and the land is used and is necessary for the operation of the road, and that by virtue of such lease and possession, by the terms of the charter of its grantee, a right of way was acquired in and over the land.

The plaintiff located the land as described in the deed and complaint and it was shown that the land was used for railroad purposes to load and unload cars, and had been used for depot purposes since 1878-'79. The road was extended from Hendersonville to Asheville in 1880, and completed in 1886. The defendant introduced the charter (Laws 1854-'55, ch. 229), entitled "An act to incorporate the Greenville and French Broad Railroad Company." Section 11 of the act is as follows: "In the absence of any written contract between the company and any owner or owners of said land through which the said railroad may be constructed, in relation to said land, it shall be presumed that the land upon which the said railroad may be constructed, together with 100 feet on each side of the center of said road, has been granted to said company by the owner or the owners thereof; and the said company shall have good right and title to the same, and shall have and hold and enjoy the same unto them and their successors so long as the same may be used only for the purposes of said road, and no longer, unless the

(216) person or persons to whom any right or title to such land . . . descend or come shall prosecute a suit for the same within two years next after the construction of such part or portion of said road as may be constructed upon the land of the person or persons so holding or acquiring such right to the title as aforesaid; and if any person or persons to whom the right or title to said lands, tenements, or hereditaments belong, or shall hereafter descend or come, do not prosecute a suit for the same within two years next after the construction of the part of said road upon the land of the person or persons so having or acquiring said right or title as aforesaid, then he or they and all claiming under him or them shall be forever barred to recover the same."

(2) The defendant, under plaintiff's objection, introduced the Laws of South Carolina, vol. 15, p. 348, No. 274, entitled "An act to incorporate the Spartanburg and Asheville Railroad Company." Section 4 of said act conferred upon said corporation power to construct a railroad from Spartanburg, S. C., to the North Carolina line in the direction of Asheville." . . . Plaintiff excepted.

(3) The defendant introduced chapter 27, Laws 1874-'77, entitled "An act to amend the charter of the Greenville and French Broad Railroad Company." The preamble of said act is as follows: "Whereas the Greenville and French Broad Railroad Company of North Carolina and the Spartanburg and Asheville Railroad Company of South Carolina have, in pursuance of the laws of North and South Carolina, been consolidated into one company; and whereas it is deemed expedient to repeal some of the restrictions contained in the charter of the Greenville and French Broad Railroad Company." The plaintiff objected to this statute for the reason that it does not appear that there was in fact any consolidation of the two companies in the act, and because no power is given in the act to the Asheville and Spartanburg Railroad (217) Company to condemn land, and no corporate rights are given whatever. The objection was overruled, and the plaintiff excepted.

A certified copy from the records of Buncombe County of a deed in trust from the Spartanburg and Asheville Railroad Company to Inman & Cleveland was admitted. This deed has been registered in Henderson County from this certified copy. The plaintiff objected to the deed because it appears to be a copy and was ordered to registration and was registered in Henderson County from a copy from the records of Buncombe County, and because it was not properly admitted to probate and registered in Henderson County. The objection was overruled, and the plaintiff excepted.

The defendant next offered a certified copy of the record in the case of *Tomay v. Spartanburg and Asheville Railroad Company and others* in the Circuit Court of the United States, in which the mortgage deed was foreclosed and the property sold. The deed from Inman & Cleveland, trustees, to the Asheville and Spartanburg Railroad Company, conveying all of the property rights . . . of said company, bearing date 4 April, 1881, and duly registered. The defendant rested.

The plaintiff introduced Book 37, p. 162, Record of Deeds of Henderson County, showing the deed from T. G. Barker (plaintiff) to the Spartanburg and Asheville Railroad Company, conveying land known as the "stock lot" on the side of the railroad track, opposite the land in controversy. This land was conveyed to the company for use as a "stock lot" and other railroad purposes. The plaintiff showed the location of the "stock lot," . . . and at the conclusion of the testimony his Honor directed the jury to answer the first issue, "Is the plaintiff the owner and entitled to the land in controversy set out in the complaint? 'Yes,' subject to the right of way of the Asheville and Spartanburg Railroad Company, as provided in the charter of the Greenville and French Broad Railroad Company as contained in (218) chapter 229, Laws 1854-'55." To the second issue, the plaintiff was not entitled to the possession, plaintiff excepted. From a judgment upon the verdict the plaintiff appealed.

Smith & Valentine for plaintiff.
G. F. Bason and F. H. Busbee for defendant.

CONNOR, J., after stating the facts: The plaintiff's first exception to testimony becomes immaterial by reason of the answer to the first issue. His second exception is pointed to the introduction of the South Carolina statute, for that it is irrelevant and cannot affect the rights of a citizen of this State. The exception is based upon a misconception of the purpose for which the statute was introduced. For the purpose of showing the history, original creation, and consolidation of the two corporations, we can see no valid objection to its competency. It certainly could not confer upon the corporation chartered in South Carolina any rights, privileges, or powers in respect to the property of the plaintiff in this State, nor does it profess to do so. It simply charters a railroad company with power to construct a road to the North Carolina line. The exception was not urged in this Court and cannot be sustained.

The third exception is directed to the act of 1874-'75, because: (1) It does not appear that in fact there was any consolidation of the two companies. (2) It does not confer any power on the corporation to condemn land. These objections go rather to the effect of the act than to its com-

petency. The recital that a consolidation had been made in pursuance of the laws of the two States must be taken as *prima facie* true for the purposes of this case. In regard to the second ground, the claim of the defendant does not depend upon the right of eminent domain,
(219) but upon a statutory presumption. The exception cannot be sustained. The exception to the introduction of the deed in trust must also be overruled.

We are thus brought to the consideration of the real question presented by the appeal. Whatever corporate rights vested in the Greenville and French Broad Railroad Company passed to and vested in the Asheville and Spartanburg Railroad Company by the consolidation. 10 Cyc., 303. The power to enter upon land for the purpose of constructing the road was clearly conferred upon the Greenville and French Broad Railroad Company. It was further provided by section 11 that, in the absence of a written contract, it shall be presumed that the land upon which the said road may be constructed, together with 100 feet on each side of the center of the road, has been granted to said company by the owners thereof. . . . The validity of the consolidation is not material to this controversy; it was recognized by the General Assembly in the manner herein set forth. The trust deed executed by the Asheville and Spartanburg Railroad Company vested in the trustees, for the purposes therein set out, the title to the property of the consolidated railroad companies. This title passed to and vested in the Asheville and Spartanburg Railroad Company by virtue of the proceedings, decree, sale, etc., of the Circuit Court of the United States. By virtue of section 697 of The Code, the purchasers became the Asheville and Spartanburg Railroad Company. We do not think that the decision of this Court in *James v. R. R.,* 121 N. C., 523, 46 L. R. A., 306, conflicts with this view. The question presented in that case is easily distinguished from the one under consideration. At the time of the purchase, 4 April, 1881, the Spartanburg and Asheville had entered upon and constructed its track over the land in controversy. The plaintiff's witness puts it at about 1879 or 1880. This Court in *R. R. v. McCaskill,* 94 N. C.,
746, discusses and construes language similar to that contained
(220) in section 11 of the charter of the Greenville and French Broad. It was held that "the presumption of the conveyance arises from the company's act in taking possession and building the road, when, in the absence of a contract, the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued it would be more effective in passing the owner's title and estate. Thus vesting, it remains in the

company as long as the road is operated, of the specified width, unaffected by the ordinary rules in reference to repelling presumptions."

The decision in this case has been modified in *R. R. v. Sturgeon,* 120 N. C., 225. It is there held that under similar conditions, construing the same language, the road acquires, not a title to the land, but an easement which entitles it to possession of the whole right of way only when it shall appear that it is necessary for its purposes in the conduct of its business. We do not understand that in any of the decisions of this Court the doctrine of *McCaskill's case* has been otherwise modified. In *Dargan v. R. R.,* 131 N. C., 623, *Sturgeon's case* was approved. A railroad under a charter such as the one before us may acquire its right of way in three different methods: 1. By purchase, which includes dedication, in which case it will be confined to the width set forth in the deed and act of dedication. 2. By condemnation, in which case it will be confined to the width set forth in the map or profile which is required to be filed under the statute. If, in either case, it contents itself with accepting and paying for less than 100 feet, it must be content to be restricted to such limits as are fixed. The first method, of course, arises out of a contract; the second is in the exercise of the right of eminent domain, and all statutory provisions for taking property in this way must be strictly construed, and no such power can be granted by implication. This is elementary learning. 3. In the absence of (221) any written contract, it shall be presumed that the land upon which the road may be constructed, together with 100 feet on each side of the center of the road, has been granted to the company by the owners thereof, and it acquired a good right and title to the same, so long as the land may be used only for the purposes of the road, and no longer, unless the owner shall prosecute a suit within two years to recover either the land or damages by way of condemnation. This mode of acquisition is not an exercise of the right of eminent domain; it is based upon a purely statutory presumption. The concurring conditions are (1) entry and construction of the road, and (2) the failure of the owner to prosecute an action for two years. These concurring conditions existing, the statute fixes the term of two years within which the owner may prosecute his action, and in default of which the road acquires the easement described, to wit, "100 feet on each side of the center of the road," with the limitation fixed as to time and use. It would seem that there could be no doubt in regard to the meaning of the Legislature. With the policy which prompted the Legislature in the early history of railroad building in this State to put this provision in the charters of the contemplated roads we have nothing to do. Finding them to be constitutional, it is our duty to interpret and enforce them in accordance with well-settled principles of legal construction.

The boundary is fixed at "100 feet on each side of the center of the road," and we have no right to restrict it. The duration of the easement is "so long as the same may be used only for the purposes of the road, and no longer." This Court in *Sturgeon's case* has defined the extent of the easement, both in respect to the width and the use to which it must be confined. It is said, however, that the presumption only arises in the absence of any written contract, and the burden is upon
(222) the defendant to show this condition. It must be conceded that when one relies upon a presumption to establish a right he must show every fact out of which the presumption arises.

While we have no disposition to violate the elementary principle of law that a party who claims to have acquired the title to property or any easement therein or right to put any burden thereon by presumption must establish his claim by showing the facts upon which it is based, we must not refuse to give to the clearly expressed intent of the Legislature, especially when it assumes the form of a contract, a fair interpretation. Whether in the first introduction of railroad building in this State the Legislature conferred power, in respect to the acquisition of rights of way and other special privileges, too freely, it is not within our province to say. Whether the growth in wealth and development of the natural resources of the State, incident to the improvement of facilities for transportation, has compensated for such grants, it is equally beyond our province to discuss. This Court best serves its purpose and discharges its legitimate function in our governmental system when it confines itself to its constitutional orbit "to review any decisions of the courts below upon any matters of law or legal inference." Const., Art. IV, sec. 8.

When the defendant showed its actual occupancy of the land for two years in the manner and for the purposes to which it was appropriated, in the absence of any deed or written contract or proceeding for condemnation, the statutory presumption arose with the effect upon the rights of the parties declared by the statute. If one is sued by the State for land and shows a possession, either by himself or others, for thirty years, under the law as it existed prior to 1868, then arose a presumption of a grant as against the State, and a similar possession of twenty-one years presumed a deed as against an individual. The
(223) charter simply defines the kind, character, and purpose of the possession and raises the presumption of a grant of an easement of fixed limitations at the end of two years. Charters containing these provisions have been granted in this State since 1833. No serious question has ever been raised as to their validity. *R. R. v. Davis,* 19 N. C., 452; *R. R. v. McCaskill, supra; R. R. v. Sturgeon, supra.* The plaintiff must recover on the strength of his own title. The easement having

been acquired by the statutory presumption and the defendant being in the actual enjoyment of it, the plaintiff cannot oust it.

His Honor stated that there was no contradiction in the testimony, and as a question of law directed the verdict. In his ruling we find

No error.

DOUGLAS, J., dissenting: This is another case in which I would wish to state my views at greater length; but it is perhaps unnecessary to do so in view of my dissenting opinion in *Jones v. Comrs.*, 130 N. C., 457, and *Dargan v. R. R.*, 131 N. C., 626. I need only repeat that in my opinion any construction of a statute which has the effect of taking private property without compensation and without giving the owner any adequate remedy for obtaining compensation, is contrary to the Constitution of this State as well as the Fourteenth Amendment to the Constitution of the United States. I may also say that in my opinion any statutes of limitation which discriminate against the citizen by taking from him his property while in the actual possession thereof, and giving it to a railroad corporation upon a mere constructive possession, is contrary to the letter and spirit of section 3, Article VIII of the Constitution of this State, which provides that: "All corporations shall have the right to sue and shall be subject to be sued in all courts in like manner as natural persons." I am especially interested (224) in the principles decided in this case on account of its unjust tendencies and dangerous possibilities. Hitherto the lands thus taken have been of comparatively small value; but if the principle is correct, what is there to prevent railroad companies from demanding a right of way 200 feet wide through our principal cities, and thus appropriating perhaps millions of private property without the shadow of compensation. The value of the property would make no difference in the justice and legality of the claim. The cabin of the poor is as sacred as the mansion of the rich, and both should equally receive the fullest protection of the law.

Cited: R. R. v. Olive, 142 N. C., 265, 272, 273; *Parks v. R. R.,* 143 N. C., 293; *Earnhardt v. R. R.,* 157 N. C., 364; *State's Prison v. Hoffman,* 159 N. C., 568; *Tighe v. R. R.,* 176 N. C., 244.

(225)

GOODWIN v. CLAYTOR.

(Filed 13 December, 1904.)

1. Exemptions—Lex Fori—Conflict of Laws.

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum.

2. Exemptions—Corporations—Garnishment—Domicile.

Where a corporation organized in New Jersey, but having no property in that State—the bulk of its property and its principal place of business being in North Carolina—was summoned in North Carolina's garnishee in an action between two residents of Virginia, the exemption laws of Virginia were not applicable.

3. Garnishment—Process, Service of—The Code, Sec. 364.

Where service of summons was had by publication on a nonresident of the State, and a debt due the defendant was garnisheed, plaintiff did not lose any lien on the debt by taking a judgment against the defendants and the garnishee.

4. Garnishment—Judgments—Domicile—Jurisdiction—Process.

In garnishment proceedings against a nonresident defendant, service being had by publication, no jurisdiction is acquired to support a personal judgment against the defendant.

5. Garnishment—The Code, Sec. 364.

Under the statute, moneys due by a garnishee, or goods in his hands, at the time of appearance and answer, are applicable to the debt, though not earned and due when he was summoned to answer.

6. Garnishment.

A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover.

7. Garnishment—Jurisdiction—Foreign Corporations—The Code, Sec. 194.

The courts of this State have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought in the State against its salesman; the cause of action against it and in favor of the salesman having arisen here, and the subject of the action being situated here.

8. Exemptions—Garnishment—Domicile—The Code, Sec. 493.

The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment.

ACTION by G. O. Goodwin against A. B. Claytor and the R. J. Reynolds Tobacco Company, garnishee, heard by *McNeill, J.*, and a jury, at February Term, 1903, of FORSYTH.

This action was heard upon a case agreed as follows: The action was commenced before a justice of the peace by Goodwin, a resident of the

State of Virginia, against Claytor, also a resident of the State of Virginia, for the recovery of $109.67, with interest on $96.01 from 14 January, 1903, due by judgment. The indebtedness of Clay- (226) tor to Goodwin is admitted. Service of summons was duly had by publication and by garnishment of a debt due from the R. J. Reynolds Tobacco Company to Claytor. Claytor is an employee of the R. J. Reynolds Tobacco Company in the capacity of traveling salesman, and the money which was attached in the hands of the R. J. Reynolds Tobacco Company was the earnings of Claytor for his personal services, and said earnings accrued within sixty days next preceding the institution of this action, service of garnishment, filing of answer, and the order of the justice. These earnings were used for the support of a family dependent upon him. It is admitted that the R. J. Reynolds Tobacco Company is a corporation duly chartered and created under and by virtue of the laws of the State of New Jersey and is engaged in the manufacture of tobacco, with its principal place of business and bulk of its property in Winston, N. C., it having no property in New Jersey, save that such office as is required by the laws of New Jersey is located there. The said company has complied with the laws of North Carolina in reference to foreign corporations of the nature and character of this company. The contract between Claytor and the company was signed by Claytor in Virginia and returned to Winston by mail. The preliminary arrangements, however, and the principal points involved in the contract were agreed upon at the office of the company in Winston. The salary of Claytor is usually paid him by check upon a bank in New York, which is sent to him by mail in Virginia, but occasionally a check is drawn on a bank in Winston and mailed to him in Virginia. These checks are sent from the office of the company in Winston. The contract between the company and Claytor does not fix where or how his salary shall be paid. All services performed and done, under and by virtue of this contract, are performed and done in the States of Virginia and West Virginia, and no part of said work is done in North Carolina. At the date of the service of the (227) writ of garnishment on the company it was indebted to Claytor by reason of the contract in the sum of $16.55 for salary and $17.58 expense money, and likewise since the service of the writ of garnishment has become indebted to Claytor up to the date of filing the answer in the sum of $86 for salary and blank dollars for expense money, the expense money being advanced by Claytor and the company reimbursing him for the same upon receiving statement thereof.

The laws of Virginia upon the question of exemptions are as follows: "Section 3630 of The Code of 1887—Every householder residing in this State shall be entitled to hold exempt from levy, seizure, garnishment,

or sale under any execution, order, or process issued on any demand for any debt or liability on contract, his personal and real estate, or either, to be selected by him, including money and debts due him, to the value of not exceeding $2,000. Section 3652—Wages owing to a laboring man, being a householder, not exceeding $50 per month, shall also be exempt from distress, liability, or garnishment. Section 3656—An injunction may be awarded to enjoin the sale of any property exempt under the provisions of this chapter, and to prevent the wages exempted by section 3652 from being garnisheed or otherwise collected by an execution creditor." It is admitted that Claytor is a householder, or head of a family within the meaning of the exemption law of the State of Virginia, and it is likewise admitted that he has never had allotted to him any exemption under and by virtue of the laws of that State. This agreed statement of facts is made and signed without prejudice to any rights of either of the interested parties to make any motion or enter any special appearance as in its or his judgment may be deemed advisable.

The court, upon the case agreed, rendered judgment in favor of the plaintiff and against both defendant and garnishee for the full amount of his debt and the costs. Defendant and the garnishee excepted (228) and appealed.

A. H. Eller for plaintiff.
Glenn, Manly & Hendren for defendants.

WALKER, J., after stating the facts: The counsel of the defendant and of the garnishee, in their able and exhaustive brief, rely on several grounds to defeat the plaintiff's recovery. For convenience, we will change somewhat the order in which they are stated in the brief. It is contended (1) that the debt garnisheed is exempt by the laws of Virginia from garnishment; (2) that if the debt was subject to garnishment at all, any lien acquired by the service of the writ was waived and the garnishee released by taking a general and personal judgment against the defendant and the garnishee, instead of taking an order condemning the debt to the payment of the plaintiff's claim; (3) that the judgment is erroneous, as it condemned a debt due after the service of the writ; (4) that the court was without jurisdiction to proceed against the garnishee for the purpose of condemning the debt due by him, because it is necessary to the possession and rightful exercise of such jurisdiction that three things should concur: (*a*) the corporation who is the garnishee in this case must have such a residence and agency within the State as renders it amenable to the process of the court; (*b*) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery

of the debt; (*c*) it must appear that the *situs* of the debt is in this State; (5) and lastly, they insist that the earnings of a debtor are exempted from condemnation by the laws of this State. We will consider these contentions in the order thus presented.

The right of exemption under the laws of Virginia cannot be enforced here. It is well settled that exemption laws have no extra-territorial effect. They are not, in respect to the question now (229) under discussion, a part of the contract, but relate only to the remedy, and the right to an exemption is therefore subject to the law of the forum. Rood on Garnishment, sec. 100; *R. R. v. Sturm,* 174 U. S., 710; *Sexton v. Ins. Co.,* 132 N. C., 3, 60 L. R. A., 615. But there is another decisive answer to this claim of exemption. We have concluded, as will appear hereafter, that the domicile of the corporation, the Reynolds Tobacco Company, is, for the purposes of this case, in this State, and it nowhere appears that it has any domicile or even an agency in the State of Virginia. Indeed, the case shows that, while it was created a corporation in the State of New Jersey, it has no property in that State, but the bulk of its property and its principal place of business are here. For this reason it could not be sued by the defendant Claytor in the State of Virginia for the debt garnisheed in this action, and Claytor, therefore, could not avail himself of the exemption laws of that State. It is argued that as the plaintiff and the defendant Claytor are residents of Virginia, if Claytor is not allowed his exemption under the laws of that State, the plaintiff will be enabled thereby to evade or "shove by" the law of the domicile of both of them and set it at defiance. How can this be if the plaintiff cannot, by the process of the courts of that State, reach and lay hold of the *res,* which is the debt due by the tobacco company? An exemption, it would seem, can be allowed only in property actually situated in the State where the claim of exemption is asserted and where the property in which it is claimed is subject to the jurisdiction and process of its courts. As we will presently show, the tobacco company had no domicile and could not be served with process there, and, besides, as will also appear hereafter, the *situs* of the debt, if any is required, was here. The argument predicated upon the exemption of the particular debt in Virginia must (230) therefore fail, as no exemption exists.

We do not think that, if the plaintiff acquired any lien on the debt due to the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the garnishee seems to be expressly warranted and contemplated by the statute (The Code, sec. 364), and that against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him except in so far as it could by its process levy

upon or seize his property, and in this respect the suit is to all intents and purposes in the nature of a proceeding *in rem* and not one *in personam. Cooper v. Reynolds,* 10 Wall, 308; *Pennoyer v. Neff,* 95 U. S., 714; *Winfree v. Bagley,* 102 N. C., 515; *Fisher v. Ins. Co.,* 136 N. C., 217, at this term; *Ins. Co. v. Stratley,* 172 U. S., 602. Nor do we think the judgment was erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. The Code, sec. 364, provides: "When an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee for all sums of money due to the defendant from him, and for effects and estates of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of the garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment." The language thus employed clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor at the time of appearance and an- (231) swer, shall be applied in satisfaction of the debt. 1 A. & E., (1 Ed.), pp. 1150, 1151, 1165. It does not appear in this case how or when the salary was to be paid. It is admitted, however, that an amount more than sufficient to pay the plaintiff's claim was due at the time of filing the answer, and judgment was rendered only for the amount of the defendant's indebtedness to the plaintiff.

We come now to the consideration of the defendant's fourth exception, which involves important questions not at all free from difficulty. For the purpose of determining whether any one of the defendant's contentions under the fourth exception is well founded, we may admit the general rule that a garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. It would appear to be a necessary corollary from the proposition, thus stated, that the plaintiff in the garnishment is in his relation to the garnishee substituted merely to the rights of his own debtor and can enforce no claim against the garnishee which the debtor himself, if suing, would not be entitled to recover. Shinn, sec. 487; *Myer v. Ins. Co.,* 41 Md., 595; *Brause v. Ins. Co.,* 21 Wis., 509. The garnishee can be placed in no worse position by reason of the garnishment than

he occupied as a debtor to the defendant, nor subjected to any greater liability. This is a just and reasonable doctrine, but it does not by any means sustain the objections of the defendant. It seems to be conceded that if the creditor of the garnishee can sue the latter in this State, then the plaintiff can proceed here against the garnishee. That the garnishee, the tobacco company, although a corporation having its domicile of origin in New Jersey, was amenable to process such as issued in this case is too well settled to be now an open question. We are speaking now of the service of process and not of jurisdiction. (232) It is found as a fact that the company has complied with the laws of this State concerning foreign corporations, which means either that it had an agent in this State upon whom process could be served under the general law in all actions against it, or that it had complied with the provision of chapter 5, Laws 1901. As the tobacco company transacted business here by the favor or comity of this State, it was subject to the State's laws and to all of its reasonable rules and regulations regarding the service of process, and any judgment of a State court, having jurisdiction of the cause or of the subject of the action, is binding upon the company, at least in this State, the same as if it were a domestic corporation or an individual. The subject is fully discussed in *Fisher v. Ins. Co.*, 136 N. C., 217. See, also, *R. R. v. James*, 161 U. S., 545; *R. R. v. Trust Co.*, 174 U. S., 552; *Shields v. Ins. Co.*, 119 N. C., 380. While the company cannot be treated as a domestic corporation or as a distinct entity in this State, for the purpose of determining the jurisdiction of the Federal courts, it may be so regarded in respect to its liability to be sued here and the jurisdiction of our courts over it, which extends to suits not only by residents of this State, but to those by residents of other States, who are equally entitled to be admitted to our courts to prosecute actions for the protection of their rights and the recovery of their property, in the absence of any law forbidding the same. The State may, it is true, exclude nonresidents from our courts, if it sees fit to do so, without infringing the Constitution of the United States, which protects only citizens of a State against such discrimination by another State; but we do not think the principal defendant, who is the debtor of the plaintiff, has been denied the right to sue his debtor, the garnishee, in our courts by section 194 of The Code.

It having been settled that a foreign corporation exercising (233) its franchises in this State may be subjected to the process of garnishment, when it holds property or credits of the debtor for which the latter can sue in our courts, and that the plaintiff in attachment as against the garnishee is subrogated to the rights, in that respect, of the debtor, and can recover only by the same right and to the

same extent as the debtor could recover, if he were suing the garnishee, his debtor (*Myer v. Ins. Co., supra*), it must follow that the plaintiff may maintain his action and the garnishment proceedings as ancillary to it, unless he is precluded from doing so by section 194. That section provides that an action may be brought against a foreign corporation by a plaintiff not a resident of this State, when the cause of action shall have arisen or the subject of the action shall be situated within this State. It appears in this case that the terms of the contract between Claytor and the tobacco company were agreed upon in this State, and, while the services were performed by Claytor in Virginia, all checks for his salary or wages were drawn at and sent from Winston in this State; and it further appears that the tobacco company has no property in New Jersey, which by courtesy may be called its domicile of origin, and that the bulk of its property is in this State, which is actually its domicile by adoption.

What a curious result would follow if we should hold that Claytor cannot sue the company in this State. We will force him to seek his debtor in New Jersey, but he will find no property there to satisfy his debt, and there is no good reason why he should be required to resort to the courts of any other State than New Jersey where there may happen to be some of the property of his debtor, but where the debtor has no domicile of any kind, and where the same law may exist as we have here; nor should he be required to first obtain judgment in New Jersey and then come here to sue upon it. A construction of our statute, with
(234) reference to the special facts of this case, which would produce such an anomaly by requiring him to pursue any one of the courses indicated, should not be accepted as the true one, unless no other is admissible. The transactions out of which the cause of action of Claytor against the company arose occurred in this State, and the debt due to him was as much payable here as it was in Virginia. For some purposes it may be important to determine precisely where a debt is payable or a contract is to be performed, but it is a well established general rule that "all debts are payable everywhere, unless there be some special limitation or provision in respect to the payment, the rule being that debts, as such, have no *locus* or *situs,* but accompany the creditor everywhere and authorize a demand upon the debtor everywhere." 2 Parsons Cont. (8 Ed.), 702. The contract between Claytor and the tobacco company contained no "special limitation or provision in respect to payment," and the debt growing out of it, if not, by reason of the special circumstances of its creation, payable here (*Perry v. Transfer Co.,* 19 N. Y. Supp., 239), was payable generally, and could have been sued on by Claytor in this State, and therefore was attachable here. "This is the principle and effect of the best considered

cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." *R. R. v. Sturm,* 174 U. S., 710; Beale on Foreign Corp., sec. 284.

Considering the special facts of this case, we find that the tobacco company obtained a charter in New Jersey for the avowed purpose of establishing its principal office and transacting its business in this State. It was born, it is true, in New Jersey; but it lives, moves, and has its being in this State. It is nominally a corporation of the other State where it was originally created, but in reality has its home, its domicile, here. There is no valid or practical reason why this case should not be held to come substantially within the principle of *Sexton v. Ins. Co., supra,* and *Boyd v. Ins. Co.,* 111 N. C., 372; and if that is the correct view, the tobacco company cannot certainly be prejudiced (235) in the least when it is required to pay its debts where it conducts its business, and has all or the larger part of its assets. On the contrary, it will be to its advantage if it is required to pay where it has its assets, rather than at the domicile of its origin, where it has none, and where it performs none of its corporate functions. This case is clearly distinguishable from *Balk v. Harris,* 124 N. C., 468, 45 L. R. A., 257, 70 Am. Rep., 606, and *Strause v. Ins. Co.,* 126 N. C., 223, 48 L. R. A., 452. The facts in this case and of those two cases are wholly different. It has been said that a corporation must dwell in the place of its creation and cannot migrate to another sovereignty (*Bank v. Earle,* 13 Pet., 588); but this *dictum* has been held to be nothing but a rhetorical statement of the perfectly obvious principle that a corporation, wherever it goes, is subject to the law of the State where it was created and cannot rid itself of the control of that State, nor can it disregard the restrictions of its charter, which embodies the limitations of its legal existence and its corporate powers. It may, though, acquire a domicile or a residence in another State, and be subject to its laws to the same extent as if it had been fully domesticated there. Murfree on For. Corp., secs. 8 and 9. Our conclusion on this branch of the case is that the tobacco company was amenable to the process of our courts, both mesne and final; that the cause of action against it and in favor of Claytor arose in this State (*Steel v. Comrs.,* 70 N. C., 137), and that the subject of the action is situated here, that is, the debt due from the tobacco company to the defendant, the *res,* as it is called (*Winfree v. Bagley,* 102 N. C., 515), which has been brought within the jurisdiction of the court by service of the garnishment.

It was necessary to decide the question we have discussed before considering the defendant's last ground of objection, because a decision for him on any one of those questions would have settled the case entirely in his favor. (236)

The defendant further insists that his earnings for personal services at any time within sixty days next preceding the garnishment were exempt under section 493 of The Code. He admits that this exemption is allowed by that section in supplementary proceedings, but his counsel argue that it is intended by the law that such earnings shall in no way be condemned or applied to the payment of debts. The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction so as to embrace all persons coming fairly within their scope. Black Interp. of Law, 311. This Court has uniformly held that where property is exempted from seizure under final process it is similarly exempt from levy or seizure under any mesne process issued for the purpose of placing it in the custody of the court and thus preserving it until it can finally be applied to the satisfaction of the plaintiff's debt. *Chemical Co. v. Sloan,* 136 N. C., 122. Supplementary proceedings are in the nature of final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable *fi. fa.,* and if the defendant comes within the general description of the persons designated in the act, there is no good reason for denying him the exemption under the garnishment. The homestead and personal property exemptions can be claimed only by residents of this State. But this is so by reason of the express words of our Constitution and laws. There is no such limitation in section 493, and we are unable to see why we should restrict its meaning so as to exclude the defendant from the benefit of its wise provisions, and thereby defeat the evident policy and benevolent purpose of the Legislature. We prefer to give the section a liberal construction which will be apt to do
(237) justice and at the same time carry out the legislative intent, and which, too, will not be contrary to the letter of the law.

The defendant should be allowed his exemption out of his earnings in accordance with the provisions of section 493, and to this extent there was error in the judgment upon the case agreed.

We have discussed the case somewhat at length, as it involves questions of great and increasing importance and, it may be, of far-reaching consequences. It was unusually well presented on both sides by counsel in their briefs.

Error.

Cited: Holshouser v. Copper Co., 138 N. C., 258; *May v. Getty,* 140 N. C., 319; *Wright v. R. R.,* 141 N. C., 170; *Wierse v. Thomas,* 145 N. C., 268; *Silk Co. v. Spinning Co.,* 134 N. C., 429; *Currie v. Mining Co.,* 157 N. C., 218; *Patrick v. Baker,* 180 N. C., 592.

JONES v. MARBLE COMPANY.

(Filed 13 December, 1904.)

1. **Attorney and Client— Privileged Communications— Evidence— Witnesses.**

Where an attorney writes a letter to a client and sends a copy thereof to an associate attorney, such copy is a privileged communication.

2. **Attorney and Client—Privileged Communications—Waiver—Witnesses.**

Where a client makes his attorney a witness in an action by an associate counsel for attorney's fees, the client thereby waives the right to claim as a privileged communication any transaction between himself and his attorney relative to the transaction for which the fees are denied.

ACTION by W. W. Jones and others against the Nantahala Marble and Talc Company, heard by *Long, J.*, and a jury, at June Term, 1904, of BUNCOMBE. From a judgment for the plaintiff, the defendant appealed.

Merrick & Barnard and Locke Craig for plaintiffs. (238)
Frank Carter and H. D. Chedester for defendant.

MONTGOMERY, J. The plaintiffs, partners in the practice of the law, brought this action to recover of the defendant certain fees for professional services rendered. The defendant denied that it owed the plaintiffs anything for professional services, averring that it had paid to the plaintiffs a reasonable compensation for the same. The only exception in the appeal arises on a matter of evidence. One of the plaintiffs in his own behalf testified as to the value of his services and his contract of employment. The defendant introduced as a witness an attorney who was associated with the plaintiffs as one of the defendant's attorneys in the suit in which the plaintiffs alleged that they earned the fees which are the subject of this action, for the purpose of showing that the fees and charges claimed by the plaintiffs were excessive and exorbitant. His testimony as to the amount involved tended to show that the fees were excessive. On his cross-examination, the plaintiffs, to show that the witness had on a former occasion expressed himself otherwise than he testified as to the amount involved in the suit in which the plaintiff's fees were alleged to have been earned, showed him a carbon copy of a letter which the witness had written and sent to the president of the defendant company on that subject, and which copy the witness had sent to the plaintiffs. The witness identified it, and, over the objection and exception of the defendant, his Honor admitted it. The witness for himself was willing to waive any privilege he might be thought to have, but disclaimed any right to represent the defendant.

The objection was that it was a confidential communication between attorneys and client, and could not be received as evidence over the objection of the client (the defendant). The letter upon its face shows that the matter was of a confidential nature between lawyer and client.

It contained matters directly connected with the important
(239) features of the litigation, bearing on the amount that might be recovered against the defendant, and which, if they had been known to the opposing side, might have been harmful. The matters being confidential at the time the letter was written, they remained so perpetually unless they should be afterwards waived by the client. It makes no difference that the carbon copy of the letter was sent to the plaintiffs by the witness. It was just as much a confidential communication as if it had been sent by the client to the plaintiffs. All communications, whether by conversation or in writing, between the attorneys for a party concerning the subject-matter of the litigation are priviledged. 23 A. & E., 57, and authorities there cited.

The question then arises, Did the defendant by introducing the witness to prove that the charges of the plaintiffs were excessive waive the privlege of secrecy and confidence? We think it did. The purpose and object of the defendant, as we have said, was to show that the plaintiff's charges were exorbitant, and the chief method of doing that was in examining the witness as to the amount involved in the litigation. The witness, in his examination in chief, gave testimony on that head, the effect of which upon the jury was calculated to damage the plaintiff's case. The views of the witness on that matter in the written communication to his client, the plaintiffs contended, were favorable to them and different from his opinion expressed on the witness stand. Certainly, the defendant could not get the benefit of the witness's testimony to disparage the plaintiffs' claim, and then exclude the plaintiffs from the benefit of an opinion of the witness expressed at another time, and which the plaintiffs claim was favorable to them. The opening up of the question of the excessive amount of the plaintiffs' services through the method of showing the small amount involved was a waiver by the defendant of the seal of confidence which the law
(240) imposed upon the communication between the witness and the defendant on that question.

No error.

DOUGLAS, J., concurs in result.

(241)

DEAVER v. DEAVER.

(Filed 13 December, 1904.)

1. Evidence—Receipts—Consideration.

It is competent to contradict the recital in a deed as to the amount of the consideration in an action involving the recovery of the purchase money or upon a covenant.

2. Frauds, Statute of.

A promise by a purchaser of land, in consideration of the sale to him, to assume and pay a debt secured by deed of trust on the land, is not a promise to answer for the debt or default of another within the meaning of the statute of frauds.

3. Covenants.

The holder of the legal title to land who conveys it to a beneficial owner at the direction of the latter is not bound to discharge an incumbrance, nor is he liable on covenants for failure to do so.

4. Trusts—Covenants—Frauds, Statute of.

In an action for breach of a covenant against incumbrances the fact that the nonliability of defendant depends on his having held the land merely as a trustee under an admitted parol trust does not prevent the court, because of the statute of frauds, from investigating the matter and awarding defendant relief from liability.

5. Witnesses—Evidence—The Code, Sec. 590.

A distributee of an estate of a grantee, who had purchased an interest in the property from the grantor and had afterwards conveyed that interest to the grantee, was not incompetent to testify, in an action by the administratrix of the grantee for breach of the covenant against incumbrances, that the grantor held the property merely as a trustee for the grantee, and conveyed it to the grantee without receiving any consideration, and that the grantee assumed, as part consideration for the transaction by which he acquired the beneficial interest, the incumbrance on account of the existence of which suit was brought.

6. Issues—Trial.

It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy, and each party has a fair opportunity to present his version of the facts and his view of the law.

ACTION by Ella B. Deaver against R. M. Deaver, heard by *Long, J.*, and a jury, at March Term, 1904, of BUNCOMBE.

This is an action upon a covenant against incumbrances contained in a deed for a tract of land from the defendant, R. M. Deaver, to his brother, A. E. Deaver, dated 11 May, 1897. The deed also contained covenants of seizin and of warranty. The consideration recited in it is $3,000, the receipt of which by the defendant is acknowledged. The breach alleged consists in the fact that at the time the deed was executed

there was an incumbrance on the land, to wit, a deed of trust dated 21 October, 1890, from the defendant to J. E. Rankin, securing a debt of $1,000, which was evidenced by a note of the defendant payable to Mrs. Mary J. Lusk, and due 1 January, 1891.

The defendant, admitting the execution of both deeds and the existence of the indebtedness to Mrs. Lusk, secured as above stated, alleges in his answer that the plaintiff's intestate became the beneficial owner of the land, and that the defendant, having only the naked legal title and having no other interest of any kind, executed the deed of 11 May, 1890,
(242) and thereby conveyed the land to the intestate—the latter for a valuable consideration—having at the time assumed the debt due to Mrs. Lusk and promised to pay the same to her, and thereby satisfy and discharge the deed of trust to Rankin. The defendant further alleges that the deed of 11 May was executed with the distinct understanding and agreement that it was intended merely to convey the legal title, which was then in the defendant, and for no other purpose, and that in fact no such consideration as is mentioned in the deed passed from the intestate to the defendant, and that the intestate never paid the defendant anything for the land in money or money's worth. Issues were submitted to the jury, and among others three, which are numbered five, six, and seven, were based upon the averments of the answer just set forth. In order to sustain the affirmative of those three issues, the defendant proposed to prove by W. E. Logan that the tract of land was originally purchased by the intestate and the defendant from one Roberts, who was directed to convey it to the defendant Deaver for the purpose of being held by him in trust for himself and his brother until some pending matters could be adjusted. The witness afterwards bought the interest of the defendant, with the understanding between himself and the intestate that the defendant should continue to hold the legal title for them; that, afterwards, the witness sold his interest to the intestate, and it was agreed in the settlement between them that the intestate should assume and pay the debt due to Mrs. Lusk as a part of the consideration for the land, and that the defendant, instead of making the deed to the witness for his interest, should convey the whole interest directly to the intestate; that no consideration passed to R. M. Deaver in the trade and transfer, but he was merely required to convey the legal title held by him to the intestate, in order to carry out the agreement between the witness and the intestate; that the plaintiff, who is the administratrix of A. E. Deaver, was notified of the arrangement
(243) between the witness and her intestate as to the assumption by the latter of the debt due to Mrs. Lusk. The court, upon objection by the plaintiff, excluded this testimony, except the part concerning the notice to Mrs. Lusk, and the defendant excepted. There was other

similar testimony offered by the defendant which was also ruled out by the court, and the defendant excepted. Evidence was introduced tending to show that A. E. Deaver bought the one-half interest of W. E. Logan at the same price the latter had agreed to pay the defendant for it. From a judgment in favor of the plaintiff, the defendant appealed.

Merrimon & Merrimon for plaintiffs.
Tucker & Murphy and Moore & Rollins for defendant.

WALKER, J., after stating the facts: We do not see why the testimony of the witness Logan was not relevant and admissible, nor why he was not a competent witness. The testimony certainly tended to show that A. E. Deaver had agreed in the settlement with Logan, who had bought the defendant's one-half interest, that in consideration of the sale to him of that interest he would pay the Lusk debt and satisfy the deed of trust, and it is not incompetent because it contradicts the recital in the deed, namely, that the $3,000 had been paid. Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual in its nature and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money it is only *prima facie* evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by oral evidence. Washburn thus states the rule, and the quotation seems to fit this case exactly: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of (244) damages, in an action upon the covenants in the deed it is not competent to contradict the acknowledgment of a consideration paid in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." 3 Wash. R. P. (5 Ed.), marg. p. 614. This passage from Washburn is quoted and approved in *Kendrick v. Ins. Co.*, 124 N. C., 315, 70 Am. St., 592, and the authorities in support of the principle are there collected by the present *Chief Justice*. See, also, *Harper v. Dail*, 92 N. C., 397, where *Ashe, J.*, states clearly the distinction recognized in the books between a case where the evidence would affect the validity of the contract, or deed, and one where it would not, but would only rebut the *prima facie* case made by the acknowledgment, treated as a receipt for money.

The assumption by A. E. Deaver to Logan of the Lusk debt was not within the statute of frauds. It was an original promise and not one superadded to the liability of R. M. Deaver. The intestate bought

Logan's interest in the land and, in consideration of the sale to him, promised to pay the Lusk debt. It seems to us that the case in this respect comes directly within the principle of *Mason v. Wilson*, 84 N. C., 51, 37 Am. Rep., 612, and *Voorhees v. Porter*, 134 N. C., 591, where other like cases will be found. The sale of the land to the intestate by Logan constituted a new and original consideration for the promise of the former to pay the Lusk debt, and is in no respect a promise to answer for the debt or default of another within the intent and meaning of the statute of frauds. If in the arrangement between the parties when the intestate acquired Logan's interest he promised to pay the Lusk debt, it would indeed be unjust if he or his representative should be allowed to repudiate the promise and subject the defendant to the payment of damages.

If the facts are found to be as we have stated them, and the defendant merely held the legal title by agreement of all the parties, and (245) conveyed it by their direction, there was no breach of the covenant, for it was not the defendant's duty to pay the debt. If the defendant did not in fact receive the consideration recited in the deed, there is no rule of law, and certainly none of equity, which forbids him to show the truth of the matter in order to defeat the enforcement of an inequitable claim.

We are at a loss to understand how the doctrine of parol trusts has any bearing upon the case. There is no attempt here to establish any such trust. The person supposed to be charged with the trust, that is, the defendant, admits it. The law concerning parol proof of trusts has nothing to do with the case, as we view it. The sole purpose is to show the entire nature of the transaction from its inception, when the defendant bought from Roberts and took the legal title for himself and his brother, the intestate, to its conclusion, when the alleged promise was made by the intestate to pay the Lusk debt. We cannot, therefore, conceive how the fact that an admitted parol trust comes incidentally into the case, as part of the proof of the ultimate fact, prevents the court, even under the most rigid application of the statute of frauds, from proceeding to investigate the matter with a view of ascertaining the facts and then of doing justice between the parties upon the facts as found.

The witness Logan was not incompetent as a witness under section 590 of The Code: (1) He is not a party to nor is he in any way interested in the event of the action; nor (2) does he propose to testify in behalf of himself, or (3) in favor of a party who derived his interest from him, or (4) against the representative of a party deceased who claims adversely to his assignee, nor (5) does his testimony relate to a personal transaction or communication with a deceased person whose representative is suing, or being sued, by the assignee of the witness.

A careful reading of section 590 will show that the objection (246) to the witness upon the ground of his incompetency is not within either the letter or the spirit of the enactment. *Bunn v. Todd,* 107 N. C., 266. The case appears to show that, instead of proposing to testify so as to affect himself beneficially, either directly or indirectly, the witness was in fact ready to testify against his own interest, as he is the heir and distributee of A. E. Deaver, who was his uncle.

If it was at all necessary to plead specially the matters set up in defense, it may be that the answer was not drawn with that fullness and technical precision required by the rules of good pleading; but this defect may be remedied by amendment. We are inclined to the opinion, though, that while issues 5, 6, and 7 were properly submitted under the answer as it is now framed, yet that the excluded testimony was admissible under issues 8 and 9. It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits. *Warehouse Co. v. Ozment,* 132 N. C., 839. The court erred in excluding the testimony as above indicated.

New trial.

Cited: Jackson v. Tel. Co., 139 N. C., 357; *Wilson v. Cotton Mills,* 140 N. C., 57; *Lemly v. Ellis,* 143 N. C., 212; *Horne v. Power Co.,* 144 N. C., 377; *Clark v. Guano Co., ib.,* N. C., 71; *Faust v. Faust, ib.,* 387; *Aden v. Doub,* 146 N. C., 13; *Brown v. Hobbs,* 147 N. C., 76; *Bank v. Ins. Co.,* 150 N. C., 775; *Marrow v. White,* 151 N. C., 96; *In re Herring's Will,* 152 N. C., 259; *Dale v. Lumber Co., ib.,* 654; *Wilson v. Taylor,* 154 N. C., 215; *Fields v. Bynum,* 156 N. C., 415; *Peele v. Powell, ib.,* 558; *Alford v. Moore,* 161 N. C., 387; *Hendricks v. Ireland,* 162 N. C., 524; *Price v. Harrington,* 171 N. C., 133; *Handle Co. v. Plumbing Co., ib.,* 502; *Hall v. R. R.,* 172 N. C., 348; *Plemmons v. Murphey,* 176 N. C., 675.

(247)

GRIFFIN v. RAILROAD.

(Filed 17 December, 1904.)

1. Instructions—Negligence—Evidence.

Where in an action for injuries to a passenger in alighting from a train there was no evidence that plaintiff was commanded or invited by the porter to alight while the train was in motion, it was error to charge that if plaintiff attempted to jump from the train as it was moving into a sta-

tion, and was injured, he could not recover, unless he "was commanded or invited by the porter to alight from the train while it was in motion."

2. Instructions—Negligence—Evidence.

Where a train was standing still when the porter requested plaintiff to alight, an instruction that if the porter invited or commanded plaintiff to get off when the train was moving, and plaintiff, in obedience to such invitation, attempted to alight, and was injured, he was entitled to recover, was error.

PETITION to rehear this case, reported in 134 N. C., 101.

Claude Kitchin, W. E. Daniel, and E. L. Travis for petitioner.
Day & Bell and G. B. Elliott for defendant.

MONTGOMERY, J. This case is before us again on a petition to rehear. The petition must be dismissed, whatever might be the opinion of the Court upon the matter discussed therein, for the reason that there was a serious error in the trial below, and one to which we were inadvertent when the case was originally heard in this Court. It is this: The defendant, amongst other things, asked the court to instruct the jury that "Ordinarily it is negligence to jump from a moving train, and if the jury find from the evidence that the plaintiff attempted to jump from the defendant's train as it was moving into the station at Palmyra, and was injured in so attempting to jump off, then you will answer the (248) first issue 'No.'" His Honor repeated this instruction to the jury, but added the words "unless the plaintiff was commanded or invited by the porter to alight from the train while it was in motion." The instruction as it was asked ought to have been given, without the modifying or qualifying language which followed. There were witnesses who testified that they saw the plaintiff jump off the car while it was going three or four miles an hour and before it reached the station. The qualification which his Honor added had no evidence to support it. There was an allegation in the complaint that the porter invited or told the plaintiff to get off when the train had nearly stopped, and was moving very slowly, but the plaintiff in his evidence testified over and over again that when the porter spoke to him to get off the car had stopped.

The same error was repeated by his Honor in his charge in chief, when he told the jury: "If you find from the evidence, the burden of proof being upon the plaintiff, that the plaintiff purchased a ticket from Kelford to Palmyra from the defendant's agent at Kelford; that he entered the defendant's train at Kelford as a passenger and as such rode upon the defendant's train to Palmyra; that shortly before the train reached the station at Palmyra the porter announced the station; that the plaintiff then left his seat and walked to the door of the car and stood in the

door until the car he was on passed the station; that as the car the plaintiff was on passed the station, the porter invited or commanded the plaintiff to get off; that the train was then moving, and that the plaintiff in obedience to the command or invitation of the porter attempted to alight from the train and was thrown to the ground and injured, you should answer the first issue 'Yes.'" The train was not in motion It was standing still. It could not have been negligence, therefore, on the part of the defendant if the porter had asked the plaintiff to alight when the car was standing still. But under the instruction of his Honor the jury were left to consider the defendant's negligence on the theory that the porter had asked the plaintiff to alight when the train was in (249) motion.

Petition dismissed.

LANCE v. TAINTER.

(Filed 17 December, 1904.)

1. Deeds—Acknowledgment—Husband and Wife—Notary Public.

A deed of trust acknowledged before the grantee named therein as notary public is void.

2. Deeds—Probate—Registration—Acknowledgment.

Where the acknowledgment of a deed is void, the registration thereof is also void.

3. Bankruptcy—Cancellation of Instruments—Cloud on Title—Deeds—The Code, sec. 1254.

A trustee in bankruptcy may maintain an action to cancel, as a cloud on title, a deed made by the bankrupt, which was void for defective acknowledgment, probate, and registration.

CONNOR, J., dissenting.

ACTION by N. J. Lance against A. C. Tainter and another, heard by *Long, J.*, at January Term, 1904, of MADISON. From a judgment for the plaintiff, the defendants appealed.

Gudger & McElroy for plaintiff.
W. T. Crawford for defendant.

CLARK, C. J. This is an action by the plaintiff, as trustee in bankruptcy of two bankrupts, to have canceled a deed in trust executed by them jointly, because it was acknowledged by both grantors and privy examination of their wives was taken before the trustee (250)

named in said deed, who was a notary public. The trustee in the deed being an interested person, the acknowledgment and privy examination before him were absolutely void. *Long v. Crews,* 113 N. C. 256, and cases cited; 1 Devlin Deeds, secs. 476 and 477; 1 Cyc., 553, and notes.

The acknowledgment being a nullity, so was the probate by the clerk based thereon and the registration. *Long v. Crews, supra; Barrett v. Barrett,* 120 N. C., 129, 36 L. R. A., 326; *Todd v. Outlaw,* 79 N. C., 235; *Robinson v. Willoughby,* 70 N. C., 358; 1 Devlin, *supra,* 478.

The Code, sec. 1254, provides that "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deeds of trust or mortgage in the county where the land lieth." The Bankrupt Law of 1898, sec. 67*a,* provides that "Claims which, for want of record or for other reasons, would not have been valid liens as against the creditors of the bankrupt, shall not be liens against his estate." And section 70*e* provides that "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred." It follows, therefore, that this instrument, not having been legally acknowledged, probated, nor registered, is invalid against the creditors of the bankrupt and should be canceled as a cloud upon the title which might injuriously affect the administration of the estate in the plaintiff's hands. The demurrer that the complaint did not state a cause of action was properly overruled.

No error.

CONNOR, J., dissents.

Cited: Allen v. Burch, 142 N. C., 527; *Smith v. Lumber Co.,* 144 N. C., 48; *Godwin v. Bank,* 145 N. C., 330; *Wood v. Lewey,* 153 N. C., 402; *Carriage Co. v. Dowd,* 155 N. C., 316; *Bank v. Redwine,* 171 N. C., 571.

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(251)

TURNER v. MCKEE.

(Filed 17 December, 1904.)

1. Justice of the Peace— Pleadings— Penalties— Counties— The Code, Secs. 840, 711, 754, 259.

A complaint before a justice alleging the nonpayment of $200 due by reason of the penalty accrued under section 711 of The Code for neglect of duty as a member of the board of commissioners for his failure to require

an itemized account, fully verified by the oath of the claimant, before he audited and approved such account, as required by section 754 of The Code, states a cause of action.

2. Counties—Commissioners—Accounts—The Code, Secs. 754, 272.

The statute providing that no account shall be audited by a board of county commissioners unless it is itemized and verified, is mandatory, and does not confer any discretion upon the commissioners.

WALKER and CONNOR, JJ., dissenting.

ACTION by C. D. Turner against B. H. McKee, heard by *Bryan, J.*, at August Term, 1904, of ORANGE. From a judgment for the defendant, the plaintiff appealed.

C. D. Turner, in propria persona.
Graham & Graham and S. M. Gattis for defendant.

CLARK, C. J. The Code, sec. 754, provides that "No account shall be audited by the board (of county commissioners) for any services or disbursements, unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied."

This is a very explicit and very wise provision of the lawmaking power. It is of the highest importance to the public that this requirement should always and everywhere be strictly observed. The lawmakers were so fully persuaded of the necessity of county com- (252) missioners observing this and similar provisions, that it is further provided by The Code, sec. 711, that "Any commissioner who shall neglect to perform any duty required of him by law as a member of the board shall be guilty of a misdemeanor and shall also be liable to a penalty of $200 for each offense, to be paid to any person who shall sue for the same."

Not satisfied with placing the county commissioners under the supervision of the grand jury and solicitor, the Legislature added a *qui tam* action, thus making it to the special as well as general interest of any citizen to see that the duties imposed upon the commissioners are faithfully executed. The plaintiff accordingly brought this action against one of the county commissioners before a justice of the peace "for the penalty of $200 accrued under section 711 of The Code of North Carolina for neglect of duty required of him as a member of the board of commissioners for failing to require an itemized and verified account to be filed by John Laws before auditing the said account, as required by section 754 of The Code." This was stated in the summons. In his return to the appeal the justice stated: "The plaintiff

complained of nonpayment of $200 due by reason of the penalty accrued under section 711 of The Code for his neglect of duty as a member of the Board of Commissioners of Orange County, for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of The Code. The defendant demurs to the complaint in this action for that the plaintiff in said complaint does not state facts sufficient to constitute a cause of action, in that it fails to show what accounts, if any,

the defendant is liable to the plaintiff for the penalty sued for,"
(253) and the justice of the peace added that he dismissed the action at the plaintiff's cost.

On appeal, the judge "sustained the demurrer and (there being no amendment asked) affirmed the judgment of the justice of the peace dismissing the action." This was error. The Code, sec. 840, Rule 5, provides, as to proceedings in the justice's court: "Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant." The allegation of "neglect of duty in failing to require" an itemized and verified account is a charge of negligently failing to do so. The statutes (sections 754 and 711) are also referred to in stating the cause of action.

The defendant certainly must have known what was meant here, and that he was sued for "a penalty of $200 under section 711 of The Code for neglect of duty as a member of the Board of Commissioners of Orange County for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of The Code." The magistrate understood exactly what the action was for, and thus clearly states it in his return. It is impossible that the defendant and his counsel did not understand it. The defendant, a public officer, thus clearly charged with a failure to discharge a public duty, should have answered, either admitting or denying the charge, or setting up his defense. In *Staton v. Wimberly,* 122 N. C., 107, the Court said that the statute imposing the duty, whose violation was there alleged, "allows some discretion in the board of commissioners by the express terms of the statute," and that the evidence failed to show any abuse of that discretion. The Code, sec. 754, does not confer any discretion, but is mandatory in requiring the account to be itemized and sworn. Whatever defense the

defendant has must appear by the answer and on the trial. There
254) has been no such failure to state a cause of action as to justify a dismissal of the action.

It does not appear that there was more than one account audited in favor of John Laws, and if there had been, the plaintiff could have made out his allegation upon the trial by showing any one account or all of

the accounts of John Laws, which had been audited without being itemized and verified as required by the statute—other than those whose illegal auditing was protected by the statute of limitations, if pleaded. If the defendant desired fuller information before pleading, he should not have demurred, but have asked for a bill of particulars. "The court may in all cases order a bill of particulars" (The Code, sec. 259), and even in criminal cases, *S. v. Brady,* 107 N. C., 882. See cases cited in Clark's Code (3 Ed.), p. 274. But here the defendant was even better informed than the plaintiff. It was plain to the defendant "what was meant" by the proceeding, and he needed no further information to set up his defense.

An indictment of a public officer for neglect of duty, not more explicit than here, was sustained in *S. v. Dickson,* 124 N. C., 871. In *S. v. Hatch,* 116 N. C., 1003, it was held that "Carelessness amounting to a willful want of care in the discharge of official duties" justified a verdict of guilty even under section 1090 of The Code, and that honesty and good intent are not a full defense, because there may be neglect of duty without any corruption in office. This has been cited with approval in *Stanly v. Baird,* 118 N. C., 83; *Sanders v. Earp,* 118 N. C., 279; *S. v. Oswalt,* 118 N. C., 1213; 32 L. R. A., 396; *S. v. Deyton,* 119 N. C., 882; *Staton v. Wimberly,* 122 N. C., 110; *S. v. Dickson,* 124 N. C., 874. We are not anticipating any defense the defendant may set up, but merely hold that a sufficient cause of action has been stated under The Code, secs. 754 and 711, when the facts herein alleged are admitted by a demurrer, especially when the pleading was in a court of a justice of the peace, and no repleading was ordered on the hear- (255) ing of the appeal in the Superior Court.

The judgment dismissing the action must be reversed. The demurrer should be overruled, with leave to the defendant to answer over. The Code, sec. 272.

Reversed.

DOUGLAS, J., concurring: I am much impressed with the able and elaborate dissenting opinion of *Justice Connor,* and heartily agree to nearly all he says, and yet I cannot come to his conclusion. It may be that I am unduly influenced by my disinclination to permit a public officer to meet a charge of official misconduct with a mere demurrer. I think he should answer, and if he needs any further information for his defense, let him ask for a bill of particulars or move the court to "require the pleading to be made definite and certain by amendment," as provided in section 261 of The Code. I cannot think that the defendant is so entirely ignorant in fact as he may be in contemplation of law. I am still of the opinion that "an informer has no natural right

to the penalty, but only such right as is given by the strict letter of the law," as was said in *Dyer v. Ellington,* 126 N. C., 941. I also think that the statute being penal in its nature, although the action thereon is said to be civil, should be strictly construed in furtherance of substantial right, and that faithful public officers, honestly striving to do their duty within the letter and spirit of the law, should not be held liable for omissions purely technical in their nature and immaterial in their results. On the other hand, no matter how high their character or how honest their general intentions, they cannot be permitted to treat with indifference laws passed for the protection of the public, whose servants they are. Let them render an account when called on, and if they are faithful they will receive the fullest measure of justice. I do
(256) not mean to intimate any opinion as to the facts of this case, because I know nothing of the facts. They are to be passed on by the jury, with whose functions I have neither the wish nor the right to interfere. While this is not a criminal prosecution, it seems to me that it comes within the general rule of official conduct discussed in *S. v. Dickson,* 124 N. C., 871. I concur in the opinion of the Court.

WALKER, J., dissenting: My first impression of this case was that the plaintiff had alleged facts sufficient to constitute a cause of action, and while he had not pleaded with technical accuracy and perhaps had stated his grievances somewhat inartificially, yet there was just enough said to require an answer from the defendant. A more careful and critical examination of the case and a better understanding of the facts convince me that my first impression was not correct, and that there are defects in the complaint which, in the present state of the case, namely, a defective complaint and a demurrer thereto sustained, must be fatal to the plaintiff's recovery, at least in this action. The pleadings in the justice's court were oral, but the cause of action is set out in the summons, and the substance of it, which is stated in the return of the justice as required by The Code, sec. 840, Rule 2, is as follows: "The plaintiff complained of the defendant for the nonpayment of the sum of $200 due by reason of penalty accrued under section 711 of The Code of North Carolina, for his neglect of duty as a member of the Board of Commissioners of Orange County; for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of The Code." The duty, for a breach of which the plaintiff claims a penalty, is thus prescribed by law: "No account shall be audited by the board for any services or disbursements unless it is made out in items and has attached to and filed with it the affidavit of the claimant that the services
(257) therein charged have been in fact made and rendered, and that

no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification." The Code, sec. 754. The penalty for a violation of the duty required by that section is imposed by section 711 as follows: "Any commissioner who shall neglect to perform any duty required of him by law as a member of the board shall be guilty of a misdemeanor, and shall also be liable to a penalty of $200 for each offense, to be paid to any person who shall sue for the same." It will be observed that by section 754 it is provided that the duty of the commissioners to require an itemized account shall extend only to accounts for services rendered and disbursements made by the claimant for the benefit of the county, and the requirement that the statement shall be verified is confined only to accounts for services thus rendered. In the latter case the claimant must not only itemize his account, but must make oath "that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied." The use of the word "made" in that part of the section last quoted would indicate that it was intended that accounts for disbursements should also be verified, as the verb "made" would aptly apply to disbursements, whereas it does not to services. We would not, in correct speech, use the term "services made" by the claimant. This apparent inaccuracy in the form of expression cannot, as we will presently see, have the effect to enlarge the scope of the statute or to extend its operation beyond the meaning of the words actually used. But if it could have such effect in the interpretation of a penal statute, and the section be construed to require an itemized and verified statement, both (258) in the case of accounts for services performed and in that of disbursements made for and in behalf of the county, we still think that plaintiff's case as stated in his complaint is without the statute, as, from the statement of the legislation upon this subject which we have made, it seems clear, upon the settled principles of construction applicable to penal enactments, that no one of the duties required to be performed by the commissioners comes within this case so as to subject the defendant to the penalty imposed by section 711 of The Code.

It is perfectly familiar learning, being one of the first principles of statutory interpretation, that penal laws must be construed strictly, and it is not permissible to enlarge their operation by implication nor by any equitable construction, but we must ascertain their meaning only by the express letter. They must be restricted to the plain import of the language used to convey the intent of the Legislature. *Smithwick v. Williams,* 30 N. C., 268; *Coble v. Shoffner,* 75 N. C., 42; *S. v. Midgett,*

85 N. C., 538. In declaring upon a penal statute certain rules of pleading, besides the general rules, are specially applicable to such cases. The plaintiff in his complaint under the general rule must show a good title to that which he seeks to recover, and if he fails in this respect the defendant may demur, move in arrest of judgment, or bring a writ of error. But the special rules require him, in an action for a penalty, to set forth every fact essential to show that his case is within the letter and spirit of the law by which it is given. He must plead with particularity so that the court may clearly see, without the necessity of making any inference, implication or conjecture, that the unlawful act has been done or that the duty enjoined has been omitted by the defendant. No intendment will be made in his favor. He must succeed, if at all, upon the facts as he states them, and not upon any deduction from (259) them or any mere statement of a conclusion of law. Archbold Civ. Pl., 106, 109; 1 Chitty Bl., 372; 16 Enc. Pl. and Pr., 274, 275, 276; *Wright v. Wheeler,* 30 N. C., 184. While the distinction between actions at law and suits in equity and all feigned issues have been abolished, and there is now but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which is denominated a civil action (Const., Art. IV, sec. 1), and while new rules have been prescribed for determining the sufficiency of a pleading (The Code, sec. 231), one of which rules is that in the construction of a pleading for the purpose of determining its legal effect, its allegations shall be liberally construed with a view of substantial justice between the parties (Code, sec. 260), all this does not mean that the court shall supply necessary allegations, nor was it intended to repeal those rules of pleading so essential to producing certainty of statement and consequently a determinate issue between the parties, for The Code provides that the complaint shall, in actions in the Superior Court, contain "a plain and concise statement of the facts constituting a cause of action," and in actions in justices' courts it shall state in a "plain and direct manner" the said facts, the latter being language no different in effect from that used in the case of pleadings in the higher court, but of equivalent import. However we may consider it, the law requires in every court that the pleadings shall state the facts, and all the facts, which are necessary to constitute a good cause of action, plainly and concisely. I do not see that this varies substantially the rule of the common law, or what was sometimes called the rule of special pleading. The two systems are in this respect essentially the same.

The plaintiff sues in what is termed a "popular action," not so called because such actions meet with popular favor or approval, but deriving its name solely from the peculiar fact that it can be brought (260) by anybody who is willing to inform against the defendant,

and who is therefore denominated a common informer or prosecutor. Blackstone defines it as an action for a statutory penalty or forfeiture, given to any such person or persons as will sue for it; an action given, in England, to any of the King's subjects (3 Bl. Com., 151), and in this country to the *people* in general. The recovery may go to the informer, or if the action is *qui tam,* that is, one in which the plaintiff sues for the State as well as for himself, it is divided as the law may direct.

Having acquainted ourselves with the nature of the action and applying the foregoing principles to this case, let us see if the plaintiff has brought it within the statute so as to become entitled, as a common informer, to the penalty he seeks to recover. I think he has not. Section 754 applies only to cases where the account is for services rendered, and even if a verified statement is required as to disbursements, it refers to such as have been made by the claimant. There are many kinds of accounts filed with the commissioners upon which claims for payment are based, and the glaring defect in the complaint is that it is not stated therein that the account alleged to have been audited without being itemized or verified was either for services or for disbursements. Mr. Laws may have had some other kind of claim against the county, which is not included in the terms of the statute; but whether he had or not, the law will not require the penalty of the defendant unless we can see clearly that he has violated its mandate. There is not even room enough in this complaint for a reasonable conjecture as to the truth of the matter. The defendant is not liable to the plaintiff, unless the board has failed to require an account for services to be itemized and verified or an account for disburements to be itemized. This is according to the letter and, as far as we can see, also according to the spirit and intent of the statute. The plaintiff has failed to allege that the account was for services or disbursements, if he can claim anything in respect (261) to the latter for failure to verify. It follows that his complaint is defective in that "it does not set forth specially the facts upon which the plaintiff relies to constitute the offense, and it has not that certainty on its face as will enable the court to see what has been omitted." *Nash, J.,* in *Wright v. Wheeler, supra.* For anything that appears in the complaint, the defendant may have done a perfectly lawful act. In this case the facts are surely not stated with any more certainty and precision than were the facts in the case last cited, and they were held to be insufficient to warrant a recovery for the penalty claimed.

It has been said in a case where a statute similar to ours was construed, and in which the plaintiff sought to recover a penalty, that "the main office of a complaint being to apprise the defendant of the facts upon which the plaintiff relies to establish a cause of action, The Code

(of New York) requires that such facts shall be stated plainly and precisely; and, inasmuch as this action is highly penal in its nature, there was special reason why, in this particular instance, the rules of pleading should not have been relaxed." *Steuben v. Wood,* 24 App. Div. (N. Y.), 442. This language fits our case, even applying the liberal rules of pleading under The Code.

I have not adverted to the fact that the complaint charges that the defendant McKee individually failed to require an itemized and verified account, whereas the statute requires that duty of the board as a corporate body or distinct entity, and not of the individual members. The latter must act together as a unit. This is certainly not good pleading. Whether, the duty being single, its omission is therefore a single offense, for which only a single penalty can be exacted, is a question I need not consider at present, though it will be one well worthy of serious consideration when we are required to decide it. There are also (262) other important questions involved which I need not now discuss.

The plaintiff was given an opportunity to amend his complaint, but preferred to stand upon his rights as fixed by the present state of the pleadings. The complaint being defective, I can see no error in the ruling of the court by which the demurrer was sustained.

CONNOR, J., dissenting: Recognizing fully the liberality with which under our Code system pleadings are construed "in furtherance of justice" and advancement of the remedy, I cannot concur in the conclusion reached by the Court in this case. I cannot think that it was ever contemplated by the authors of The Code system that a party may maintain an action, not knowing, or, if knowing, refusing to inform the court of the facts upon which his alleged grievance is based. Either the plaintiff is "fishing" for a cause of action or he is trifling with the court in bringing the action as he does and refusing to comply with the most reasonable and, I think, strictly legal, demand that he state "in a plain and direct manner the facts constituting the cause of action." Rule 3, Justices' Courts, The Code, sec. 840. The records of the commissioners, including "the books and papers of the board," are "free to the examination of all persons." The Code, sec. 712. The plaintiff before beginning his action could have found, by a few moments' examination, "filed in alphabetical, or other due order, all accounts presented or acted on by the board, . . . the amount allowed and the charges for which it was allowed." *Ibid.* In the light of these plain provisions of the law, certainly there can be no good reason for further relaxing the rules and elementary principles of pleading, requiring the plaintiff to state "in a plain and direct manner the facts constituting his cause of action." This Court has repeatedly held that it was necessary to do so, and has

ex mero motu, upon an inspection of the entire record, arrested (263) judgment for failure to comply with the rule. In *Scroter v. Harrington,* 8 N. C., 192, *Henderson, J.,* said: "That the defendant may be informed of the nature of the charge against him, the law requires that the facts constituting it should be stated with precision." I cannot perceive any substantial difference between stating facts "with precision" and in a "plain and direct manner." In conclusion, it is said: "These proceedings, it is true, originated before a justice of the peace, and as to matters of form are not to be critically scrutinized; yet matters of substance ought not, and cannot, be overlooked." In *Wright v. Wheeler,* 30 N. C., 184, *Nash, J.,* said: "It is a principle of pleading that the declaration must set forth a good title to that which is sought to be recovered; if it does not, the defendant may demur or move in arrest of judgment or bring a writ of error. In an action upon a statute to recover a penalty, the plaintiff must set forth in his declaration every fact which is necessary to inform the court that his case is within the statute; and it is laid down by Mr. Chitty in his treatise on pleading, 1 vol., 405, that it is necessary in all cases that the offense or act charged to have been committed or omitted by the defendant appear to have been within the provisions of the statute, and that *all the circumstances necessary to sustain the action must be alleged.*" (The italics in the original opinion.) Again, it is said: "The declaration must have sufficient certainty on its face to enable the court to know what has been done. Facts are to be stated, not inferences or matters of law; nor will the conclusion *contra forman statuti* aid the omission." The Court arrested the judgment *ex mero motu.*

In *Drake v. McMinn,* 27 N. C., 639, *Nash, J.,* concluding the opinion, says: "We have nothing to do with the motives of the plaintiff in instituting these proceedings. He appears before us as a public informer, seeking to enforce against the defendant a forfeiture (264) incurred by the violation of the law. He must be prepared to show by his evidence that, by law, he has a right to demand and receive the money forfeited. We think that he has not done this; that there is in his declaration a defect fatal to his claim, and that his judgment must be arrested." In *Hardwick v. Tel. Co.,* 70 Vt., 180, the Court said: "As the statute does not prescribe the form of action, the declaration should set forth with particularity the facts upon which the plaintiff relies to constitute the offense"—saying in regard to the complaint, "It is not within the rule of certainty to a certain intent in general," and is bad on special demurrer. In *Bigelow v. Johnson,* 13 Johns, 428, it is said: "It is a well-settled rule that in declaring for offenses against penal statutes (where no form is expressly given) the plaintiff is bound to set forth specially the facts on which he relies to constitute the offense."

It was formally held that the declaration must refer to the statute, but "Under the more liberal rules of modern times the tendency is to consider counting upon the statute when the action is strictly penal as a mere formal matter and unnecessary." 16 Enc. Pl. and Pr., 274. "It is necessary in all cases that the offense or act charged to have been committed or omitted by the defendant appear to have been within the provisions of the statute and that all the circumstances necessary to sustain the action be alleged." *Ibid.,* 275. To the suggestion that a different rule prevails under The Code it may be noted that the Supreme Court of New York, construing the section of The Code, of which ours is an exact copy, said: "The main office of a complaint being to apprise the defendant of the facts upon which the plaintiff relies to establish a cause of action, The Code requires that such facts shall be stated plainly and concisely; and inasmuch as this action is highly penal in its nature, there was especial reason why in this particular instance the rules of pleading should not have been re-
(265) laxed." *Steuben Co. v. Wood,* 24 N. Y. App., p. 442. "General allegations are always insufficient, and no material fact may be left to conjecture or inference." Enc. Pl. and Pr., 276. "When jurisdiction over actions to recover penalties is granted to justices of the peace or other inferior courts, the usual manner of proceeding is not thereby changed." *Ibid.*

Applying these well-established rules, so essential both to orderly procedure and to the protection of the citizen against harassing and expensive litigation, I think the complaint fatally defective. No account, either by number, date, or amount, is named. The complaint is: "For his failure to require an itemized account, fully verified by the oath of Mr. John Laws, before he audited and approved said account." The words "said account" must refer to some account theretofore named or in some manner designated; but none is named or designated. It is said, "The defendant must have known what was meant here, and that he was sued for a penalty," etc. It is further said that "The magistrate understood exactly what the action was for, and thus clearly states it in his return." As the learned *Chief Justice,* writing for the Court, makes this statement of fact, I must assume that it is correct; but I must, with all possible deference, say that I can account for it only upon the theory that their mental vision measures up to the standard fixed by Samuel Weller respecting the kind of eyes by which he was expected to see "thro' a flight o' stairs and a deal door." I must confess that I am unable to exactly understand what the plaintiff means. Without calling "in aid" the power to read the mind of the plaintiff, I am unable to see what his grievance is. Whether it was that the defendant audited an account presented by some one else not fully verified

by Mr. John Laws, or whether Mr. Laws had presented an account not itemized and fully verified, does not very clearly appear to my mind, and I am not surprised that a layman should have respectively asked that the plaintiff "in a plain and direct manner" inform him just how he became indebted to him, etc. This was, in my (266) opinion, his legal right, without regard to the wisdom of the statute or the fact that as a county commissioner he was under the supervision of the grand jury and the solicitor, with the additional safeguard of being subject to a *qui tam* action by the plaintiff. While, by taking upon himself the burdens and duties of a county commissioner, the defendant becomes liable to an action or indictment for acts of misfeasance and nonfeasance, I do not understand that he forfeits any of his legal rights as a citizen or becomes liable to be prosecuted otherwise than according to the due course of the law and procedure. In demurring he simply exercises a legal right, and I cannot see why he may not do so without subjecting himself to criticism.

The suggestion that the defendant should have answered, either admitting or denying the charge, assumes the very question in controversy, that there is no charge he was called upon to answer. He has a right to demand, before he is required to "admit or deny" anything, that the complaint contain, not formal or technical language, but a "plain and direct statement of the facts." Our laws, both substantive and remedial, are the expressions of the minds and experience of a plain people, using plain and direct language to express plain thoughts. They are not intended to encourage a game of hide-and-seek in the courts. If one will call his neighbor into the courts, let him do so in a manner and with speech that may be understood by plain men. It is suggested that the defendant should not have demurred, but joined issue and "gone to the country." This again assumes the very question in issue. The issues arise upon the pleadings, and if these raise no issue the finding of which will enable the court to proceed to judgment, the parties and the court will at the end of the trial have performed the proverbially useless feat of coming out where they went in, or of moving around in a circle. Let us suppose the jury had found every word of (267) the complaint true, how much nearer would the court be to "a plain and direct statement of the facts constituting the cause of action"? It is the purpose of the demurrer to prevent this result. The exact point has been decided by the Supreme Court of New York. In *Cortland v. Howard,* 1 N. Y. App. Div., 131, *Parker, C. J.,* said: "There seems to be no provision in a justice's court for moving to make a complaint more definite and certain. It is not sufficiently explicit to be understood—and by that is meant sufficiently explicit to fairly inform defendant upon what the cause of action is based—his remedy is by

demurrer. This remedy the defendant took in this case, and we think he was entitled to it." The defendant was under no obligation to ask for a bill of particulars. This right is given the defendant for his benefit and not to aid a defective complaint. It is very doubtful whether section 259 applies to justices' courts. Rule 11 expressly provides: "Either party may demur to the pleading of his adversary or any part thereof when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true." Rule 12 prescribes the duty of the justice upon hearing the demurrer. Reasonable certainty in the statement of the cause of action is required not only to enable the defendant to answer intelligently, but to protect him from being a second time vexed with litigation for the same matter. It is said that the defendant should plead and submit his cause to the jury. I am unable to see what question would be submitted to the jury. The record will show whether the account set out or specified in the complaint was audited. The court will find as a conclusion of law whether it is itemized and verified as required by the statute. Why should not the plaintiff be required to give the court such information as will enable it upon demurrer to render judgment?

Before the adoption of The Code the action for the recovery of a penalty was in *debt*. "The pleader should in this connection by (268) apt, connected, and substantial averments disclose the right of action. The pleading must be definite and certain, and should studiously avoid all tendency towards looseness in presenting the facts upon which the right of recovery is based." 5 Enc. Pl. and Pr., 918. This pertains to a substantial legal right. Let us suppose that plaintiff has judgment upon his complaint and immediately sues the defendant, complaining in exactly the same language. How could the defendant maintain a plea of *res judicata?* He has been in office, we may presume, for two years. Hundreds of accounts have been audited by the board. Why may not the plaintiff continue to sue indefinitely, or so long as the estate of the defendant is able to respond to the execution sued out?

Any system of pleading and procedure, either civil or criminal, which permits the process of the court to be used oppressively, either to the citizen or the officer, should be amended, or, if beyond the power of amendment, abolished. This Court has wisely said: "An informer has no natural right to the penalty, but only such right as is given by the strict letter of the law." *Douglas, J.,* in *Dyer v. Ellington,* 126 N. C., 941. General warrants have not been favorites with our people. They savor of inquisition and oppression. I find no authority for relaxing the rules which in their wisdom the sages of the law have laid down for the protection of the citizen against vexatious litigation and oppressive

prosecutions. The record shows that the plaintiff has prosecuted to this Court three suits against the commissioners. I can see no reason, if permitted to proceed as in this case, why he may not prosecute as many hundred and take chances of finding among the records enough accounts not duly itemized and verified to make his venture profitable and ruin the commissioners. Simplicity in the law is sometimes obtained at too high a price, even to the destruction of the safeguards of the citizen. I may be unduly sensitive in such cases, but I am sure (269) that no injustice or harm or even delay can come to the State or its citizens by requiring informers to "state in a plain and direct manner the facts constituting their cause of action," or, in the language of *Chief Justice Henderson,* "with precision." I respectfully but firmly dissent from the conclusion reached by the Court. I think that the judgment of his Honor should be affirmed.

Cited: Turner v. Wilson, post, 707; *Glenn v. Comrs.,* 139 N. C., 418.

FRANCIS v. REEVES.

(Filed 17 December, 1904.)

1. Executors and Administrators—Purchasers for Value—Notice—Descent and Distribution—Debts of Decedent—The Code, Sec. 1442.

A purchaser for value of the lands of a decedent after two years from his death takes a good title as against creditors, if such purchaser had no notice.

2. Husband and Wife—Agency—Presumptions.

No presumption arises from the relationship of husband and wife that the husband is the agent of his wife.

3. Agency—Evidence—Sufficiency—Husband and Wife.

The evidence in this case is not sufficient to show that a husband was agent for his wife in the examination of title to land conveyed to her by a deed of trust to secure a loan to a third person.

ACTION by T. L. Francis against W. T. Reeves and others, heard by *Jones, J.,* and a jury, at May Term, 1904, of HAYWOOD.

This action is prosecuted by the plaintiff against the defendant W. T. Reeves, administrator of K. Reeves, deceased, V. S. Lusk and wife, and others, for the purpose of subjecting certain lands, or (270) the proceeds thereof, in the hands of Mrs. Lusk, to the payment of a judgment recovered against the defendant administrator of K. Reeves.

The record shows that during the year 1886 A. J. Reeves executed his note to the plaintiff, with Kindred Reeves as surety, for $650. Plaintiff indorsed the note to one Herren, who indorsed it to Garrett. The surety, K. Reeves, died in 1886, devising his property, including the real estate described in the complaint, to his three sons, W. T., A. J., and R. C. Reeves. Failing to name an executor, W. T. Reeves was appointed administrator *c. t. a.*, and qualified in 1888. He did not advertise for claims. In 1898 Garrett sued the principal, W. T. Reeves, administrator, and the plaintiff on his indorsement and recovered judgment. The other parties being insolvent, the plaintiff paid the judgment and took an assignment thereof. He afterwards recovered judgment against W. T. Reeves, administrator, on said judgment.

George H. Smathers testified as follows: "That some time in 1890 A. J. Reeves applied to him to secure a loan, and at the time he had a number of claims and judments against the said Reeves for collection and was anxious to secure a loan. Reeves was to pay him $25 as a fee to secure the loan; that he went to Asheville and saw Colonel and Mrs. Lusk; went first to Colonel Lusk, and he said the money belonged to his wife and that I would have to see her; that he did see her, and she said that she had had trouble about loaning money and wanted to know if the loan was absolutely secure, and I told her that there would be no trouble about it, and she consented, if the title should prove all right and that there was no incumbrance on the land. That he told Colonel and Mrs. Lusk that he would come back and look up the title and incumbrances, and Colonel Lusk was to come out afterwards and verify his examinations as to records, which he did before the trust deed was executed. That he had heard of the note testified to by Reeves,
(271) and told A. J. Reeves that the matter would have to be settled, or rather Reeves told him about the note at the time he applied for the loan. That Reeves told him that his father owed nothing at the time of his death, but was surety on this note, but that the note had been adjusted; that it had been transferred from Francis to Herren and from Herren to Garrett and that Garrett had given it to W. T. Reeves' wife as an advancement, and that he told W. T. Reeves that it was not necessary to advertise if his father owed no debts, but told him the safer plan was to follow the law, and that he was sure that Reeves said there were no debts; that A. J. Reeves made the statement, before the loan was made, that the Francis note had been adjusted or had been given by Garrett to Reeves' wife. That his recollection is that the matter was discussed in the presence of Colonel Lusk. That he stated to Colonel Lusk that there were no debts against the estate, but that K. Reeves had signed a note as surety, but that Garrett, the party holding the note, had given it to his daughter, wife of W. T. Reeves, and that after this

conversation he and Colonel Lusk got down The Code and read section 1142, and afterwards Colonel Lusk considered the loan safe and the loan was made and I was named as trustee. Think that the loan was made about this time, but don't know whether the deed was drawn that day. That he said to Colonel Lusk, 'I suppose your wife wants you made trustee,' and he said 'There was nothing said about it, and as you will be here, I guess you had better be trustee,' and said that he would come out when I had prepared an abstract. That he thinks that he went to Asheville to deliver the notes and assure them that the loan was all right, and that he turned notes over to one or the other of them. That note was not paid at maturity, and some time thereafter Mrs. Lusk instructed him to sell. Then Colonel Lusk told me to scare the interest out of him; that they did not want to sell the property. That Reeves made some payments in checks and some in money, and that he sent it in, but most of the payments were (272) made directly to Colonel Lusk. That after he received the notice to sell it was two or three years before the sale was made. Colonel Lusk bid off the land for Mrs. Lusk and the deed was made to her. That Colonel Lusk told him that he was bidding it in for her, and that he knew that it was Mrs. Lusk's money, but after the land was sold and bought for Mrs. Lusk, he went to Asheville and had a talk with Mrs. Lusk and she said, 'You and the Colonel have got me in trouble again,' and that he told her that he thought that the land was worth more than she gave." It was admitted that the deed was made to Smathers more than two years after the issuing of letters to W. T. Reeves on the estate of K. Reeves.

At the conclusion of the testimony his Honor, upon the defendant's motion, directed judgment of nonsuit. Plaintiff excepted and appealed.

Crawford and Hannah for plaintiff.
G. A. Shuford for defendant.

CONNOR, J. The excellent brief filed by counsel for appellant states that there are only two questions presented by the appeal:

1. Is there more than a scintilla of evidence that V. S. Lusk had knowledge of the note signed by K. Reeves, or information which put him upon inquiry as to the note at the time the deed of trust was executed and the loan made?

2. Is there more than a scintilla of evidence that V. S. Lusk was the agent of Mrs. Lusk in making the loan?

We concur with his Honor upon both questions. The deed of trust was made more than two years after the grant of letters, and Mrs. Lusk made a loan upon the faith of the security. She is a purchaser

(273) for value, and her title is therefore good, "even as against creditors," unless she had notice of the outstanding debt. The Code, sec. 1442. There is no suggestion that she had personal knowledge of any fact sufficient to put her upon inquiry. Reversing the order of the questions as they are put in the brief, we inquire whether there is any evidence that Colonel Lusk was her agent in the transaction. The answer to this question depends upon the construction to be placed on the testimony of Mr. Smathers. It is clear that there was no express contract between Colonel Lusk and his wife by which she made him her agent. It is conceded that, if by her conduct, if unequivocal and understood by the parties (that is, the wife and the other contracting party), she recognized him as her agent, she must be bound by his acts. It would seem, however, that no presumption arises by reason of the relationship that he is the agent of his wife. 1 A. & E., 958. The agency must be proven. Reinhardt on Agency, 51. "The husband may act as agent of his wife, but in order to bind her he must previously be authorized to do so, or his act must with full knowledge be ratified." *McLaren v. Hall,* 26 Iowa, 297. "The wife may constitute the husband her agent, but to establish this the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation of wife." *Rowell v. Klein,* 44 Ind., 290; 15 Am. Rep., 235. We do not find any evidence that Mrs. Lusk appointed her husband agent to examine the title to the land. Mr. Smathers said to her that he would go back to Waynesville and look up the title and encumbrances, and Colonel Lusk was to come out afterwards and verify his examination as to records, which he did before the trust deed was executed. This appears to have been Mr. Smathers' suggestion. The testimony falls short of evidence proving an agency.

Affirmed.

Cited: Barrett v. Brewer, 143 N. C., 92; *Stout v. Perry,* 152 N. C., 313; *Lee v. Giles,* 161 N. C., 546.

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(274)

TROTTER v. ANGEL.

(Filed 17 December, 1904.)

1. Negotiable Instruments—Evidence—Consideration.

Where, in an action to recover on a bond given for the price of a livery business, one of the defendants testified that he had never had any talk with the obligee about his release from the bond until after he had sold his interest in the business to his partner, it was not error to refuse to

permit defendant to testify further that he sold out his interest to his partner because he was to be released from liability on the bond, and that such release was part of the consideration.

2. Negotiable Instruments—Evidence—Harmless Error.

Where, in an action on a bond given for the price of a livery business, the court, at the request of one of the defendants, eliminated from the case the question of consideration inducing such defendant to sell his interest in the business to his partner, error, if any, in refusing to permit such defendant to testify that he sold his interest to his partner because he was to be released from liability on the bond, which was a part of the consideration, was harmless.

ACTION by H. G. Trotter against T. W. Angel, heard by *Jones, J.*, and a jury, at Spring Term, 1904, of MACON. From a judgment for the plaintiff, the defendant appealed.

Horn & Mann for plaintiff.

Robertson & Benbow, Jones & Johnston, and J. Frank Ray for defendant.

MONTGOMERY, J. The defendants, Angel & Shepherd, bought out the livery business of the plaintiff's assignor and executed, together with the other defendant, Sheffield, as surety, the sealed obligation mentioned in the complaint for the payment of the purchase price, $825. It is admitted that the contract was executed by the parties; that $572.38 had been paid on the contract, and that the plaintiff was the (275) owner thereof. The defendants Shepherd and Sheffield seek to avoid their liability for the balance which remains due on the contract by reason of an alleged release and discharge on the part of the obligee. The position of the defendant Shepherd is that the obligee agreed with him and the defendant Angel that if he, Shepherd, would sell out his interest in the livery business to Angel, the obligee would release him from his contract and agreement and look to Angel only for its fulfillment; that he did transfer and assign his interest in the business to Angel under that agreement, and that therefore he is discharged from his original obligation.

The position of the defendant Sheffield is that he was only a surety on the original obligation; that Shepherd was discharged and released by the obligee from liability on the original contract, and that therefore in law he was discharged. The issues tendered by the defendants were: 1. Is defendant Angel indebted to plaintiff; and if so, in what sum? 2. Is defendant Shepherd indebted to plaintiff; and if so, in what sum? 3. Is defendant Sheffield indebted to plaintiff; and if so, in what sum?

The evidence was conflicting and contradictory. It was offered to be shown by the defendant Shepherd, a witness for the defendants, that he sold out his interest in the livery business to Angel because he was to be released from the payment of liability on the bond, and that that was part of the consideration. We see no error in the refusal of his Honor to receive the evidence. The witness had just said that he had never had any talk with the obligee about his release from the bond until after he had made the trade with Angel. The question, therefore, did not relate to a release from the bond by the obligee, but to what was said and done between Shepherd and Angel. If that had been the understanding between Shepherd and Angel it could not have affected
(276) the obligee, for the reason we have given, that is, that Shepherd had sold out and traded with Angel before he had had any conversation on the subject with the obligee. However, this witness was allowed to state that he would not have sold to Angel had he not thought he would be released, and that he received nothing from Angel, but simply turned over his interest in the contract to him. If there had been error in the exclusion of the evidence it would have been harmless, because his Honor at the request of the defndant Shepherd eliminated the question of consideration from the case and from the jury's consideration by giving the jury the following instructions:

1. "That if they shall find from the evidence that J. S. Trotter, one of the parties in the firm of H. G. Trotter & Son, said to T. W. Angel that if he, Angel, would buy out the interest of T. B. Shepherd in the livery business of Angel & Shepherd, that in that event he, J. S. Trotter, or the firm of H. G. Trotter & Son, would release Shepherd from liability on the contract sued on; and if the jury shall further find that Angel communicated this offer to Shepherd, and in consequence thereof Shepherd did sell out his interest in the livery business to Angel, then the court charges you to answer the second issue 'No' and the third 'No.'"

2. "That if the jury shall find from the evidence that J. S. Trotter, of the firm of H. G. Trotter & Son, told the defendant Shepherd that he or the firm would release Shepherd from further liability on the contract sued on if he, Shepherd, would sell his interest in the livery business to Angel, and in consequence thereof Shepherd did sell his interest to Angel, then the court charges you to answer the second and third issues 'No.'"

There was no error in the charge of the court raised by section 3, for it is perfectly apparent that the word "chaffering," in the connection in which the judge used it, made the instruction consonant and of like import with the instructions asked by the defendant
(277) Shepherd and quoted above. There being no error in the ex-

clusion of the evidence referred to, and no error in the charge on the subject of the alleged release and discharge of the defendant Shepherd, it follows that there was no error in the case of which the surety Sheffield could complain, for his Honor, at the latter's request, told the jury (1) that if they "shall find from the evidence that the defendant Shepherd was simply surety for the defendants Angel and Shepherd on the contract sued on, and this fact was known to the plaintiff or his partner, J. S. Trotter, and shall further find from the evidence that the defendant Shepherd was released from further liability on the contract, as heretofore explained, then you shall answer the third issue 'No.' (2) If the jury shall find from the evidence that Shepherd was released by J. S. Trotter from further liability on the contract sued on, as heretofore explained, then you will answer the third issue 'No.'"

His Honor submitted the case fully and fairly to the jury with full and proper instructions on every point. The defendants were denied no proper evidence, and in fact probably got in some they were not strictly entitled to, and the jury simply accepted the evidence introduced by the plaintiff as true.

No error.

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(278)

EXTINGUISHER COMPANY v. RAILROAD.

(Filed 17 December, 1904.)

Carriers—Negligence—Proximate Cause.

Though a carrier of goods was negligent in failing to forward goods shipped, it is not liable for the loss of the goods by fire, where it was not negligent with respect to the fire, in the absence of evidence that the negligence in failure to forward the goods was the proximate cause of the loss.

ACTION by the General Fire Extinguisher Company, heard by *W. R. Allen, J.*, and a jury, at July Term, 1904, of MECKLENBURG.

Plaintiff, on 12 March, 1902, delivered to the Seaboard Air Line Railway at Charlotte a carload of iron piping to be delivered to the Rhodhiss Manufacturing Company of Granite Falls, N. C. The Seaboard Air Line Railway Company issued therefor its bill of lading—"Released"—contracting to deliver it to the consignee or to its connecting line at Lincolnton, N. C., to be carried to its destination. The jury, in response to an issue submitted, found that the Seaboard Air Line Railway Company delivered the piping to the defendant company

at Lincolnton, being the connecting line between said point and Granite Falls, on 15 March, being Saturday. About one-half of the piping was carried to its destination by defendant. The remaining half, while in the defendant's possession awaiting shipment, was destroyed by fire communicated to the car by the defendant's warehouse, which was burned on the morning of 18 March. The delay in forwarding the whole of the piping on the day of its delivery, or Monday following, was caused by the failure of defendant to have sufficient cars for that purpose. The defendant was at that time a narrow-gauge road. The car containing the piping was on the track of the Seaboard Air Line
(279) Railway Company near the warehouse of defendant. It was in evidence that the warehouse was burned about 1 o'clock on the morning of 18 March. There was no evidence as to how the fire originated. It was in evidence that when the fire was discovered the warehouse was enveloped in flames. No night watchman was kept at the depot. The defendant kept tubs and barrels filled with water at the depot. The people of Lincolnton had no provision for "fighting fire"—depended on buckets of water.

The jury, having found that the piping was delivered to defendant company, responded affirmatively to the second issue: "Was the destruction of that part of the shipment of pipe by fire caused by the negligence of the defendant, as alleged in the complaint?"

The defendant in apt time requested the court, in writing, to instruct the jury: "That if the jury find as a fact, from the evidence, that part of the pipe was destroyed by fire without any fault on the part of the defendant, and that it provided such appliances and equipments for protecting the property in its control and possession from fire as were ordinarily in common use in the town of Lincolnton, and exercised such care over the same as an ordinarily prudent person would have done under similar circumstances, then the jury should answer the second issue 'No.'" The court declined to give the instruction. Defendant excepted.

The court, in response to plaintiff's request, instructed the jury on the second issue: "That it is the duty of a common carrier to carry and deliver with reasonable promptness under all circumstances, and if after defendant had received said shipment or car of pipe from the Seaboard Air Line Railway it could with reasonable promptness have carried the shipment of pipe from Lincolnton to its destination before the fire occurred, it was defendant's duty to do so, and such failure would be negligence; and if this negligence was the cause of the
(280) injury, the second issue should be answered 'Yes.'

"The law imposes upon common carriers the obligation to have and to furnish sufficient facilities for reasonably prompt transportation

of goods tendered for carriage, and would be liable for failure to transport promptly, whether the failure is due to a want of facilities or to a captious refusal to carry; and if the jury shall find that the failure of defendant to carry and deliver the said car or shipment of pipe to its destination before the said fire occurred was due to the want of sufficient cars to carry the usual and ordinary amount of freight over its road, then defendant was negligent, and if this was the cause of the injury, the second issue should be answered 'Yes.'"

From a judgment for the plaintiff, the defendant excepted.

W. F. Harding for plaintiff.

Osborne, Maxwell & Keerans and J. H. Marion for defendant.

CONNOR, J., after stating the case: In the view which we take of the case it becomes unnecessary to pass upon the defendant's exceptions to his Honor's charge upon the first issue. Assuming that, as found by the jury, the piping had been delivered to the defendant company and that the defendant was in default in not having, as was its duty, a sufficient number of cars to send it within a reasonable time to Granite Falls, we are of the opinion that the defendant was entitled to the instruction asked, and his Honor should not have given the instruction asked by the plaintiff. The defendant, by its failure to ship within a reasonable time, became liable for such damages as naturally and proximately resulted from such breach of contract or duty. *Lindley v. R. R.*, 88 N. C., 549. *Pearson, J.*, in *Ashe v. DeRossett*, 50 N. C., 299, 72 Am. Dec., 552, says: "When one violates his contract he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission, as a natural con- (281) sequence thereof, may reasonably be presumed to have been in contemplation of the parties when the contract was made. This rule of law is well settled; but the difficulty arises in making its application." In that case a quantity of rice was sent to the mill of defendant's intestate pursuant to a contract that it was to be worked in its "turn." The rice was not worked in its "turn." The mill with its contents was thereafter burned. In an action on the contract for failure to have the rice beaten in its "turn" the plaintiff claimed the value of the rice as the measure of the damage to which he was entitled. This Court held that, in the absence of any evidence of negligence in respect to the burning of the mill, he was not entitled to recover the value of the rice. The Court said: "There is nothing to show that the contingency that the rice might be burned if left in the mill was in the contemplation of the parties. On the contrary, its being burnt was an accident unlooked for and unforseen, and can in no sense be considered as having been

caused by the fact that it was not beat in the turn promised by the defendant's intestate; consequently, the damages were too remote." *Wells v. R. R.,* 51 N. C., 49, 72 Am. Dec., 556, in which the principle was applied to a contract of carriage. Upon the second trial of *Ashe v. DeRossett, supra* (53 N. C., 240), the court below submitted the question to the jury to say whether the promise was made in contemplation of the imminent risk from fire, etc., and they so found. This Court held that there was no evidence to sustain the finding, saying: "So, notwithstanding the opinion of the jury, as it is a mere matter of opinion and there is no evidence in regard to it, we are disposed to adhere to the opinion previously expressed by us."

In *Whitford v. Foy,* 65 N. C., 265, the case is approved and the distinction pointed out wherein a bailee misuses the property or by
(282) conduct converts it to his own use, in which case, if the property is lost or destroyed, he is liable for its value, without regard to the cause of such loss, in an action of trover under the former system, or for a conversion now. The Court says: "But such a rule has never been applied to other contracts, still less to a mere neglect by a trustee, when no fraud is imputed." In *Sledge v. Reid,* 73 N. C., 440, the principle was applied to the case of a wrongful taking by a sheriff of a mule—the Court refusing to give damages for loss of plaintiff's crop. The Court cite *Ashe v. DeRossett, supra,* and *Hadley v. Baxendale,* the leading case on the subject. *Edmundson v. Fort,* 75 N. C., 404; *Foard v. R. R.,* 53 N. C., 235, 78 Am. Dec., 277.

The principle has been frequently applied in other courts to cases against carriers negligently delaying the shipment of freight. In *Morrison v. Davis,* 20 Pa., 171, 57 Am. Dec., 695, the defendant, common carriers by water, received the plaintiff's goods for shipment by way of canal. They used a lame horse, and thereby the boat was delayed. When the boat reached the Juanita division of the canal it struck an unprecedented flood and the plaintiff's property was injured. In an action for the negligent delay it was sought to recover the value of the property. The Court said that the proximate cause of the disaster was the flood; the fault of having a lame horse was a remote one, which, by concurring with the extraordinary flood, caused the injury. "In any other than a carrier's case the question would present no difficulty. The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." After discussing the question at some length, the Court say:

"Now, there is nothing in the policy of the law relating to
(283) common carriers that calls for any different rule as to conse-

quential damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those damages which ordinary skill and foresight is bound to anticipate." *Daniels v. Ballentine,* 23 Ohio St., 532, 13 Am. Rep., 264; *Denny v. R. R.,* 79 Mass., 481, 74 Am. Dec., 645. The Court cites with approval *Morrison v. Davis, supra,* saying: "The defendants failed to exercise due care and diligence in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary, and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible." The property was burned in defendant's warehouse after its arrival at the point of destination. It was held that the defendant was not liable. *R. R. v. Burrows,* 33 Mich., 6; *Hoadley v. Transportation Co.,* 115 Mass., 305, 15 Am. Rep., 106; *R. R. v. Reeves,* 77 U. S., 176.

The contract with the plaintiff by which the defendant carried the freight "released" relieved it of its common-law liability as insurer, but not against injury resulting from its own negligence. *Smith v. R. R.,* 64 N. C., 235; 6 Cyc., 393. As his Honor properly told the jury, the burden was therefore on the plaintiff to show that the piping was destroyed by the negligence of the defendant. Of course, in view of the law, as we have seen, such negligence, if any, referred to the burning of the warehouse—either in respect to the origin of the fire or the facilities for controlling it. His Honor told the jury that the measure of duty in this respect was ordinary care, or the care of the prudent man.

There is no suggestion as to the origin of the fire; it may, so far as it appears, have been caused by rats, matches, incendiary, or any other of the unaccountable causes against which human experience (284) teaches it is next to impossible to provide.

In regard to keeping a watchman at the depot, we are not prepared, in the absence of any evidence that it is usual to do so, to say that it was the duty of the defendant to do so. It would seem that if the defendant used the same precaution used by citizens of Lincolnton, it would discharge its duty.

While it is true that this Court has, following the Supreme Court of the United States, and probably a majority of the State Supreme Courts, held that, except in very rare and exceptional cases, negligence is a question of fact and the measure of duty is the conduct of the prudent man, we think that it is still the duty of the judge to explain to the jury the law in the light of the testimony. *Russell v. R. R.,* 118

N. C., 1098; *Hinshaw v. R. R.*, 118 N. C., 1047. We have no purpose to question or shake the doctrine as laid down in those and later cases. In the application of the rule the most careful and anxious attention and desire to keep true to the line cannot always secure results satisfactory to minds approaching cases from opposite points of view and often preconceived mental bias.

In this case there was no conflicting evidence. The jury had a full and intelligent description of the conditions, a judge of marked ability and clearness of judgment heard the testimony, and if there had been no evidence of the way in which owners of property in the same town protected their houses from fire the jury would have had nothing save their own experiences and their individual opinions as to what a prudent man would have done in respect to property situated as was the defendant's to protect it from fire other than the damage incident to the passing of engines. What may have been the duty of the court in instructing the jury in such condition of the evidence is not presented in this (285) case. We are of the opinion that the defendant was entitled to have the jury told that the measure of duty was the care taken by prudent citizens of Lincolnton in that respect to their property. Defendant's exception in that respect must be sustained. His Honor should have told the jury that there was no evidence showing that the delay in shipping was the proximate cause of the destruction of the property. The inquiry would thus have been narrowed to the question of negligence in respect to the means provided for "fighting fire." What would have been the liability of the defendant if the freight had been delayed beyond the number of days fixed by the statute it is unnecessary to suggest. We have not considered the exceptions directed to the first issue. There must be a

New trial.

Cited: Bowers v. R. R., 144 N. C., 688; *Bollinger v. Rader*, 151 N. C., 386; *Garland v. R. R.*, 172 N. C., 640; *Walls v. Spruce Co.*, 175 N. C., 667.

JUNGE v. MACKNIGHT.

(Filed 17 December, 1904.)

Judgments—Quieting Title—The Code, Secs. 385, 386—Laws 1893, Ch. 6—The Code, Sec. 286.

In an action to determine conflicting claims to real property, the failure of the defendant to answer at the return term entitled plaintiff to a judg-

ment by default final in accordance with the facts stated in the complaint, without inquiry or proof of such facts.

CLARK, C. J., and DOUGLAS, J., dissenting.

PETITION to rehear this case, reported in 135 N. C., 105.

U. L. Spence and W. J. Adams for petitioner.
H. P MacKnight, in propria persona, in opposition.

CONNOR, J. This cause is before us upon a petition to rehear. After a full and anxious consideration we are of the opinion that the petition should be allowed and the judgment of the Superior Court affirmed, thus reversing the decision of this Court. 135 N. C., 105. (286) We are not inadvertent to the well settled rule of this Court recognized and adhered to in a number of cases which will be found collected in Clark's Code, Rule 53, p. 943. We are of the opinion that in respect to a question of practice, especially where, in a matter of which we are compelled to take notice, the almost uniform custom has been followed otherwise than as held by us, we should not hesitate when convinced of error to reverse our judgment. Many titles are dependent upon the validity of judgments rendered as the one before us. The reason and authorities set forth and cited in the several opinions filed at the first hearing render it unnecessary to discuss the question at any length. It will be noted that, as was then said, the plaintiff must be careful to draw his judgment, when by default final, according to the right arising upon the case stated by the complaint, because "The defendant is concluded by the decree so far at least as it is supported by the allegations of the bill." If the decree or judgment do not conform to this well-settled principle, if it give relief in excess of or of a different character from that to which the plaintiff is entitled upon the *allegations of fact* in the complaint, the court will promptly set it aside upon application. The practice prevailing in courts of equity, to which in some measure The Code system in this respect may be assimilated, is thus stated by Mr. Beach: "The proceeding which is termed taking a bill *pro confesso* is the method adopted by the court for rendering its process effectual when the defendant fails to appear and answer, by treating the defendant's contumacy as an admission of the complainant's case and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant *according to the equity arising upon the case stated by the complainant.*" Mod. Eq. Pr., 191; *Morrisey v. Swinson,* 104 N. C., 555; *Thompson v. Wooster,* 114 U. S., 104. It thus becomes (287) important that the pleader, when he wishes to take a judgment by default final, set forth clearly the *facts* upon the admission of which, by failure to answer, he bases his right to relief, so that the court may, upon an inspection of his complaint, adjudge his right to correspond with

such facts. It also becomes the duty of the judge in such case to cause to be read or to inspect the complaint before signing judgment, so that the right adjudged may be such as, upon the facts stated, the plaintiff is entitled to. In courts of equity, which are always open for the hearing of causes and rendering of decrees upon "rule days," it is usual to take the decree *pro confesso* and give the defendant an opportunity at the next "rule day" to show cause against the decree tendered by the plaintiff, when he will be heard for that purpose only, unless he move to set aside the decree *pro confesso*. In our system of holding the courts only at stated terms, with no power in the judge to sign judgments out of term, except by consent, it is not practicable to follow the equity rules. It often happens that important judgments involving large property interests are signed at the last moment of the court. The most careful judges find themselves embarrassed by this condition. It might be well to adopt a rule requiring all judgments which are to be taken by default during the term to be presented with the verified complaint not later than Thursday of the term. This, of course, is only suggestive. The petition to rehear must be allowed and the judgment below

Affirmed.

MONTGOMERY, J., concurring: This case is before us upon the petition of the plaintiff appellant for a rehearing. It was first heard and reported in 135 N. C., 105. The action was commenced for the purpose of (288) determining an adverse claim set up by defendant to certain real estate of the plaintiff, under the provisions of chapter 6, Laws 1893. The defendant filed no answer, and upon the complaint having been fully verified, a judgment by default final in favor of the plaintiff was rendered. Upon an appeal to this Court the judgment was reversed. There was a divided Court, however, two of the judges having dissented. The Justice who writes this concurring opinion wrote the opinion in the case when it was here before at Spring Term, 1904. Having changed his opinion as to the question involved, and expressed his views in a concurring opinion filed by him in *Eason v. Dortch,* 136 N. C., 291, the dissenting opinion of the Court in the case as originally heard becomes the opinion of the Court. It is needless to reiterate what was said in the dissenting opinion in the case and what was said by the writer of this opinion in *Eason v. Dortch, supra,* as those opinions can be readily found and examined.

Two further matters, however, I wish to add which seem to me to be pertinent: First, it is not provided in section 386 of The Code that when the defendant shall fail to answer, judgment by default may be had at the return term, but that judgment by *default and inquiry* may be had and the inquiry executed at the next succeeding term. A judgment by

default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions *sounding in damages* the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of *the* cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed. There is, it is true, an expression at the end of the opinion in the case of *Osborn v. Leach,* 133 N. C., 432, that may seem to be inconsistent with the first clause of that proposition, but all the authorities in this State—and they are numerous—are to the effect that a judgment by default and inquiry admits *the* cause of action, and the plaintiff is only to prove his (289) damages. In *Banks v. Mfg. Co.,* 108 N. C., 282, the action was for damages on account of an alleged malicious prosecution. No answer having been made, a judgment by default and inquiry was had, and this Court held that the court below properly refused to submit an issue offered by the defendant as to whether defendant did prosecute the plaintiff maliciously and without proper cause. The Court said: "The issue tendered by the defendant was not raised, as there was no answer, and the matter was settled by the judgment by default." The judge submitted one issue only, "What damages, if any, has plaintiff sustained?" and this Court approved of that course, saying, "The only inquiry was as to the *quantum* of damages." In *Parker v. House,* 66 N. C., 374, the action was against a constable and his bond for a failure to use due diligence in collecting claims put into his hands as an officer. This Court said: "The default of the defendant in failing to answer admits the execution of the bond sued on, and that the plaintiffs have good cause of action, and the only question left for determination is the amount of damages." In *Coles v. Coles,* 121 N. C., 277, the Court said: "Upon a judgment by default and inquiry the legal liability is fixed by the default, and the inquiry is only to ascertain the amount."

In *McLeod v. Nimocks,* 122 N. C., 437, the action was for the recovery of damages for the conversion and embezzlement of the proceeds of cotton, and upon the defendant's failure to answer, there was a judgment that the defendant, while the relation of principal and agent existed between the parties, unlawfully, willfully, and fraudulently embezzled and converted to his own use 141 bales of cotton, and that the plaintiff recover of the defendant the value of the cotton. The cause was continued until the next term of the court, that an issue might be submitted and tried by a jury as to the value of the cotton. The defendant, in his appeal from the judgment, did not except to the inquiry (290) as to the value of the cotton, but he excepted to that part of the judgment on the question of conversion and embezzlement as not being authorized by The Code, sec. 286. This Court said: "We think his con-

tention not well founded. The action sounded in damages. The tortious conduct of the defendant was set forth in the complaint as the basis for demanding the damages. The judgment by default and inquiry—the defendant having said nothing in answer to the plaintiff's complaint—was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would have been entitled to nominal damages without any proof. That cause of action was admitted by defendant's failure to answer." Numerous authorities were cited in support. The Court further said: "So, in the present case, the defendant, by his failure to answer, admitted the cause of action as set out in the complaint, and the judgment was a proper one"

Those decisions are not affected by *Parker v. Smith,* 64 N. C., 291, and *Lee v. Knapp,* 90 N. C., 171, where the actions were in *assumpsit* for goods sold and delivered, and the Court held that the plaintiff had to prove on the inquiry both the delivery of the goods and their value. In both cases it is expressly stated that the specific articles of merchandise were not set forth in the complaint. In *Witt v. Long,* 93 N. C., 388, where the action was in *assumpsit* for goods sold and delivered, and the specific articles were set out in the complaint in the shape of an open account, it was held that the defendant not having stipulated to pay the price charged for the goods, the matter of their value was to be settled by a writ of inquiry. The cause of action then being confessed or admitted in interlocutory judgments by default, there follows a writ of inquiry by means of which the damages are to be assessed. The
(291) writ of inquiry is issued in no cases except in actions sounding in damages and only for the purpose of ascertaining the amount of the plaintiff's damages. A writ of inquiry in common-law practice is defined in Black's Law Dictionary to be a writ "which issues after the plaintiff in an action has obtained a judgment by default on an unliquidated claim, directing the sheriff, with the aid of a jury, to inquire into the amount of the plaintiff's demand and assess his damages." Bouvier, in his Law Dictionary, defines a writ of inquiry as one "sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the venue is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages" The same definition, in very much the same language, of a writ of inquiry is given in the law dictionaries of Rapalje and Lawrence, Abbott, Anderson, and Burrill. "If the action sounds in damages (according to the technical phrase), that is, be brought, not for specific recovery of land, goods, or sums of money (as is the case in real or mixed actions or the personal actions of debt and detinue), but for damages only, as in

covenant, trespass, etc., and if the issue be an issue in law, or any issue in fact not tried by jury, then the judgment is only that the plaintiff ought to recover his damages, without specifying their amount, for as there has been no trial by jury in the case the amount of damages is not yet ascertained. The judgment is then said to be interlocutory. On such interlocutory judgment the court does not in general, itself, undertake the office of assessing the damages, but issues a writ of inquiry directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, commanding him to inquire into the amount of damages sustained, by the oath of twelve good and lawful men of his county, and to return such inquisition, when made, to the (292) court. Upon the return of the inquisition the plaintiff is entitled to another judgment, viz., that he recover the amount of the damages so assessed; and this is called final judgment." Stephens on Pleadings, 105. Of course, the damages are assessed under The Code by the jury, in the presence of and under the direction of the judge.

I conclude, therefore, that judgment by default and inquiry, in section 386 of The Code, has reference only to actions sounding in damages.

The second matter I wish to mention is the argument to be drawn from the prohibition of the recovery of costs by the plaintiff in such actions as the present one when the defendant suffers judgment to be taken against him without answer. It seems to us that it was the intention of the lawmakers to apply that prohibition only up to and including the appearance or return term. It could hardly have been their intention to declare that in case of a failure of the defendant to answer, then an interlocutory judgment should be entered against him, and at the succeeding term of the court have the whole question of title and alleged aspersion of title gone into, with the entire costs saddled upon the plaintiff even if he should be successful. It seems to me to be clear that a judgment final was intended to be recovered by the plaintiff in actions of this nature by the statute which gives the right of action. Laws 1893, ch. 6.

DOUGLAS, J., dissenting: This case was heard at the last term of this Court, and fully considered. In addition to the opinion of the Court, two opinions, one concurring and one dissenting, were carefully and ably written. Not a single point was overlooked that seems to me to have any material bearing upon the case. Therefore, under the repeated decisions of this Court the petition to rehear should be denied. In *Watson v. Dodd,* 72 N. C., 240, *Chief Justice Pearson,* speaking (293) for the Court, says: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some

material point was overlooked, or some direct authority was not called to the attention of the Court." Does the case at bar come within any of those exceptions? Certainly not, as far as any one has undertaken to advise us. This language of *Chief Justice Pearson* was quoted with approval in *Weisel v. Cobb,* 122 N. C., 67, with the citation of eighteen additional cases. The entire headnotes to *Weisel's case* are as follows:

"1. Rehearing of decisions of cases of this Court are granted only in exceptional cases, and when granted, every presumption is in favor of the judgment already rendered.

"2. Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first rehearing, the former judgment will not be disturbed."

That case was decided by a unanimous Court, and has been cited in *Capehart v. Burrus,* 124 N. C., 48, and *Coley v. R. R.,* 129 N. C., 407, 57 L. R. A., 817. It was also the sole authority cited for the *per curiam* denial by the Court (*post,* 704) of the petition to rehear in *McNeill v. R. R.,* 135 N. C., 682. Of course, where the petition comes within the spirit of the rule, it should be granted; but some presumption of law must adhere to the decisions of this Court.

Aside from this question, I see no reason why the decision should now be changed. I still adhere to my concurrence in the concurring opinion of *Clark, C. J.,* filed at last term, and which I presume will now become a dissenting opinion.

If Stephens were still the recognized standard of pleading in this State, and we were still dealing with covenant, trespass, trover, case, assumpsit, debt or detinue, my opinion might possibly be different; but as (294) our practice is governed by The Code, we must enforce its provisions. In it the cases are specifically stated in which judgment by default final can be rendered; and it is expressly provided that "in *all* other actions . . . judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term." The Code, secs. 385 and 386. Chapter 6, Laws 1893, does not profess to make any change in The Code, and has no relation to the case at bar. The expression, "suffer judgment to be taken against him without answer," could apply just as well to judgments by default and inquiry as to those by default final.

The opinion of the Court frankly admits the danger attending the rendering of judgments by default final at the return term, and by its essential reasoning emphasizes the wisdom of the lawmakers in restricting defaults final to a very small class of cases, and providing that "in all other actions" the inquiry shall be held at the succeeding term. It cannot be contended that the opinion of the Court follows the letter of the statute. I cannot admit that it follows the spirit of the statute when

it construes into it provisions which in its own opinion are essentially dangerous. It is true, we should all correct our errors when we are convinced that we are wrong; but I am not convinced, and must stand upon the letter of the law and my convictions of its essential spirit.

CLARK, C. J., dissenting: The sole point in this case is whether a judgment by default final could be entered. There is nothing in the record which calls in question the effect of a judgment by default and inquiry. The majority of the Court do not concur in a review of any part of the unanimous decision lately rendered in *Osborn v. Leach,* 133 N. C., 432, since cited and approved in same case, 135 N. C., 628, which makes it therefore unnecessary to discuss it. I concur with *Mr. Justice Douglas'* dissent upon the question presented by the record, and refer to the views set forth in my concurring opinion on the former hear- (295) ing of this case, 135 N. C., 107.

Cited: Currie v. Mining Co., 157 N. C., 219; *Patrick v. Dunn,* 162 N. C., 23; *Stelges v. Simmons,* 170 N. C., 44; *Lee v. McCracken, ib.,* 576; *Jernigan v. Jernigan,* 178 N. C., 85.

COBB v. RHEA.

(Filed 17 December, 1904.)

1. Appeal—Judgments—Motions—Title of Cause.

An appeal from the decision rendered on a motion for payment of reference fees in consolidated causes should be entitled by the name of the first action in which the motion was made.

2. References— Fees— Judgments— Costs— The Code, Sec. 533— Laws 1889, Ch. 37.

The amount and the apportionment of the fees of a referee are in the discretion of the trial judge.

3. Judgments—Appeal—References—Costs.

The apportionment and the amount of the fees of a referee is a final judgment and will be reviewed on appeal in case of abuse, but cannot be changed at a subsequent term.

4. Executors and Administrators— References— Costs — The Code, Sec. 1416.

The fees of a referee taxed against an administrator are not a preferred debt.

ACTION by T. H. Cobb against H. E. Rhea, heard by *Long, J.,* at October Term, 1904, of BUNCOMBE. From a judgment for the plaintiff, the defendant appealed.

Davidson, Bourne & Parker for plaintiff.
G. A. Shuford and W. J. Peele for defendant.

(296) CLARK, C. J. There were three actions pending in the name of *H. E. Rhea, Admx., v. R. R. Rawls et al.* These were consolidated into one action. There were three other actions, *Buchanan v. Rhea, Admx.; Asheville Tobacco Warehouse Co. v. H. E. Rhea, Admx., et al.,* and *Summey v. Rhea, Admx., et al.* The plaintiff, Cobb, having been allowed fees as referee and as arbitrator in said several causes years ago, and the settlement of the estate having been unaccountably delayed, made a motion in each of said four actions that the administratrix, Rhea, pay the reference fees as a preferred debt. The four motions were consolidated, and from the judgment thereon the administratrix appeals. This not being an action, but a motion in the cause, the appeal should regularly have been entitled by the name of the first action in which the motion was made, as is the practice in taxing a prosecutor with costs (*S. v. Hamilton,* 106 N. C., 660), or judgment in a cause against a witness or other person for contempt—though the practice has not always been observed in the latter class of cases.

In *Buchanan v. Rhea, Admx.,* there was judgment at Fall Term, 1893, that plaintiff recover of the administratrix $3,018.60, with interest, etc., "and the costs of this action, in which costs shall be included the sum of $100 allowed to T. H. Cobb for his services as such herein rendered." In *Asheville Tobacco Warehouse Co. v. Rhea, Admx.,* a similar judgment for recovery of a debt, with interest and costs, was rendered, adding as above a recovery by plaintiff of "the costs of this action, including the sum of $100 to T. H. Cobb, referee." In *Summey v. Rhea, Admx.,* judgment was rendered at December Term, 1895. "By consent, T. H. Cobb, referee herein, is hereby allowed $300 for his services as such referee and to be paid out of the assets of H. K. Rhea, deceased, and as part of the costs of this action and to be taxed therein." The three actions pending in the name of *H. E. Rhea, Admx., v. Rawls et al.* having been
(297) consolidated at December Term, 1895, the judgment included an allowance of $1,000 to T. H. Cobb as arbitrator, subject to a credit of $300 already paid, "leaving due him $700 in this judgment, and as between H. E. Rhea, administratrix of H. K. Rhea, H. E. Rhea individually, and R. A. Rawls, said $700 shall be adjusted in the proportions in said award directed." The award thus made a part of the judgment in paragraph 13 thereof adjudged the $700 to be paid as follows: "350 by H. E. Rhea individually; R. A. Rawls $350, to be credited with $150, leaving $200 due to him, and $300 by H. E. Rhea, administratrix of H. K. Rhea, of which $150 has been paid, leaving balance of $150 due by her as administratrix."

Originally, under The Code, sec. 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them, in its discretion. Clark's Code (3 Ed.), p. 714. A practice has grown up, owing to such delays as this, of granting judgment for referee's fee, whether awarded against one party or divided between them, and issuing execution at once. There is nothing to be said against this, and frequently a similar order is rendered for other costs, especially when a continuance is granted upon payment of costs. The question is not of ordering payment, but whether such order can be made a preferred debt against an estate.

By above summary it will be seen there are judgments against the administratrix for $100 each as part of plaintiff's recovery of costs in first two cases, *Buchanan v. Rhea, Admx.,* and *Asheville Tobacco Co. v. Rhea, Admx.,* also in *Summey v. Rhea, Admx.,* $300, "to be paid out of assets of H. K. Rhea, deceased, and as part of the costs of this action, and to be taxed therein"; and finally, in the consolidated cases of *Rhea, Admx., v. Rawls,* a "balance of $150 due by her as administratrix," making a total of $650 adjudged against the administratrix as cost.
The apportionment of referee's fees is a final judgment both as (298) to the amount and the apportionment, and rests in the discretion of the judge making the allowance, subject to exception and review by appeal in case of abuse. Such order cannot be changed by a subsequent coördinate judge. "There is no appeal from one Superior Court judge to another." *May v. Lumber Co.,* 119 N. C., 98; *Alexander v. Alexander,* 120 N. C., 474; *Henry v. Hilliard,* 120 N. C., 487; *Scroggs v. Stevenson,* 100 N. C., 358; *Cowles v. Cowles,* 121 N. C., 276.

The only remaining question is whether such judgment for referee's fees is a preferred debt. Referee's fees, by the statute, and also the decisions (*Wall v. Covington,* 76 N. C., 152; *Young v. Connelly,* 112 N. C., 650), are simply "a part of the costs," and of no higher dignity than any other costs nor than the debt to whose recovery they are a mere incident, and, as against the administratrix, must take the *pro rata* allowed the judgment. It is true, the clerk and other officers may demand their fees in advance as the case progresses, and so may the referee, and if paid by the personal representative they may be allowed by the clerk as "necessary disbursements and expenses" in managing the estate; but not so as to costs recovered by the opposite party. And when administratrix's costs are not paid in advance, judgments for such costs, including the part of referee's fees adjudged against the estate, which are a part of the costs, have no greater dignity and take no greater *pro rata* than the judgment of which they are a part, or any other judgment. The fact that funds derived from a sale of realty of H. K. Rhea to make assets in another proceeding are in the hands of the clerk gives the court no

authority to order the costs in these cases, nor the referee's fees as part of such costs, to be paid out of such fund as a preferred debt. They are not preferred by The Code, sec. 1416, which determines the order of priority of indebtedness in the settlement of estates, nor by any (299) other statute. The proceeds of sales of realty to make assets, so far as necessary to pay debts, will in due course be paid the administratrix and will be disbursed by her in accordance with law.

Error.

Cited: Horner v. Water Co., 156 N. C., 496; *Dockery v. Fairbanks*, 172 N. C., 530.

COWARD v. COMMISSIONERS.

(Filed 17 December, 1904.)

1. Witnesses—Costs—Homicide—Nolle Prosequi—The Code, Secs. 739, 3752, 3756, 3739.

Where a *nolle prosequi* is entered on an indictment for homicide as to murder in the first degree, the witnesses for the State subsequently attending the trial are entitled to only half fees.

2. Costs—Counties.

To tax a county with the costs in a criminal action where the defendant is convicted, the trial judge must find that the defendant is unable to pay the costs.

3. Witnesses—Costs.

A witness for the State being entitled to only half fees may recover in full the amount paid for proving his ticket.

4. Costs—Counties.

Where a party pays into court the full amount afterwards recovered, he should not be taxed with the costs.

ACTION by O. B. Coward against the Commissioners of Jackson County, heard by *Ferguson, J.*, at January Term, 1904, of JACKSON. From a judgment for the plaintiff, the defendants appealed.

Walter E. Moore for plaintiff.
C. C. Cowan for defendant.

(300) CLARK, C. J. The question presented is the liability of the county of Jackson for costs of State's witnesses in *S. v. Long*, who was indicted in that county for murder, but whose cause was removed to the Superior Court of Macon. After the removal to the latter a *nolle*

prosequi was entered as to murder in the first degree, and the witnesses were subpœnaed to the next term, at which the prisoner was tried for murder in the second degree and convicted of manslaughter. The witnesses for the State were entitled to their mileage and fees in full so long as attending court as witnesses upon the capital charge, including the term at which the *nol pros.* was entered. This was not contested, and those costs have been paid in full.

The plaintiff is assignee of the State's witnesses, Fowler and Fengate, as to their witness tickets for that part of their attendance which was at the terms subsequent to that at which the *nol. pros.* as to the capital charge was entered, and he claims full fees. But the attendance at those terms was to prove a noncapital charge, and by section 739 of The Code it is provided that "If there be no prosecutor in a criminal action, and the defendant shall be acquitted or convicted and unable to pay the costs, or a *nolle prosequi* be entered or judgment arrested the county shall pay the clerks, sheriffs, constables, justices, and witnesses one-half their lawful fees, except in capital felonies and in prosecutions for forgery, perjury, and conspiracy, when they shall receive full fees."

In *S. v. Hunt,* 128 N. C., 584, it is held that the solicitor may enter a *nol. pros.* as to the charge of murder in the first degree, and that thereafter it is only a trial for murder in the second degree, entitling the prisoner only to four peremptory challenges. And it is added (p. 586) that thereafter the county will be saved the higher expense attendant upon attendance of witnesses for the trial of the higher offense.

The plaintiff contends that at all events he is entitled to recover full pay for witness Fengate, because he attended court out of his county. The Code, sec. 3756, fixing the per diem and mileage of (301) witnesses, makes this discrimination between witnesses, that those attending out of their own county shall receive 5 cents mileage, and those attending within the county "a rate to be fixed by the county commissioners, not to exceed 5 cents per mile." But payment of both alike, and all other costs, must be made by the county in the manner provided by section 739 (above set out) in cases in which the costs shall fall upon the county, as therein specified. The true construction of The Code, sec. 3756 (regulating fees of witnesses), sec. 3739 (regulating fees of clerks), and sec. 3752 (regulating fees of sheriffs), is had by reading as a proviso at the end of each of them section 739. It may be noted that the court failed to find that the defendant Long was convicted and unable to pay the costs, which finding was probably necessary under section 739 to recover against the county at all. But there is no exception on this point, and we presume that such finding was in fact made.

The second exception, that the court allowed repayment in full of 10 cents paid by the witness to the clerk for proving his ticket, cannot be

sustained. This was no part of the costs of the case proper, but a necessary disbursement of the witness to procure proof of his attendance, and he (or his assignee) is entitled to have it back in full. If the county paid back only half of that sum it would be keeping half the money the witness himself has paid.

The defendant having made tender upon demand, and paid into court the full amount of one-half the witness tickets held by the plaintiff, should not have been taxed with the costs. *Pollok v. Warwick,* 104 N. C., 638; *Smith v. Loan Assn.,* 119 N. C., 256.

Error.

Cited: S. v. Mayhew, 155 N. C., 481, 482, 485.

(302)

SATTERTHWAITE v. GOODYEAR.

(Filed 17 December, 1904.)

1. Brokers—Contracts—Time—Commissions.

Where a vendor of land empowers a broker to sell the same at a certain price, provided the matter was closed up within thirty days, the time so limited began to run from the date of mailing the letter containing such authority, and the broker is not entitled to commissions if the owner sells after the expiration of the thirty days.

2. Instructions—Verdict.

Requests for instructions concluding with the words, "plaintiff cannot recover," should not be given.

3. New Trial—Issues.

Where exceptions are taken only to one issue, a new trial will be restricted to that issue.

4. Costs—Appeal—The Code, Sec. 527.

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court.

ACTION by S. C. Satterthwaite against Charles Goodyear and others, heard by *Jones, J.,* and a jury, at February Term, 1904, of HAYWOOD. From a judgment for the plaintiff, the defendants appealed.

Shepherd & Shepherd for plaintiff.
H. R. Ferguson for defendants.

CLARK, C. J. On 20 March, 1901, the plaintiff, a real estate agent in Waynesville, N. C., who had been collecting rents on the realty of the Goodyear estate in and near that town and had sold some of it, wrote to Walter Goodyear in New York City—one of the defendants—and in the course of his letter he said: "I am trying to negotiate a deal for

farm and Richland Park, including cottage. I made an offer of (303) $19,000 for the entire property, $6,000 cash, balance in one and two years at 6 per cent, or farm $9,000 and the other $10,000, same terms. . . . Kindly let me know if I can make a concession of $500 on each property, if it is necessary to make the deal." To this, Charles Goodyear, the other defendant, replied, 26 March, 1901: "Replying to yours of 20th, would say we would be willing to accept the price mentioned for the farm and the Richland Park property, provided the matter could be closed up within thirty days, as I have good use now for just about this amount of money. I understand your proposition to be $8,500 for the farm and $9,500 for the Richland Park property, $6,000 cash, and balance in equal payments at one and two years at 6 per cent." Charles Goodyear was sole executor of his father, by whose will Richland Park was devised to the widow.

While the plaintiff was collector of rents from and manager of the property, the above letter of 20 March shows that he did not have authority to sell this property for less than $10,000, for the letter was either an offer or an application for authority to sell the realty named at prices therein stated, the Richland Park property being put at $9,500. The reply of 26 March, whether it be an acceptance of an offer or a power of attorney, was restricted to prices therein named, and was limited to thirty days. The plaintiff did not report the name of the person with whom he was negotiating, and he made no sale at any price. On 22 April, 1901, Charles Goodyear telegraphed to the plaintiff: "Can you carry out your proposition of 20 March?" To which the plaintiff replied: "Prospective purchaser now in New York; am trying for $10,000." On 28 April, 1901, Charles Goodyear, as executor or as agent for his mother, or both (it is immaterial), sold the Richland Park for $8,000 to Jones, who was the party with whom the plaintiff (304) had been negotiating. The plaintiff brings this action against Walter Goodyear, Charles Goodyear, individually, and Charles Goodyear, executor in part, to recover $400, being 5 per cent commissions on the sale of the Richland Park made by Charles Goodyear.

The contract is set out in the letters of 20 March offering to sell Richland Park at $9,500 and the reply accepting that offer, "provided the matter was closed up within thirty days." The plaintiff contends that the thirty days should be counted from the receipt by him of the letter on 28 March. But whether Charles Goodyear's reply was an acceptance or a power of attorney, it bound him from the date of mailing the same (9 Cyc., 295; *Adams v. Lindsay,* 1 B. and Ald., 68; Benjamin on Sales, sec. 44), and necessarily bound him only for the thirty days he therein specified. Had he refused altogether, and a prior authority to sell had been shown, of course a revocation of such authority would not deprive

the agent of his commissions on a sale made before a valid revocation reached him. But this is not that case.

It was error to refuse the plaintiff's seventh prayer, that as the plaintiff allowed thirty days to elapse without making any sale, the jury should answer the first issue "Nothing." The court should also have given the eighth prayer, that there was no evidence that either of the defendants conspired with the purchaser to defeat the plaintiff of his commissions. The other six prayers were defective in that each concludes "plaintiff cannot recover," which this Court has so often held to be properly refused under the present system, under which there is no general verdict "that the plaintiff recover," but the jury respond to issues. *Witsell v. R. R.*, 120 N. C., 557.

There is no exception as to the verdict upon the second issue as to charges for collecting rents, and hence the new trial will be re-
(305) stricted to the first issue. *Benton v. Collins,* 125 N. C., 83, 47 L. R. A., 33, and cases cited. But as this issue alone was contested on appeal, and the costs on a partial new trial are in the discretion of the court, The Code, sec. 527 (2), the costs of the appeal will be taxed against the appellee.

Error.

Cited: Lynch v. Veneer Co., 169 N. C., 173; *Wooten v. Holleman,* 171 N. C., 165.

STALCUP v. STALCUP.

(Filed 17 December, 1904.)

1. Husband and Wife—Evidence—Tenancy in Common.

The evidence in this case is sufficient to be submitted to the jury on the question as to whether certain persons were tenants in common.

2. Husband and Wife—Tenancy in Common—Joint Tenants.

Where lands are granted to husband and wife, and it appears from words of the grant that the intention was to create a joint tenancy or a tenancy in common, they will take and hold as joint tenants or tenants in common, and not as tenants of the entirety.

ACTION by J. T. Stalcup against W. R. Stalcup and others, heard by *Long, J.,* at August Term, 1904, of CHEROKEE. From a judgment for the defendants, the plaintiff appealed.

E. B. Norvell and Ben Posey for plaintiff.
J. F. Ray for defendant.

MONTGOMERY, J. The plaintiff, who is the only child and heir at law of his deceased mother, claims a one-half interest in the tract of land

described in the complaint. It is alleged in the complaint that in 1893, whilst the plaintiff's mother and P. S. Stalcup were husband and wife, P. S. Stalcup bought with the money of his own and his (306) wife the land, and took a bond for title in his own name; that the bond for title ought to have been so executed as that one-half of the land should be conveyed to the plaintiff's mother and the other half to P. S. Stalcup, but that when the bond was drawn and executed, neither the plaintiff's mother nor P. S. Stalcup being present, by mistake, oversight, and ignorance on the part of the draftsman, and also on the part of the bargainor and the bargainee, it was drawn and executed so as to make it appear that P. S. Stalcup was to receive a deed as the sole bargainee, when the real intention of the makers of the bond for title, as well as P. S. Stalcup's, was that the bond and deed should show that P. S. Stalcup was to be the owner and bargainee of only one-half of the land and the mother of the plaintiff the other half. It is also alleged that the purchase price was paid for the land, the one-half of which with the money of the mother of the plaintiff and for one-half of the land; that P. S. Stalcup died, and afterwards the bargainors, through mistake and oversight, executed a deed to the defendants W. R. Stalcup, Burgess Jacobs, and Nancy Stalcup, the devisees under the will of P. S. Stalcup.

On the trial, Lovingood, the bargainor, a witness for the plaintiff, testified that when P. S. Stalcup approached him to buy the land he said he wanted it for himself and his wife; that he wanted the bond to show that he was entitled to one-half and that his wife was entitled to one-half, as one-half of the money they were paying for the land was his and one-half hers; that witness said further that when the bond was executed neither Stalcup nor his wife was present, and that Stalcup "wanted it to show up that he and his wife were equal in the land, he in one-half and she in one-half." He said further: "I delivered this paper to P. S. Stalcup, and he was not satisfied, because it did not show that his wife was to have a half of it, and I persuaded him to let it alone (307) till the deed was made, and I would make it tell in the deed as he had directed. It was to show that they were 'halves,' that each paid half and had half."

Upon the defendant's motion on the demurrer to the evidence the plaintiff was nonsuited. There was error in the judgment of nonsuit. If a deed be made for land to husband and wife (and it is immaterial if the purchase money be furnished one part by the husband and another by the wife, or all by one of them), if nothing else appears, they take an estate in entirety—that is, they hold the land under the old common-law expression *per tout, et non per my.* That was so because of the relation between the parties, they being in law but one person and each having

the whole estate as but one person. *Bruce v. Nicholson,* 109 N. C., 202; 26 Am. St., 562; *Ray v. Long,* 132 N. C., 891. But in the case before us the plaintiff has shown by competent evidence that the bond for title should have been drawn and executed so as that when the deed should be made, on the payment of the purchase price, the bargainor should have conveyed to the wife, Mrs. Stalcup, one-half of the land, and to the husband the other half. The deed was not to be made to the husband and wife, simply acknowledging the purchase money, but was by express agreement to be made so as to declare that one-half of the purchase money had been paid by the husband and the other half by the wife, and that for that consideration one-half interest in the land was to be conveyed to the wife and the other half interest to the husband. Such a deed would have created the husband and wife tenants in common.

This rule of law does not conflict at all with *Ray v. Long, supra,* but is in conformity to that decision. In 15 A. & E., 846, it is said: "But it has been held that in consequence of the theoretic unity of husband and wife, lands granted to husband and wife jointly during coverture cannot be held by them as tenants in common or as joint
(308) tenants, notwithstanding the terms of the grant. The prevailing doctrine in modern times, however, is that when lands are granted to husband and wife, and it appears from words of the grant that the intention was to create a joint tenancy, or a tenancy in common, they will take and hold as joint tenants or tenants in common, and not as tenants of the entirety," and many cases from several States are cited to support the text.

Error.

Cited: Isley v. Sellars, 153 N. C., 376; *Highsmith v. Page,* 158 N. C., 229; *Eason v. Eason,* 159 N. C., 541; *Murchison v. Fogleman,* 165 N. C., 400; *Moore v. Trust Co.,* 178 N. C., 125.

CURTIS v. RAILROAD.

(Filed 17 December, 1904.)

Appeal—Dismissal—Rules of Supreme Court, 5, 28, 34, 17.

Though an appeal is not docketed seven days before the call of the district to which it belongs, if the appellee fails to docket a certificate and move to dismiss before the appellant dockets his transcript, the appeal will not be dismissed.

ACTION by W. A. Curtis against the Southern Railway Company, from BUNCOMBE, *Long, J.,* August Term, 1904. From a judgment for the defendant, the plaintiff appealed.

A. J. Franklin for plaintiff.
Moore & Rollins and A. B. Andrews, Jr., for defendant.

CLARK, C. J. This is a motion to dismiss this appeal: (1) because not docketed seven days before beginning the call of the district to which it belongs, as required by Rule 5; (2) because the record was not printed in the time required by Rule 34; (3) because the appellant has not printed and filed a brief in time required by Rules 28 and 34. It is only necessary to quote what was said upon an identical motion in *Benedict v. Jones,* 131 N. C., 474: "The uniform ruling of this (309) Court . . . may be thus summed up: An appeal must be docketed not later than the termination of the next term of this Court beginning after the trial below (with the exceptions specified in the proviso to Rule 5, 128 N. C., 634). If not docketed at such term by the time required for hearing at such term, the appellee may docket a certificate under Rule 17 then, and at any time during the term, if before the appellant dockets the transcript, and have the appeal dismissed. But if the appellee is dilatory and the appellant dockets the transcript at that term, before the appellee moves to dismiss, though too late to secure a hearing, then the appeal will not be dismissed. *Packing Co. v. Williams,* 122 N. C., 406; *Smith v. Montague,* 121 N. C., 92," and citing other cases.

Here the appeal was not docketed at the required time, but it was docketed at this term, the first term beginning since the trial below, and being docketed before the appellee moved to dismiss, the latter's motion came too late. As the case consequently goes over to the next term for hearing, the record and brief are only required to be printed at next term at the specified time before the call of the district to which the appeal belongs.

Motion denied.

Cited: Ammons v. R. R., post, 707; *Foy v. Gray,* 148 N. C., 436; *Craddock v. Barnes,* 140 N. C., 428; *Laney v. Mackey,* 144 N. C., 632.

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(310)

BOARD OF EDUCATION v. COMMISSIONERS.

(Filed 19 December, 1904.)

Taxation—Highways—Schools—Poor Persons—Const. N. C., Art. 7, Secs. 1, 2, 7; Art. II, Sec. 5—Laws 1903, Ch. 240.

Poll taxes collected under a special act of the General Assembly for highways cannot be diverted to schools and the support of the poor.

ACTION by the Board of Education of Macon County against the Board of County Commissioners of Macon County, heard by *Ferguson, J.,* at Fall Term, 1904, of MACON.

The plaintiff board of education in its complaint alleges that the defendant board of commissioners, at their regular meeting on the first Monday in June, 1904, levied a tax of $1.58 on each taxable poll in the county for school purposes and 30 cents for the support of the poor. The State had theretofore levied 12 cents on each poll for pensions—all of which aggregated $2 on the poll, being the constitutional limit. That at the session of 1903 of the General Assembly an act was duly passed authorizing the commissioners of Macon County to levy a special tax of 30 cents on the $100 worth of property and 90 cents on each taxable poll for the purpose of working the public roads of said county. That by said act it was provided that the special taxes levied and collected pursuant to the authority thus conferred should constitute a special fund for working the roads, and that they should not be applied to any other purpose. Chapter 240, Laws 1903. The plaintiff asked that a *mandamus* issue commanding the defendant board to apply the proceeds of the tax levied on the polls by said act to the support of the public schools of Macon County. The defendant board demurred to the complaint. His (311) Honor, *Judge Ferguson,* sustained the demurrer and rendered judgment against the plaintiff for cost. Plaintiff excepted and appealed.

T. J. Johnston for plaintiff.
Horn & Mann for defendant.

CONNOR, J., after stating the facts: Well prepared and well considered briefs were filed in this case by counsel on each side. They have aided us in considering and deciding the interesting question presented for the first time for decision. The plaintiff's counsel say: "The decision of the case turns upon the question whether a capitation tax levied by the commissioners in pursuance of a special act of the Legislature for a special purpose, as contemplated by Article V, section 6, of the Constitution, must be appropriated in the manner prescribed in section 2 of the same article." The defendant resists the construction contended for by pointing us to section 7 of the same article.

Section 2, Article V, provides that "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor," etc.

Section 6 provides that "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes and shall never exceed the double of the State tax, except for a special purpose, and with the approval of the General Assembly."

Section 7. "Every act of the General Assembly levying a tax shall state the object to which it is to be applied, and it shall be applied to no other purpose."

The plaintiff contends that by section 2 the proceeds of all capitation tax, whether derived from the general revenue act made to meet the ordinary and necessary expenses of the State and county government, or from special acts authorizing the levy of a tax for a special pur- (312) pose exceeding the constitutional limit, must be applied to the support of the public schools and the poor. That section 2 controls the application of all capitation tax, thus confining the language of section 7 to property tax. The defendant contends that section 2 should be confined in its application to capitation tax levied pursuant to the requirement of section 1, Article V, to meet the equation prescribed for ordinary expenses of the State and county government. That section 7 controls the application of not only all property tax, but all capitation tax levied pursuant to special laws for a special purpose. The defendant suggests that, whether this is correct as to all capitation tax, it is certainly so as to all such tax in excess of $2. It must be conceded that there is an apparent conflict between the two sections. It is our duty to reconcile them, so that, if possible, both be given force and effect. It is said by *Judge Cooley:* "If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." Const. Lim., 92.

Article V of the Constitution has been the subject of much controversy; the construction and reconciliation of the different sections have given the Court much difficulty. There can be no doubt that the restrictions and limitations therein have seriously embarrassed the Legislature in providing necessary revenue to meet the demands of a growing, progressive community. It is impossible to read the many opinions of the justices of this Court without being impressed with this fact. It would seem that to arrive at satisfactory, or at least workable, results, the Court has run very close to the line which separates construction from making the law. We may, however, in the light of the decisions, treat some questions as settled. By the express language of Article I, (313) section 5, it is made the duty of the General Assembly to levy a capitation tax on every male inhabitant between the ages of twenty-one and fifty, which shall be equal to the tax on property valued at $300 in cash. That such State and county tax combined shall never exceed $2 on the poll.

Mr. Justice Rodman, who was a member of the Constitutional Convention of 1868, at the June Term, 1869, of this Court, in *R. R. v. Holden,* 63 N. C., 427, said: "It is too plain to admit of an argument that the

intent of this section was to establish an invariable proportion between the poll tax and the property tax, and that as the former is limited to $2 on the poll, the latter is limited to $2 on the $300 worth of property." That, with the exceptions pointed out in *Jones v. Comrs.*, 107 N. C., 248, and *Wingate v. Parker,* 136 N. C., 369 (at this term), observance of this equation is essential to the validity of all revenue or taxing laws, is shown by the uniform decisions of this Court. *Russell v. Ayer,* 120 N. C., 180, 37 L. R. A., 246. In *Jones v. Comrs., supra,* it was held that the necessity for observing the equation applied to all laws providing for revenues for the ordinary and necessary expenses of the State and county government and all special acts authorizing counties to levy a special tax to meet the necessary expenses—such as building a courthouse, a bridge, or improving the roads, etc. It was therefore essential to the validity of the tax of 30 cents on property that a tax of 90 cents on the poll be levied and collected.

We, then, have two provisions in Article V of the Constitution—one requiring "The proceeds of the State and county capitation tax to be applied to the purpose of education," etc., the other declaring that "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied," etc. If sections 1 and 2 are construed together, we have an express direction to the General Assembly to levy on (314) every male inhabitant between certain ages a capitation tax, with the limit fixed at the amount of tax levied on property valued at $300, with the further limit that such capitation tax shall not exceed $2, followed by the provision that the proceeds of the capitation tax shall be applied, etc. These two sections express the purpose to require a capitation tax, to fix its limits, to establish an equation between such tax and the property tax, and the application of such capitation tax. Section 3 prescribes a rule of uniformity; section 4 deals with the State indebtedness, etc. Section 5 prescribes what property shall be exempt from taxation. Section 6 provides for the levy of county taxes. The very important command to the Legislature concludes the article with section 7, that "Every act of the General Assembly," etc. Article IX, section 2, imposes the duty upon the Legislature to provide by taxation and otherwise for a general and uniform system of public schools, etc. Article XI imposes the duty upon the General Assembly of providing for the poor, etc.

Adopting the construction placed upon the Constitution by this Court in *Jones v. Comrs., supra,* we are constrained to hold that the act under which the tax to work the roads of Macon County was authorized necessarily provided for the capitation tax, and that its collection is lawful. We are of the opinion that in order to give full force and effect to section 7 the entire tax must be applied to the purpose for which it was levied

and collected. We think that it would be doing violence to this section to say that it applied only to taxes levied on property. It would be a singular result if every tax levied by a county by permission of the General Assembly to build a courthouse, bridge, or improve the roads, should carry with it a poll tax for an entirely different purpose. General taxes are levied for the support of the schools, the rate of which is fixed with reference to the amount to be received from polls in accordance with section 1, Article V. It is to be presumed that this tax, with (315) the added amount from polls, is deemed by the General Assembly sufficient to meet the needs of the public schools. A tax is likewise levied in each county for the support of the poor, and the commissioners may, if they think proper, appropriate so much as one-fourth of the poll tax to that purpose. The provisions of section 2 of Article V are fully met and complied with by confining its application to the capitation tax levied for the ordinary expenses of the State and county. The question, it must be conceded, is not free from difficulty. In *Long v. Comrs.*, 76 N. C., 273, *Rodman, J.*, uses language which the plaintiff insists indicates an opinion different from that which we have expressed. It does not appear whether the tax levied for repairing the courthouse was by permission of the General Assembly. It does appear, however, that the entire levy did not exceed the constitutional limit. The question is not clearly presented. In *Board of Education v. Comrs.*, 113 N. C., 385, *Avery, J.*, says: "The language of the Constitution is plain and peremptory, and forbids the application of the fund arising from the tax on polls to any purposes other than to education and the support of the poor, or of any greater proportion for the maintenance of the poor than that prescribed in the instrument, *until the levy reaches the limit of $2.*" The only question decided in that case was that the Legislature was authorized to levy a tax for the payment of pensions under the power granted in Article XI, section 7, and that it could appropriate so much of the poll tax to that purpose under the provisions of Article II, section 5, as did not exceed one-fourth of the whole. The State by general taxation and by special appropriation provides for the maintenance of public schools. The Constitution appropriates the net proceeds of all fines, forfeitures, and penalties and the proceeds of the sale of all public lands, etc. To adopt the construction of Article VII, section 5, contended for by the plaintiff, we would be compelled to write into (316) the section the words "on property," so that it would read "Every act, etc., levying a tax *on property.*" This the Court should never do. We must construe, and not *make* the Constitution.

To weaken the very essential safeguard against the abuse of the taxing power found in section 7, Article V, would expose the property of the citizen to dangers which experience has shown to lurk in every form of

government, because of the fact that "the power to tax involves the power to destroy." We should be slow to adopt a construction which would carry the capitation tax which must accompany every special tax for necessary purposes into a channel different from that "stated," setting at naught the peremptory command, "It shall not be applied to any other purpose." To do so would seriously embarrass the counties in meeting the ever-increasing demands of a progressive people for better roads, bridges, and public buildings. It is suggested that until the limit of $2 is reached the provision of section 2 controls and carries the capitation tax into the school and poor fund. We think it best to decide only the question before us. It is conceded that the limit had been reached in Macon County for general purposes and that the levy authorized by the special act is in excess of the limit. The judgment of his Honor sustaining the demurrer must be

Affirmed.

WALKER and DOUGLAS, JJ., concur in result.

Cited: Crocker v. Moore, 140 N. C., 433; *McLeod v. Comrs.,* 148 N. C., 86; *R. R. v. Comrs., ib.,* 237, 245; *Moore v. Comrs.,* 172 N. C., 428, 445; *R. R. v. Cherokee,* 177 N. C., 99; *Wagstaff v. Highway Commission, ib.,* 359; *R. R. v. Comrs.,* 178 N. C., 457.

(317)

PRINTING COMPANY v. HERBERT.

(Filed 19 December, 1904.)

1. Supreme Court—Judgments—Exceptions and Objections—The Code, Sec. 957—Verdict.

The Supreme Court will not reverse a judgment because there was not sufficient evidence to be submitted to the jury, unless the point was raised before verdict.

2. Sales—Conditional Sales—Evidence—Declarations.

In an action to recover possession of a printing press sold by plaintiff by conditional sale, which passed into the hands of a publishing company as an alleged innocent purchaser, declarations of the deceased buyer are inadmissible to show that he received value from the publishing company.

3. Sales—Consideration—Payment.

A purchaser for value must show payment of a fair and reasonable price.

ACTION by the Babcock Printing Press Manufacturing Company against W. M. Herbert, heard by *Ferguson, J.,* and a jury, at March Term, 1904, of LENOIR. From a judgment for the defendant, the plaintiff appealed.

W. D Pollok for plaintiff.
Loftin & Varser and Land & Cowper for defendant.

WALKER, J. This is an action for the recovery of personal property, to wit, a printing press and its fixtures. So far as we are able to gather the facts from the record, it appears that the plaintiff, a corporation and the manufacturer of the press, claims title to the same and the right of possession by virtue of a contract with one W. S. Herbert, now deceased, the agreement being described in the case as "a contract of conditional sale." This contract was dated 26 March, 1902, and was filed for registration 24 July, 1902. No copy of it is set out in the record, (318) and we are not informed as to its contents. It was introduced merely by the general description we have already given. The plaintiff introduced in evidence a series of notes dated 19 July, 1902, a copy of one of the series of notes being set out in the case. It refers to the contract of 26 March and recites that it was given "pursuant to the agreement." The defendant claims the title and right to the possession of the press as receiver of the Kinston Publishing Company, to which company he alleges it was sold and transferred after the date of the contract of conditional sale between the plaintiff and Herbert, and before the date of its registration. It is also alleged by the receiver that the Kinston Publishing Company purchased the press for value and without notice in law of the contract of conditional sale.

There was much testimony introduced by the parties upon the question of the purchase of the press by the publishing company and of the price paid for it. The jury returned a verdict in favor of the defendant. It is stated in the case that "the court charged the jury fully on every phase of the case and gave the contentions of both sides; there was no exception taken to the charge" There are no assignments of error.

While it may be that the conditional sale had not been consummated by the delivery to the plaintiff of the notes for the purchase price, and that there was merely an executory contract to sell, and that, at the time it is alleged the publishing company bought, W. S. Herbert had no title to the press to sell, as contended by the plaintiff's counsel, we cannot consider or decide the question, as there is no exception in the record which raises it. If the plaintiff had asked for an instruction to the jury based upon the contract and the evidence as to the time of giving the notes, and had caused to be set forth in the case a copy of the contract, so that we might determine its nature and legal effect with (319) reference to the time of the delivery of the notes, the proposition argued at length in the brief of the counsel would be before us. But there was no prayer for instructions either as to the plaintiff's or the defendant's evidence, and no exception to the charge. There is, there-

fore, nothing to consider in respect to the charge or the failure to charge. We cannot yield to the argument that, as there is no evidence of a purchase for value by the publishing company, we should reverse the judgment or award a new trial because the statute (The Code, sec. 957) requires that we should render such a judgment as, on inspection of the whole record, it shall appear to us ought in law to be rendered thereon. That section does not apply. The alleged defect does not arise in the record as distinguished from the "case on appeal." *Taylor v. Plummer,* 105 N. C., 56. An objection that there is no evidence must be raised before verdict by a proper prayer for instructions to the jury, and comes too late after the objector has taken his chances upon the verdict and has lost. *S. v. Harris,* 120 N. C., 557.

While we cannot consider the argument of counsel upon the effect to be given to the negotiations and dealings between the plaintiff and Herbert, and between the latter and the Kinston Publishing Company, with a view of determining who has the title to the property, we yet think that an error was committed in the admission of testimony which entitles the plaintiff to a new trial. Several witnesses, and among them D. F. Wooten, were permitted to testify as to the declarations made to them or in their hearing by W. S. Herbert tending to show, and introduced for the purpose of showing, that he had received value from the publishing company for the press. This evidence was nothing more than hearsay, and should have been excluded. It is evident that the
(320) witness Wooten had no personal knowledge of the matters to which he testified, for he closes his testimony as follows: "I do not know whether Mr. Herbert sold the press to the company or received a penny for it." What he had previously said, as coming from Herbert, was clearly incompetent and was calculated to prejudice the plaintiff before the jury upon the question they were trying. The plaintiff further contended that the testimony of the several stockholders was incompetent under section 590 of The Code. It is not necessary to decide this question, as it may not again be presented, and, besides, the facts as to the insolvency of the publishing company are not sufficiently explicit for us to pass upon them intelligently.

The defendant claims that the publishing company was a purchaser for value, and in order to sustain this plea he must show that the purchase was at "a fair and reasonable price, according to the common mode of dealing between buyers and sellers." (*Fullenwider v. Roberts,* 20 N. C., 278), or, as is said in *Worthy v. Caddell,* 76 N. C., 82, "the party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the property for nothing; there must have been some fraud or contrivance about it.'" The

principle is clearly stated by *Connor, J.*, in *Collins v. Davis*, 132 N. C., 109. It is alleged that Herbert received stock of the publishing company for the press. It does not appear what was the value of this stock. The company, it is said, is now insolvent. What its condition was when the stock was issued to Herbert, if it ever was issued, is a material inquiry. The publishing company must have paid something more, as we have seen, than what would be sufficient as a consideration to support a contract, if the defendant expects to show that the company was a purchaser for value. It must also appear that the press was bought by the company itself, and not merely that the negotiations for (321) the purchase were conducted by one of the stockholders, or even by all of them when not assembled in corporate meeting. *Duke v. Markham*, 105 N. C., 131; *Pinchback v. Mining Co., ante*, 171. The purchase must have been the corporate act of the company. While the corporation need not act directly, but may be represented by one or more individuals in making contracts, provided he or they are duly authorized so to act in its behalf, it must at least be the act of the corporation, and not of its individual members, in order to be binding.

The questions we have mentioned may be more fully presented at the next trial, and we do not intend by what has been said to intimate any opinion in regard to them; in the present state of the evidence we could not well do so. For the error in admitting incompetent testimony there must be another trial.

New trial.

DOUGLAS, J., concurs in result.

Cited: *Jones v. High Point*, 153 N. C., 373; *Hodges v. Wilson*, 165 N. C., 332.

(322)

MONK v. WILMINGTON.

(Filed 19 December, 1904.)

1. Trespass—Damages—Adverse Possession—Burden of Proof.

In an action for damages for trespass to real estate, the plaintiff claiming title by adverse possession, the burden is on him to show continuous possession.

2. Adverse Possession—Presumption—Trespass—The Code, Sec. 146.

There is no presumption that the possession of real estate is adverse.

DOUGLAS, J., dissenting.

ACTION by John W. Monk and another against the city of Wilmington, heard by *Justice, J.*, and a jury, at April Term, 1904, of NEW HANOVER. From a judgment for the plaintiffs, the defendant appealed.

John D. Bellamy, Bellamy & Bellamy, T. E. Brown and Empie & Empie for plaintiffs.

W. J. Bellamy, E. K. Bryan, and H. McClammy for defendant.

CONNOR, J. The plaintiff seeks to recover upon a title founded upon a disseizin, followed by twenty years adverse possession. It is conceded that the original trespass by the plaintiff's ancestor was wrongful. This does not necessarily mean that it was such an ouster as put the true owner to an action of ejectment, and thereby put the statute of limitations into operation. His Honor correctly told the jury that such possession to ripen into title must be open, notorious, continuous, exclusive, adverse, etc. The defendant insists that this has not been (323) shown.

The plaintiff John W. Monk says that his father, after purchasing the thirty acres adjoining the *locus in quo,* in 1876 or 1877, ran his fence in the manner described by him, which it is claimed covers the land. He continued such occupancy as he had until his death in 1882. His wife remained in the occupation of the same character until her death in 1885.

Thomas J. Kenan, one of the plaintiff's witnesses, the husband of the *feme* plaintiff, testified: "After she died, my wife and John W. Monk rented the land to one Dodge. My wife and Mr. Monk made a division of the land in 1886. After division, I put some cattle in pasture occasionally. I know the boundaries of the 30-acre tract. That is an independent tract, and has nothing to do with the land in controversy. After the widow of Thomas Monk died, my wife and John W. Monk leased the *locus* for five years to Dodge." After testifying to other matters, this witness continues: "Some seven acres of the land upon which the rock quarry is situated is fit for cultivation. You could have planted a crop where the rock quarry is now. That land was fit for cultivation. After the lease to Dodge was out, John W. Monk, the coplaintiff, did not lease the seven acres where the rock quarry is, to Southerland, or Rhodes, or to any one else. Rhodes leased from John W. Monk the 30-acre tract east of that. It was not leased to anybody after the Dodge lease was out, but Rhodes pastured his cattle there after he leased the other land from John W. Monk. Nor did John W. Monk do anything on the land after the Dodge lease was out. The Dodge lease was for five years from 1885."

Mr. Rhodes, a witness for the plaintiff, testified: "In 1893 I rented some land from Mr. Monk. I don't say I rented this seven acres. I rented all the land that John W. Monk owned between the New Bern road and plank road, except five acres which was reserved on the side next to the plank road, which does not touch the place where the (324) rock quarry now is. I pastured my cattle upon the land where

the rock quarry is, in 1893, until the rock quarry was started in 1899 and the fence was torn down. I used the land for pasture where the rock quarry is, and that was all it was used for. The 30-acre tract and the other land which I rented was used for cultivation. I rented the land that I rented from Mr. Monk for five years from 1893 and until it was sold. When I had my cattle on the land in controversy Mr. W. A. Wright came to me one day, three or four or five years before they began to excavate rock at the rock quarry, and wanted to rent the seven acres in controversy, and I told him that I didn't wish to rent it; that I had more land than I wanted, and I had already rented it; that I didn't want it. I told him I thought I already had it rented; that I had rented it from Monk. He then tried to sell it to me, and I told him that I didn't want to buy. This was in 1895, '96, or '97; it was before the rock quarry was started. I think it was three or four years before the rock quarry was started. The next thing I saw, the rock quarry was going on there."

It is elementary learning that the adverse possession necessary to bar the entry of the true owner must be continuous. *Ruffin, J.*, in *Malloy v. Bruden*, 86 N. C., 251, says: "At all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title, unless actually ousted by the personal occupation of another; and so, too, whenever that occupation by another ceases, the title again draws to it the possession, and the seizin of the owner is restored, and a subsequent entry by the same wrongdoer and under the same claim of title constitutes a new disseizin, from the date of which the statute takes a fresh start." In this case a break of two years was held sufficient to prevent the continuity of the possession. In *Holdfast v. Shepherd*, 28 N. C., 361, a break "of four and a half or five months" was held sufficient. Here the plaintiff's witnesses testify that there was a period of seven years, during which Monk did nothing with (325) the land. Rhodes, under a lease for an adjoining tract, pastured his cattle upon it. From 1877, the date of the first trespass, to 1890 was only thirteen years. The Dodge lease expired in 1890. In 1893 Monk leased to Rhodes the 30-acre tract adjoining the *locus in quo*, and, so far as we can discover, asserted no claim or possession of the land after that time. Rhodes pastured his cattle on it, but says expressly, "I do not say I rented this seven acres." His entire testimony is consistent with that of Kenan, who says that Monk did not lease it to Rhodes. This is consistent with the fact shown by the plaintiffs, that when Monk and his sister made partition of their father's land this seven acres was not included, although the deed of Mary E. Monk to her brother for the 30-acre tract adjoining and some other small parcels contains this language: "The foregoing described tracts, pieces, or parcels of land, being

all the land owned by the late Thomas Monk which lies on the north of the plank road." The plaintiff says that after the execution of this deed his sister had no possession or occupancy of the land. It is true that Monk says, after the Dodge lease was out, "I leased the property to Mr. Southerland for five years, and after Mr. Southerland's lease was out I leased it to Isaac Rhodes." Two of his witnesses say that the *locus in quo* was not leased to Rhodes. It is difficult to reconcile the testimony of the plaintiff's witnesses with this statement. The lease was not put in evidence. The burden was on the plaintiff to show the continuous possession.

The defendant asked his Honor to instruct the jury: "There is no presumption that the possession of the plaintiffs and those under whom they claim is adverse." This was refused, and his Honor instructed the jury: "If you should find from the evidence that Thomas Monk
(326) and his son, J. W. Monk, had actual possession of the disputed land, said possession is deemed to be adverse, and will be so held until the contrary appears." The defendant excepted. It must be conceded that there is some conflict in the authorities upon this question. *Judge Bynum,* writing for a unanimous Court, in *Parker v. Banks,* 79 N. C., 480, said: "The law never presumes a wrong; hence, he who alleges an adverse possession must show it as well as allege it." The learned justice discusses the question with his usual clearness and force, sustaining the opinion by the most approved authorities. This seems to be in accord with section 146 of The Code: "In action for the recovery of real property or the possession thereof, or damages for a trespass on such property, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." This Court held in *Ruffin v. Overby,* 88 N. C., 369, "That every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." This section of The Code, which is taken from the New York Code, has never been construed by this Court. We think that the defendant was entitled to the instruction asked.

Several other interesting questions are raised upon the record. The plaintiff put in evidence the deed from Adam Empie, administrator of J. S. Green, to W. A. Wright, bearing date 16 March, 1873. He then shows that this deed covers the *locus in quo.* The defendant also puts this deed in evidence. The plaintiff asked his Honor to charge the jury

that, in the absence of any evidence showing that Mr. Empie was administrator and obtained license to sell this land, the deed conveyed no title. Whether, after putting the deed in evidence, the plaintiff (327) can thus attack it, is not clear. It will be observed that the deed is thirty years old. How far its recitals may be taken as true by reason of its age is an interesting question. If this deed conveys the title, it would seem that the plaintiff, together with the defendant, has shown an unbroken chain of title from the State to Mr. Wright, and that the statutory presumption in regard to the character of Monk's occupancy would arise. Of course, if this deed does not convey title, his Honor was correct in holding that there was a break in the paper title. It does not appear why the record was not put in evidence. It is to be hoped that if this case shall again come to this Court the record will clearly present for construction the language of section 146 of The Code. It seems that *Ruffin v. Overby,* 88 N. C., 369, is in conflict with this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1868, as it did in *Bryan v. Spivey,* 109 N. C., 57. The question raised by the brief and argument, that the action of the defendant in making the contract and removing the rock, being in violation of the provisions of the charter of the city, is *ultra vires,* not being raised by the pleadings, we deem it best to express no opinion in respect thereto. We think that there should be a

New trial.

DOUGLAS, J., dissenting: Want of time prevents me, at this late day, from thoroughly discussing the opinion of the Court, and so I will merely indicate one or two of the salient points of error. The opinion apparently attempts to *reconcile* the testimony by *excluding* that of the plaintiff, and then proceeds to find as a fact that there was a break in Monk's possession. In the opinion appear the following significant paragraphs: "It is true that Monk says, 'After the Dodge lease was out I leased the property to Mr. Southerland for five years, and after Mr. (328) Southerland's lease was out I leased it to Isaac Rhodes.' Two of his witnesses say that the *locus in quo* was not leased to Rhodes. It is difficult to reconcile the testimony of the plaintiffs' witnesses with this statement." This Court is not called upon to reconcile the testimony of Monk with that of other witnesses, nor has it the right to say his testimony is any less worthy of credit than that of others. Monk testifies that he was in actual possession, and the jury alone can pass upon the credibility of his testimony and its relative weight as compared with that of other witnesses.

Again, the opinion of the Court places upon the evidence of Rhodes the construction most unfavorable to the plaintiff, while deciding against

the plaintiff. It is true, Rhodes said, "I do not say I rented these seven acres," but evidently meant to say that he did not know whether he had a valid lease. This is shown by his further testimony, that when Wright wished to rent the land to Rhodes he expressly declined to rent, because he had already rented the same land from Monk. His exact words as stated in the record are as follows: "I told him I thought I already had it rented; that I had rented it from Monk." This is clearly consistent with Monk's testimony, if the question of consistency can be considered by this Court.

This Court held, in *Ruffin v. Overby,* 88 N. C., 369, that "Every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made"; that is, that the possessor is deemed to be holding under his own right. But suppose that this decision is in conflict with section 146 of The Code, that section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even, if "it
(329) appears that such premises have been held and possessed adversely to such legal title." Monk's own testimony to facts tending to show that he was holding adversely would be sufficient to carry the case to the jury, even if he were not corroborated by others. His inclosing the *locus in quo* with other land admittedly his own, by a common fence, his using it for pasture, his renting it to others and paying no rent for it himself, are all circumstances tending to prove that he was holding adversely.

This case was one peculiarly for the jury, and I do not think that their verdict should be disturbed, except for some material error of law in the trial; certainly not on account of any view we might have as to the weight of conflicting evidence.

Cited: Dobbins v. Dobbins, 141 N. C., 220; *Bland v. Beasley,* 145 N. C., 170; *Stewart v. McCormick,* 161 N. C., 627; *Fowle v. Whitley,* 166 N. C., 447; *Land Co. v. Floyd,* 167 N. C., 687; *S. c.,* 171 N. C., 545; *Vanderbilt v. Chapman,* 175 N. C., 14.

(330)

RAILROAD v. LAND COMPANY.

(Filed 19 December, 1904.)

1. Eminent Domain—Railroads—Evidence.

In a proceeding to condemn land for a right of way, evidence to show the value of the land by its location and surroundings is admissible.

2. Eminent Domain—Railroads—Evidence—Tax List.

In a proceeding to condemn land for a right of way, a tax list is not admissible to show the value of the land.

3. Eminent Domain—Railroads.

Where a railroad condemns the whole of a dedicated street, the abutting owner is entitled to compensation for the full value of the land taken, less the value of any benefits arising therefrom peculiar thereto.

ACTION by the Suffolk and Carolina Railway Company against the West End Land and Improvement Company, heard by *Hoke, J.,* and a jury, at January (Special) Term, 1904, of PASQUOTANK.

This is a special proceeding to condemn a right of way for railroad purposes through certain lands owned by the defendant. It appears that the defendant bought about 130 acres of land adjoining the corporate limits of Elizabeth City, which is laid off into lots and streets. Some of the streets were improved, while others were not. Among the unimproved streets was Grice Street, which was condemned as an entirety as a right of way for the use of the plaintiff, and has been taken for such use. The report of the commissioners does not state the length or width of the right of way, but describes it simply as "all that certain strip of land across the lands of the defendant company and known and described as Grice Street." The evidence and the plat show that (331) said street is fifty feet wide, including sidewalks—that is, between the building lines. The sole issue was the amount of damages that the defendant was entitled to recover, which were assessed by the jury at $2,300. There was testimony on both sides. The plaintiff appealed from the judgment rendered.

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

DOUGLAS, J., after stating the case: The principles involved in this case are few and well settled. Its determination really depends more upon the weight given to the testimony, and that has been settled by the verdict of the jury. The first exception is to the admission of the following testimony given by a witness for the defendant. "There is a street two blocks away parallel to the one down which the railroad runs, which has been improved at considerable expense, having been paved with brick, and on this street several residences of good size and quality have been erected. The said improved street and the street covered by the right of way of the railroad are parts of the same tract of land, belonged to the defendant company, are near each other. The said improvements placed upon the property in question increase the value of the

whole tract. Cross streets connected the improved street with Grice Street."

The record states that it was given on cross-examination. This is denied by the plaintiff. We must assume the truth of the record, but it makes no difference, as we think the evidence was competent in either event. It does not come within the prohibition of the rule affirmed in *Rice v. R. R.*, 130 N. C., 375, following *Warren v. Makely*, 85 N. C., 12, and that class of cases. It does not seek to prove the value
(332) of one piece of land by comparison with the value of another, but to show its value by its location and surroundings. It is common knowledge that suburban property will sell better if it is in a good neighborhood, near to a macadamized road and in the immediate vicinity of churches and schools. If this property is within two squares of a paved street and close to good houses it would necessarily sell for more than if it were far from any house, with a mile of mudholes between it and the town. This seems to us less a question of law than of the natural and necessary effect of the evidence. The witness had testified on his direct examination that the lots on Grice Street were worth $150 on an average; that the damage would average at least 50 per cent and would amount, in his opinion, to $5,626, being an average of $75 per lot. On cross-examination he was testifying to facts which tended to show the reasonableness of the opinion he had expressed. We do not find any exception to this evidence in the record, but as both sides argued it under the assumption that there was an exception, we have considered it in that view. We see no error in its admission.

The second exception is to the exclusion of the tax list which was offered by the plaintiff to show the value of the land in question. It was properly excluded as being clearly incompetent for the purpose for which it was expressly offered. There are cases in which the tax lists have been admitted as some evidence, though slight, of claim of title and of the character of possession by the party listing the same. *Austin v. King*, 97 N. C., 339; *Pasley v. Richardson*, 119 N. C., 449; *Barnhardt v. Brown*, 122 N. C., 587, 65 Am. St., 725; *Gates v. Max*, 125 N. C., 139. Where the mere listing of the land is the act sought to be shown, the tax lists are admissible, because the lister is the actor; but the rule is essentially different where the value of the land is sought to be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. As was said
(333) by the Court, through *Pearson, C. J.*, in *Cardwell v. Mebane*, 68 N. C., 485: "The 'tax lists' were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury."

In that case the tax lists were admitted for the purpose of proving good faith of the vendees, who were charged with paying their father an exorbitant or fictitious price for the land, but not for the purpose of showing its actual value. In *Ridley v. R. R.*, 124 N. C., 37, this Court, speaking through *Clark, J.*, says: "Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But the tax valuation, being placed on the land by the tax assessors, without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta,* and is not competent against the plaintiff."

The third and last exception is to the following part of his Honor's charge, to wit:

"The jury would estimate the damage, if any, arising from the impaired value of defendant's land caused by condemnation of plaintiff's right of way; would deduct therefrom any advantages and benefits arising from the construction of plaintiff's railroad which were peculiar to this land, but not such benefits and advantages as were common to this and the public generally; and on applying this rule the excess, if any, of the damages over the benefits and advantages would be the amount to award defendant in response to this issue."

It is needless to discuss this question, in view of the recent and well-considered case of *R. R. v. Platt Land,* 133 N. C., 266, in which the rule laid down in the charge is expressly approved. In fact, (334) the plaintiff does not seem to question it as a general proposition of law, but in its brief explains the nature of its objection in the following words: "The objection to the charge of the court is that the court left it with the jury to estimate full damages for the right of way of plaintiff. We think this is error. The street had been appropriated for the public. The property had been laid off in lots and the streets were necessary for the use of the lots. They are marked on the plat and the property is being offered for sale in lots, so that the defendant owning this property would be entitled to damages by reason of the additional burden placed upon Grice Street, and not for the full damage for the right of way. Grice Street, as shown by the plat, is donated for the use of the public, being laid off in lots, and the defendants cannot withdraw the right to the street and do not claim or desire to do so; therefore they are not entitled to the street which they have donated for the use of these lots as means to sell them, and they can only recover by reason of the ownership of the adjoining lots such additional burden as the right of way for the plaintiff shall place upon said Grice Street. It is admitted by both plaintiff and defendants that where the railroad right of way goes is Grice Street." The plaintiff relies upon *White v.*

R. R., 113 N. C., 610, 22 L. R. A., 627, 37 Am. St., 639, and *Hodges v. Tel. Co.*, 133 N. C., 225, in support of its contention that the defendant can recover only for the additional burden of the railroad right of way. To the same effect is *Phillips v. Tel. Co.*, 130 N. C., 513, 89 Am. St., 868. We presume that the principle itself is not questioned by either party to this proceeding, however they may differ as to its application.

In the case at bar the plaintiff does not in practical effect impose an additional burden upon the street, but takes the street itself from (335) building line to building line, thus rendering it useless as a highway and destroying the essential purpose of its dedication. It is stated in the evidence that the plaintiff is digging up the entire street, and that the track is above the level of the surrounding land. This will virtually compel the owners to cut off from the abutting lots enough land to make a street on each side of the right of way, which would not leave sufficient depth for surburban lots in the absence of public sewerage. Moreover, under these circumstances the street would be practically impassable from side to side and could never be made a handsome or convenient thoroughfare. It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damage thereby caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff actually does, but what it acquires the right to do, that determines the *quantum* of damages. If the plaintiff acquires the right to use the entire street, the land is, in contemplation of law, just as much taken for the purposes of the easement as if it were filled with railroad tracks. Of course, this rule does not apply to subsequent acts of tort not contemplated in the original condemnation. This distinction is clearly pointed out in *R. R. v. Wicker*, 74 N. C., 220, and the rule therein laid down has been uniformly followed by this Court. *Browne v. R. R.*, 83 N. C., 128; *Knight v. R. R.*, 111 N. C., 80; *Mullen v. Canal Co.*, 130 N. C., 496, 61 L. R. A., 833. We are somewhat struck with the action of the original commissioners, who assessed the defendant's net damages at $100, stating in explanation that they had estimated and deducted "the increased value peculiar to part of said abutting land that the said railroad would bring." What this increased value would be, or how it would be brought about, they do not state. The only evidence we find of any such probable increase in value is the statement (336) made by both the plaintiff's witnesses, that the railroad "opened up the property for factories and increased the value of the same more than the damages sustained." To destroy property for the purpose for which the owners alone intend it, and turn it into factory sites when there are no factories in sight, is a benefit entirely too remote and contingent to be capable of present estimation. Some of us may have

heard of factory sites before, and, as we listened to the siren voice of the real estate agent, have seen lofty factories rise in the air, pouring forth their countless thousands of well-paid operatives seeking to buy a few choice lots in the neighborhood of Eden. Perhaps we have revisited in after years the scene of once bright but faded anticipations, only to find a lonely cow grazing in the middle of Broadway or a solitary pig-pen standing as a monument to buried hopes. It is due to the plaintiff's counsel to say that they did not press this contention in this Court, either in brief or argument.

There is another matter which, while not under exception, we think deserves attention. The commissioners, in their report condemning the land, describe it as follows: "Did proceed to condemn and by these presents do condemn all that certain strip of land across the lands of the defendant company and known and described as 'Grice Street,' for a right of way to be used by the plaintiff company for the purposes set out in said petition." It is true, the said right of way was fully and correctly described in the plaintiff's petition, which referred to a plat properly filed; but it seems to us that, as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, the said easement should be therein described as fully and correctly as it would be in a grant. Indeed, it might be better if the extent of the easement were also set out in the judgment of the court, although in the present case his Honor's judgment could not have been (337) other than it was, as the case was presented to him.

The judgment of the court below is

Affirmed.

Cited: Hamilton v. R. R., 150 N. C., 194; *Wyatt v. R. R.*, 156 N. C., 315; *R. R. v. McLean*, 158 N. C., 501; *R. R. v. Armfield*, 167 N. C., 465; *Campbell v. Comrs.*, 173 N. C., 501.

(338)

JONES v. WAREHOUSE COMPANY.

(Filed 20 December, 1904.)

1. Opinion Evidence—Experts—Negligence.

Where there was evidence that plaintiff's injury was sustained by his falling from a truck six inches high, as claimed by defendant, and also that it was the result of being caught in a belt a week later and thrown against a post in the wall, as claimed by plaintiff, it was proper to ask a physician his opinion, under all the circumstances surrounding both accidents, as to which he would attribute plaintiff's injury.

2. Opinion Evidence—Experts—Harmless Error.

In an action for personal injuries, a physician was asked, "A person falling vertically, what is the result?" and he answered, "It might cause concussion of the spinal cord." While the form of the question may be open to criticism, the answer was harmless, as it was merely what common experience would suggest to any mind.

3. Negligence—Master and Servant—Proximate Cause.

Where a master directed a servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed was the proximate cause of injury to the servant, the master was guilty of negligence.

4. Negligence—Assumption of Risk—Master and Servant.

Where the plaintiff had worked a machine four weeks, and the danger of being injured if he was caught in the driving belt and pulley attached to it was open, obvious, and known to him, and after such knowledge he continued to work at such machine, he assumed the risk incident thereto.

MONTGOMERY, J., dissenting.

ACTION by R. A. Jones against the American Warehouse Company, heard by *W. R. Allen, J.*, and a jury, at March Term, 1904, of FORSYTH.

The plaintiff alleges that he was in the employment of the defendant company in its finishing mill near the town of Spray, N. C. That he was directed by the defendant's superintendent to work at a machine known as a "napper." That there was attached to said machine a large pulley run by belting connecting with the shafting overhead. On the inner or lower side of the machine was a smaller pulley which drove a fan or other part of the machinery and is run by a smaller belt. This smaller pulley is not grooved, and the belt at times slips and has to be replaced by the operator. Defendant's superintendent, who had control of the department where plaintiff worked and directed and controlled plaintiff, told him not to stop the machine when the smaller belt slipped; that he could safely replace the belt without stopping the machine, and ordered him not to stop the machine, but to replace the belt, if it should slip, while the machine was in operation. That plaintiff was ignorant of the machinery, having only a few months' experience, as defendant well knew. That plaintiff, under the command and direction of the superintendent, whom he thought an experienced orperator and well acquainted with the machinery and its operation, attempted to replace the slipped belt as directed, when he was caught by the larger belt and hurled against the wall of the building, his back striking a post or wooden beam, and injured. That to attempt to fix said belt while
(339) the machine was in motion was a dangerous and hazardous undertaking, well known to defendant, or ought to have been well known to it, and, notwithstanding this fact, the defendant's superin-

tendent carelessly, negligently, and recklessly ordered plaintiff, who was ignorant of the danger, to attempt to adjust the slipped belt during the operation of said machine. That by reason of being thrown against the post, as aforesaid, he was seriously injured, etc.

The defendant admitted the manner in which the machine was constructed and operated, the way the belt was adjusted, etc., but denied the allegation in all other respects. It also alleged that the "napper" was the newest and most approved pattern, standard in make, and equipped with all approved safety appliances and safeguards in general use, etc. That necessarily the operation of such machine was attended with some risk, which is apparent upon an inspection of it, and this plaintiff well knew when he accepted the employment; that he operated two months without injury, etc.; that he assumed the risk incident to the employment.

Defendant also alleged that if plaintiff was injured it was the result of his contributory negligence. The court submitted, upon the merits, three issues: 1. Was the plaintiff injured by the negligence of defendant? 2. Did plaintiff, by his own negligence, contribute to his injury? 3. Was there an assumption of risk on the part of the plaintiff? An issue as to damage. The jury answered the first issue "Yes" and the second and third "No." From a judgment upon the verdict the defendant appealed.

Glenn, Manly & Hendren for plaintiff.

R. D. Reid, R. W. Winston, Pou & Fuller, Watson, Buxton & Watson, and Lindsay Patterson for defendant.

CONNOR, J., after stating the facts: The record contains sixty- (340) three exceptions, many of which are directed to the same question and are properly taken to the save the point. There was a motion at the close of the testimony to nonsuit, which was properly denied, thus disposing of exceptions 1, 2, 8, 9, and 10.

We will first discuss the exceptions to the admission and rejection of testimony. Exceptions from 12 to 16 inclusive cannot be sustained. Exceptions 17 to 18 are directed to the ruling upon the following question to Dr. A. P. Davis: "Suppose the facts to be, and the jury so find, that he (plaintiff), on the 28th or 29th of June, fell from a truck six inches high to a floor, upon his buttocks, or partially so; that he made no complaint about it to any one as having received any injuries from it; that on the morning of 3 July he was thrown by a belt, with his back striking a studding in the wall—suppose the jury should find that to be the fact, and he worked then for a night, perhaps two nights, complaining of pain—to which of these causes would you attribute the

injury?" To understand the purpose of this question, it is proper to say that there was evidence that on 28 June plaintiff was thrown from a truck six inches high and caught on his buttocks and his hands; that he did not feel any pain from this fall; that he was caught by the belt and thrown against the post on the latter part of the night of 2 July. He explained the manner in which he was injured, etc. There was evidence tending to show that plaintiff had said that he sustained the injury by falling from the truck, and evidence that he said he sustained it by being caught in the belt. Several physicians who attended him were examined as to his condition and the cause of it, etc. It was also in evidence that Dr. Davis had attended plaintiff. The plaintiff was insisting and seeking to show to the jury that he was injured by being caught in the belt, while the defendant was insisting and
(341) seeking to show that the injury was the result of the fall from the truck. It thus became relevant to have the opinion of the physicians.

Dr. Davis testified that he saw plaintiff on 10 August, and the condition in which he found him—paralyzed, almost completely, from his lower extremities, etc.—and that he was permanently paralyzed, his limbs very much emaciated; that he would never walk, etc.; that his nerves were almost destroyed. In answer to the question objected to, Dr. Davis said: "Granting that the suffering was only after the last injury, I would more than likely attribute it to the latter." He was then asked: "A person falling vertically, what is the result?" Answer: "It might cause concussion of the spinal cord." The record shows that defendant objected to the question, but not to the answer. This is necessary to present the question of its admissibility upon appeal when it is not responsive to the question. *Perry v. Jackson,* 88 N. C., 103; *Bost v. Bost,* 87 N. C., 477. Passing this objection, however, we think that while the form of the question may be open to criticism, the answer is so vague and indefinite that no possible harm could have been done to the defendant. The physician simply said what common experience would have suggested to any mind. It would seem quite self-evident without the aid of expert testimony that if a man has a fall which causes no suffering, as in this case, one would more likely attribute the suffering to the last fall. This might have been found by the jury as a matter of common experience and observation or as material evidence. The exception cannot be sustained.

Dr. Thomas was asked the same question, and answered: "I would say this second injury; because a common fall, sitting-down fall on that end on a smooth floor is so frequent with no bad results. Still, from a direct violence against the spine, this is almost sure to
(342) produce some serious results." In this instance the defendant

excepts to the answer as well as to the question. We can see no valid objection to the answer. The witness simply tells the jury what every man of common sense and observation knows to be true. This witness, after an examination as to the formation of the vertebræ, spinal cord, etc., is asked a hypothetical question as to whether, in his opinion, the injury to the plaintiff is permanent. The defendant objects to the question, but not to the answer. We can see no valid objection to either. There was a great deal of testimony introduced by both parties of this character. We think that the exceptions to it are without merit. It was very important to enable the jury to come to a satisfactory conclusion in regard to the cause of the condition in which the plaintiff was conceded to be. The physicians were intelligent and, so far as we can see, there was no marked difference in their opinions. All of the testimony showed that the plaintiff is seriously and permanently injured. We have examined the other exceptions to the admission and rejection of testimony, and find no error. His Honor instructed the jury upon each issue. Among other instructions, he gave the following:

"Negligence is a want of ordinary care, a failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances. It is a failure to perform some duty imposed by the law. The law imposes upon the master the duty of using ordinary care to provide for the servant reasonably sound and safe appliances and machinery, and a reasonably safe place and methods to do his work, and on entering into employment the servant has the right to assume that these duties have been performed, and may, without blame, act upon this assumption until some defect becomes so apparent that it may be discovered by the exercise of ordinary care. The master is not required to furnish the best machinery and appliances, nor is he required to provide the safest place or methods, but such as are reasonably safe. The law also requires the servant to exercise ordinary (343) care for his own safety. It is also a part of the contract of employment that the servant assumes the ordinary risks of his employment and also the risk incident to dangerous work or dangerous methods of work, if they are obvious.

"If you find from the evidence, and by the greater weight of the evidence, that the defendant directed the plaintiff to put the belt on the smaller pulley by placing his hands through the larger belt while in motion, and that this was not a reasonably safe way to do what he was required to do, and that while so doing he was injured, and that the unsafe way, as stated above, in which he was doing the work according to directions was the proximate cause of the injury to the plaintiff, then it will be your duty to answer the first issue 'Yes.'

"If the plaintiff has failed to satisfy you that the method adopted was not a reasonably safe method, the jury should answer the first issue 'No.'

"If the plaintiff has satisfied you that the method adopted was not a reasonably safe method, but he has failed to satisfy you that this was the real cause of his injury, the jury should answer the first issue 'No.'

"If the injury to the plaintiff was the result of an accident, the jury should answer the first issue 'No.'

"If upon a careful consideration of the evidence you cannot find how the fact is from the evidence, the jury should find the first issue 'No,' for the reason that the burden upon that issue is upon the plaintiff.

"While the law imposes a duty upon the master, it also imposes a duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working and the appliances used, and to discover those dangers which a man of
(344) ordinary prudence would discover, and if he fails to perform his duty and is injured thereby, he cannot recover damages.

"If you find from the evidence that the plaintiff had worked at this napper machine for four weeks, and that the danger of being injured if he was caught in the driving belt and pulley attached to it was open and obvious and known to him, and that after such knowledge he continued to work at said machine, you will answer the third issue 'Yes.'

"If you find from the evidence that the plaintiff knew of the danger of attempting to replace the belt on the pulley while the machine was in operation, and appreciated the danger and continued to work at said machine, and attempted to replace the belt when it slipped off the pulley, then the plaintiff assumed the risk and you would answer the third issue 'Yes.'

"Assumption of risk does not mean that, in all cases where the plaintiff has knowledge of the defects of dangerous machinery and goes on with the work, he assumes the risk, but the law is that where the defendant fails to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, the plaintiff will not be held to assume the risk in undertaking to perform a dangerous work unless the act itself is obviously so dangerous that in its careful performance the inherent probability of the injury is greater than that of safety, or unless it is a danger ordinarily incident to the employment, or unless obvious, or one which the servant may discover by the exercise of ordinary care."

The court charged the jury fully upon the question of damages.

We have examined the charge and exceptions thereto with care, and

find no error in the charge. The questions were largely for the jury, under the application of general and well-recognized principles of law. The charge is clear and full. The damages awarded are large, but that was a matter for the jury. The plaintiff is a physical (345) wreck. While we do not undertake to do more than suggest, from the cases which have been before us in which injuries have been sustained by operatives in cleaning or otherwise putting their hands into dangerous places, while the machine is in motion, it would seem that economy as well as regard for the safety of operatives would suggest that rules be made prohibiting, instead of commanding, such action by them. The courts recognize that persons working in mills and other employments where powerful and dangerous machinery is used assume certain risks, but it is the duty of superintendents and others having charge of the employees to use every reasonable precaution to protect them from injury.

The judgment must be

Affirmed.

WALKER, J., concurs in result.

MONTGOMERY, J., dissenting: This action was brought to recover damages from the defendant because of personal injuries alleged to have been sustained by the plaintiff on account of the negligence of the defendant. The defendant denies that it was negligent, and avers that the plaintiff was injured by his own negligence, and that he assumed the risk of any injury which he suffered. The plaintiff in his complaint alleges that the defendant was negligent in two respects: first, that it furnished the plaintiff, carelessly and knowingly, a dangerous and unsafe machine with which to do his work, and, second, that it directed him to use the dangerous and unsafe machine in a manner which was not reasonably safe (the plaintiff being alleged to be an unskilled workman and ignorant of the nature of the machine), and that by reason thereof he was injured in the operation of the machinery. After the evidence was all in, the court said that the defendant need (346) not offer evidence for the purpose of showing that the machine at which the plaintiff was hurt was a standard machine, as there was no evidence to the contrary. That was true, and he might have gone further and said that the machine by all the evidence was without fault. In his charge, also, the judge eliminated from the case the allegation that the defendant had furnished an unsafe and dangerous machine for the plaintiff to do his work with, and told the jury that the negligence of the defendant depended upon the question whether the defendant adopted and required the plaintiff to use a method which was not rea-

sonably safe. Nevertheless, he afterwards instructed the jury that it was the duty of the defendant to provide for its operatives not only safe machinery, but reasonably safe methods. That was an erroneous instruction, even if it be conceded that the defendant was to furnish *safe* machinery, for there had been a great amount of evidence on the character and construction of the machine offered by plaintiff in trying to prove an unsafe method of operating it, and under the first branch of that instruction the jury might have arrived at the conclusion that the machine itself was unsafe and dangerous, when that question had been eliminated by the judge, as a matter of law upon the evidence, from the trial of the case. Instead of giving that instruction, I think he should have said to the jury that all the evidence in the case went to show that the machine was a standard one, and in that connection that the only question for them to consider was whether or not the superintendent had compelled and directed the plaintiff to use the machinery in an unsafe and dangerous method.

The evidence in this case, in some respects, is most remarkable. The plaintiff himself testified that he was injured on the night of 2 July, 1901, by being thrown by a belt in motion, attached to the ma-
(347) chinery, against a post in the wall while engaged in adjusting a part of the machinery in the manner as he was directed to do by the defendant's superintendent. Several physicians, two of whom performed a surgical operation on him, attended the plaintiff in his sickness, and they testified that they examined him about the cause of his trouble, and that he told them he was hurt by having been thrown by one of the employees of the defendant, in a frolic, from a truck about six inches high, used in the warehouse of the defendant, and that he never mentioned to them that he had received any injury through the means of the defendant's machinery. He admitted himself that for months he had not told the managers of the defendant's warehouse that he had been injured by the machinery, and that it was eighteen months after the alleged injury before this suit was brought. He also told his foster-father, a man by the name of C. E. Jones, that he was hurt by being thrown from the truck by one of the defendant's employees, and he did not mention that he had been hurt by the machinery until some time after he had stated he had been hurt by being thrown from the truck. There was evidence offered and received tending to show that the plaintiff, while standing on a truck in the defendant's warehouse, was suddenly thrown to the floor, catching partly on his hands in a sitting position, by the truck having been kicked from under him by an employee of the defendant.

Upon the evidence, the plaintiff's counsel asked Dr. Davis, an expert witness, this question: "Suppose the jury should find that he was in-

jured on 28 or 29 June, that he fell from a truck six inches high to a floor upon his buttocks or partially so, that he made no complaint about it to any one as having received any injuries from it, that on the morning of 3 July he was thrown by a belt with his back striking a studding in the wall—suppose the jury should find that to be the fact, and he worked then for a night, perhaps two nights, complaining of pain—to which of these causes would you attribute the injury?" (348) The question was allowed over the objection of the defendant. The objection was well taken, and the question ought not to have been allowed. It was incompetent.

It is not necessary to go at length into a discussion of the question whether the evidence justified the recital in the question as to whether the plaintiff fell from the truck to the floor of the warehouse upon his buttocks. The evidence was that he fell from the truck to the floor and caught upon his hands in a sitting position. The difference in statement as to how he fell may not be serious enough to amount to a reversible error, but there are faults in the question, both as to its substance and form, which make it under our decisions wholly incompetent. In the first place, there is no recital in the question of any evidence going to show the nature of the injury, the extent of it, or the condition of the plaintiff either before or at the trial, and, second, there is assumed in the question the conclusion that whatever injuries the plaintiff might have sustained (if they had been stated in the question) were caused by his falling from the truck or by being thrown by the belt against the wall. That was the very question to be decided by the jury, and expert testimony on the part of the witness could only be admitted on the ground that his scientific knowledge could aid the jury in arriving at a conclusion. The condition of the plaintiff and the nature of his injuries, as brought out in the evidence, were not repeated to the witness and his opinion asked thereon (in case the jury should find the evidence to be true), as to whether the fall from the truck or being thrown by the belt against the wall could or might have caused the injury to the plaintiff. It assumed that one or the other did cause the injury. It might have been that, if the question had been properly asked, the witness might have answered that, the facts being believed by the jury, in his opinion the plaintiff's injuries were or could have been (349) caused by his having been thrown by the belt against the wall, or, also, that in his opinion the fall from the truck might have produced the same result. And he might have said further, that in his opinion the injuries were more likely to have been produced by the one than the other, as his judgment and scientific skill might dictate. The question should have been stated in a hypothetical form and not upon any assumption that the plaintiff's injuries had been received in either of

the ways mentioned in question. Rogers Expert Testimony, sec. 27; *S. v. Bowman,* 78 N. C., 508; *Summerlin v. R. R.,* 133 N. C., 550. I think there should be a new trial.

Cited: S. c., 138 N. C., 546; *Beard v. R. R.,* 143 N. C., 139; *Mercer v. R. R.,* 144 N. C., 404; *Lynch v. Mfg. Co.,* 167 N. C., 101; *Klunk v. Granite Co.,* 170 N. C., 71.

WHISENHANT v. RAILROAD.

(Filed 20 December, 1904.)

1. Negligence—Master and Servant.

Where a freight train on which plaintiff and other laborers of a road were riding home was given a sudden increase of speed and a violent jerk by the engineer putting on steam in response to a signal from the conductor when the slowing train was naturally expected to be about to come to a full stop to let the laborers off, there was negligence on the part of the railroad.

2. Negligence—Contributory Negligence—Proximate Cause—Evidence—Questions for Jury.

In this action against a railroad for personal injuries the evidence of contributory negligence of the plaintiff and as to the proximate cause of the injury should have been submitted to the jury.

MONTGOMERY, J., dissenting.

(350) ACTION by Joseph Whisenhant against the Southern Railroad Company, heard by *Neal, J.,* and a jury, at October Term, 1904, of BURKE. From a judgment for the defendant, the plaintiff appealed.

Avery & Avery and Avery & Erwin for plaintiff.
S. J. Ervin for defendant.

CLARK, C. J. The plaintiff, with other laborers working on the defendant's road west of Morganton, was daily hauled to his work and returned home on the work or gravel train. This train stopped at Morganton daily in the evening in order that the plaintiff and other laborers living at that place might get off. There was evidence tending to show the following to be the facts on this occasion: The train was returning from work and was running backward, the caboose in front, then four flat-cars, on which the laborers sat on the floor, there being no seats nor railing; then the tender and engine. The caboose was locked,

so the laborers could not enter it. The train slowed up for Morganton, whereupon the plaintiff got up and went to the platform of the rear end of the caboose, it not being safe to stand up on the flat-car, and stood on the top step to be ready to get off when the train stopped. There were no steps to the flat-car by which he could get off. The engineer, instead of stopping as usual at that point, in response to a signal from the conductor, suddenly put on steam, which caused a sudden and violent jerk which threw the plaintiff on the track, broke his skull, and otherwise injured him. This sudden increase of speed and violent jerk, when the slowing train was naturally expected to be about to come to a full stop to let the laborers living in Morganton get off, was negligence on the part of the defendant. The plaintiff could not safely have stood up on the flat-car, and in stepping upon the rear platform of the caboose car, to be ready to get off more readily and promptly, the plaintiff was not guilty of contributory negligence, unless it was shown that this was a more unsafe place. Whether it was more unsafe (351) was a question for the jury. This is not the case of one sitting in a passenger coach getting up and going out to stand upon the platform. Here the plaintiff could not get into the caboose. He could not stand up on the flat-car. Whether in going upon the platform of the caboose he took a greater risk and thus incurred contributory negligence, and whether, if he did, the subsequent negligence of the defendant in unexpectedly increasing speed (instead of stopping as usual), and the sudden and violent jerk which threw the plaintiff off the train, injuring him, were not the proximate cause of the injury—were eminently questions of fact which only a jury could determine. It was, therefore, error to nonsuit the plaintiff, for by so doing the judge passed upon the issues of fact which should determine this cause: (1) Whether or not the plaintiff was guilty of contributory negligence; (2) if that was true, was such contributory negligence, or the subsequent negligence of the defendant by increasing speed and causing the plaintiff to be thrown off, the proximate cause of the injury. If the plaintiff could have escaped unhurt but for the jerk, the negligence of the conductor in signaling at that point for an increase of speed, instead of stopping as usual for the plaintiff and others to get off, as from custom they had a right to expect, and the negligence of the engineer in suddenly turning on steam, thus causing a violent and unexpected jerk, was the proximate cause.

Upon a nonsuit, the evidence must be taken in the most favorable light for the plaintiff. The cause should have been submitted to the jury with appropriate instructions upon the different phases of the evidence. The plaintiff is entitled to have a jury pass upon his allegations and proofs, as guaranteed by the Constitution.

Error.

(352) MONTGOMERY, J., dissenting: This action was brought by the plaintiff to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the conductor on one of defendant's trains. The negligence complained of is, in substance, as follows: That the defendant owed the plaintiff, who was employed by defendant as a laborer engaged in the repairing of the railroad track, the duty of carrying the plaintiff to and from Morganton on his going to and returning from his work. That the habit and custom of the defendant was to slow down the rate of speed of the engine and train upon reaching a cross street in Morganton, near to station, so that the plaintiff could alight and go to his home; that on one of these return trips the plaintiff, while standing on the platform of the caboose when the train had slackened its speed and he was ready to alight, was suddenly hurled to the ground through the negligent conduct of the conductor, who suddenly and without warning to the plaintiff gave a signal to the engineer which resulted in a violent jerk. The evidence did not make good the allegations of the complaint. The plaintiff's evidence was to the effect that it was the habit and custom of the conductor to *stop* the train at the cross street in Morganton and that the plaintiff always got on and off after the train had been stopped. The plaintiff's evidence was, further, that as the train approached Morganton and had slowed to a low rate of speed, that is, as he said, from three to five miles an hour, he went out on the platform with a bundle and bucket in one hand and holding with the other to an iron rod attached to the platform, and just as he was about to alight was thrown off and to the ground through a sudden jerk and motion of the cars and badly hurt. His testimony further was that if he had been sitting down on the flat-cars he would have been perfectly safe.

(353) The much-discussed question in the oral arguments and in the briefs on the subject of contributory negligence it is not necessary for us to consider from the view we have taken of the case. We cannot see in what particular the defendant has been negligent. There cannot be culpable negligence in any case where the party charged with the negligence owes no duty to the other. In *Carter v. Lumber Co.*, 129 N. C., 203, the Court approves of the definition of negligence given by *Alderson, B.*, in *Blythe v. Waterworks*, 25 L. J. Eq., 213, which is as follows: "The omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a provident and reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party *not* intentionally." Another good definition of negligence is found in 7 A. & E., 370, which is in these words: "Actionable negligence is the inadvertent

failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." Now, under the evidence in this case, I mean the plaintiff's evidence, the duty of the defendant was to furnish the plaintiff safe transportation to Morganton, to stop the train at or near the station, at the usual place where the plaintiff got off, that he might alight in safety. The conductor did not stop the train as he ought to have done, but that was not the cause of the injury. The cause of the injury was the sudden jerk of the train by which the plaintiff was thrown off the car and injured. If the jerk had occurred at the stopping place, and after the train had stopped or was "nearly, almost to full stop," that is, very slowly and slightly, and gently creeping along, that the plaintiff might alight, the defendant would have been negligent. *Nance v. R. R.*, 94 N. C., 619; *Denny v. R. R.*, 132 N. C., 340. But the train in our case was moving at from three to five miles an hour, and the plaintiff had been standing some little time on (354) the platform. The defendant did not owe him the duty to keep a lookout for the plaintiff on the platform. The conductor had a right to suppose that he was in a place of safety which had been provided for the laborers on that train. A jerk of the cars, therefore, while the train was in motion was not negligence in the conductor, so far as this plaintiff was concerned, who was standing on the platform. The defendant owed the plaintiff no duty to look out for him and to care for him in that unusual place, that place of danger. Of course, if the conductor or engineer had seen the plaintiff in the situation in which he placed himself, the sudden jerk of the cars, if it had occurred then, would have been evidence of negligence. Or if the plaintiff had been where he ought to have been, in a safe place, by his own admission, and had been injured by the sudden jerk, then that fact would have been evidence of negligence on the part of the defendant. *Denny v. R. R., supra.* I think there was no error in the dismissal of the action as by nonsuit.

Cited: Jones v. R. R., 142 N. C., 214; *Kearney v. R. R.*, 158 N. C., 548; *Thorp v. Traction Co.*, 159 N. C., 37.

(355)

ROLLINS v. EBBS.

(Filed 20 December, 1904.)

Guardian and Ward—Bonds—Penalty—The Code, Sec. 1574—Suretyship.

A guardian bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize any one to insert the amount.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by T. S. Rollins against F. C. Ebbs, heard by *Jones, J.*, and a jury, at May Term, 1904, of HAYWOOD.

This action was brought by the plaintiffs on a guardian's bond. The defendants alleged that the amount of the penalty was not in the paper-writing at the time they signed it, and this was the principal matter in controversy. Much testimony was introduced upon that question. Issues were submitted to the jury, which, with their answers, were as follows:

1. "Did the defendants, I. N. Ebbs, M. L. Duckett, D. P. Plemmons, Joe M. Rector, and Jasper Ebbs, make and deliver their bond, in writing, to the State of North Carolina, for the benefit of James Blaine House, as alleged in paragraph 3 of the complaint? Answer: 'Yes.'

2. "Did the defendant F. C. Ebbs, as guardian of James Blaine House, receive the sum of $7,000, property of his ward, James Blaine House, as alleged in paragraph 4 of the complaint? Answer: 'Yes.'

3. "Did the defendant F. C. Ebbs, as guardian of James Blaine House, in violation of and in breach of said bond, use and appropriate to his own use the sum of $4,666.66 2-3 of his ward's money, as alleged in paragraph 6 of the complaint? Answer: 'Yes.'

(356) 4. "In what sum, if any, is the plaintiff or the relators damaged because of the said breach of the said bond? Answer: 'In the sum of $4,666.66 2-3, with compound interest from 8 March, 1900, until paid.'

5. "Was the paper-writing or bond described in and mentioned in paragraph 3 of the complaint incomplete when delivered to the clerk of the Superior Court of Madison County, in that it contained no penalty, and in that the space where the penalty should have been written was left blank, as alleged in the first paragraph of the further defense contained in the answer? Answer: 'No.'

6. "Was the penalty of $13,000 left out of the said bond or paper-writing described and mentioned in paragraph 3 of the said complaint, and the space wherein the penalty should have been written left blank, because of the mutual mistake and inadvertence of the parties thereto, as alleged in the reply of the plaintiff? Answer: .....

7. "Was the penalty, $13,000, left out of said bond or paper-writing described and mentioned in paragraph 3 of the said complaint because of the mistake or inadvertence of the clerk of the Superior Court of Madison County, as alleged in the reply of the plaintiff? Answer: 'No.'

8. "Was the penalty of $13,000 left out of said bond or paper-writing mentioned and described in paragraph 3 of the said complaint, and the space wherein the penalty should have been written left blank by reason of the fraud of the makers of said bond, perpetrated and practiced upon

the clerk of the Superior Court of Madison County, as alleged in the reply of the plaintiff? Answer: .....

9. "Was it the purpose and intention of the defendants, at the time of signing the paper-writing introduced in evidence, that the same should be used and filed as a guardian bond by F. C. Ebbs, as guardian of James Blaine House? Answer: 'Yes.'

10. "Was the penalty inserted in the paper-writing purporting (357) to be a bond at the time Jasper Ebbs signed the same? Answer: 'No.'

11. "Was the penalty, $13,000, inserted in the paper-writing purporting to be a bond at the time the defendant Plemmons signed the same? Answer: 'No.'

12. "Was the penalty, $13,000, inserted in the paper-writing at the time M. L. Duckett signed the same? Answer: 'No.'

13. "Have the defendants Jasper Ebbs, M. L. Duckett, D. P. Plemmons, or either of them, since the signing of the paper-writing or bond, authorized any one to insert the penalty, $13,000, in said bond? Answer: 'No.'"

The defendants in apt time objected to issues numbered 1, 6, 8, and 9. Objection overruled. Defendants moved for a new trial upon exceptions. Motion overruled. Judgment for plaintiff. Defendants excepted and appealed.

Moore & Rollins for plaintiff.
Crawford & Hannah and J. M. Gudger, Jr., for defendants.

WALKER, J., after stating the facts: It is clear what the court meant when it submitted the 10th, 11th, and 12th issues to the jury, and it is equally apparent what the jury intended to find by the answer to those issues. The inquiry manifestly was whether the amount of the penalty had been written in the bond before the time that the sureties, Ebbs, Duckett, and Plemmons, signed it, and not merely whether it was inserted at that particular time. Such an inquiry as the one last mentioned would, to say the least of it, have been immaterial. The jury found that the amount was not in the bond at the time it was signed and that the sureties named in the issues had not authorized any one to insert the penalty.

Our opinion was, at first, that enough appeared in the record (358) to bring the case within the principle stated in *Humphreys v. Finch,* 97 N. C., 303, 2 Am. St., 293, but we are now satisfied that a correct interpretation of the verdict renders that case inapplicable. The jury, by the 10th, 11th, and 12th issues have found that the amount of

the penalty was inserted after the paper-writing was signed by the sureties, and by the 13th issue they have found as a fact that Ebbs, Duckett, and Plemmons "had not authorized any one to insert the penalty, $13,000, in said bond." This, it seems to us, presents just such a case as was considered in *Graham v. Holt,* 25 N. C., 300, 40 Am. Dec., 408, in which *Justice Daniel* uses this language: "A bond is the acknowledgment of a debt under seal, the debt being therein particularly specified. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound. Shep. Touch., 56; Com. Dig., Obligation A; Hurleston, 2. In New York *Ex parte Therwin,* 8 Cowen, 118, and some other of the American cases, the *nisi prius* decision before *Lord Mansfield* in *Texira v. Evans,* 1 Anst., 229, *in nota,* has been followed. That case was where a party executed a bond with blank spaces for the name and sum and sent an agent, without a power of attorney under seal, to raise money on it; the agent accordingly filled up the blanks with the sum and the obligee's name, and delivered the bond to him. On the plea of *non est factum* the bond was considered well executed. But *Texira v. Evans* has been by this Court twice overruled as attempting to establish a distinction in the mode of executing deeds by attorney, where the object was to raise or secure money, and when it was to operate as a conveyance—the first, by a power of attorney not sealed, the other with a power of attorney under seal. The notion with us has always been—what we learned from Co. Lit., 52 (*a*), and the Touchstone, 57—that he who executes a (359) deed as agent for another, be it for money or other property, must be armed with authority under seal. The insertion of the sum in the blank space was intended to consummate the deed; it was done without *legal* authority, and the instrument is void as a bond," citing *McKee v. Hicks,* 13 N. C., 379; *Davenport v. Sleight,* 19 N. C., 381, 31 Am. Dec., 423. The same idea is also strongly expressed by *Chief Justice Ruffin* in *Davenport v. Sleight, supra,* as follows: "The ancient rule is certain that authority to make a deed cannot be verbally conferred, but must be created by an instrument of equal dignity. It is owned that there are modern cases in which it seems to have been relaxed with respect to bonds. This began with the case of *Texira v. Evans,* cited 1 Anst., 229, note, on which all the subsequent cases profess to be founded. The Court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences."

In *Cadell v. Allen,* 99 N. C., 542, *Justice Merrimon,* referring to the principle as laid down in *Graham v. Holt* and *Davenport v. Sleight,* says: "The rule, as thus stated, is recognized in many cases, and must be treated as settled and of governing authority," citing *Blacknall v. Parish,* 59 N. C., 70, 78 Am. Dec., 239, and other cases.

There has been no ratification. This Court cannot give its opinion or render judgment upon evidence merely. There must either be an admission of the facts in the pleadings or in some other form in the record, or the facts must be found by a jury. There is nothing admitted, or found by the jury, which shows that the defendants have, in any way known to the law of this State, assented to or ratified the insertion of the penalty in the bond.

If any respect is to be paid to our decisions in preference to those of other States, the findings of the jury upon the last four issues, if those issues stood alone, would entitle the appellants to a judgment. But the answers to the issues in this case, taken as a whole, are them- (360) selves conflicting. The jury have found, in response to the first issue, that the defendants made and delivered their bond, in writing, to the State for the benefit of the principal's ward, and yet, in answer to subsequent issues, they have found that the amount of the penalty was not in the paper at the time of the signing by defendants, and that it was not put there afterwards by any authorized person. The insertion of the amount at or before the time of signing was necessary to constitute the paper a perfect instrument, a good bond, unless the amount was afterwards inserted by some one having authority to do so, or unless the signers themselves afterwards ratified what had been done to make the instrument complete and in the manner indicated by this Court in the cases already cited. "If an instrument with a seal to it," says *Hall, J.*, "is not completely executed by signing, sealing, and delivering, it cannot become so by any act of an unauthorized agent. It would be dangerous if the law were otherwise." *McKee v. Hicks,* 13 N. C., 380. This was said with reference to the very kind of question we are now discussing, as an extract from the syllabus of the case will show: "A deed must be perfect in all respects before its delivery. Where a blank was left in a bond for money, to be filled up when the sum was ascertained, and after the delivery the blank was fairly filled up by a stranger: *Held,* that the instrument was void." Page 379. This was ruled to be the law, even when the alleged obligor had actually received the money on the faith of its being his valid bond. In that case this Court went still further and affirmed the judgment, notwithstanding a charge by which the jury were instructed that the defendant was not bound by the bond as his deed, "unless the person filling up the blank, on delivering the paper, had at the time of the delivery authority under the hand and seal of the defendant to do so." Page 380.

Humphreys v. Finch, 97 N. C., 303, as we have said, does not (361) apply. The decision is based upon the idea of an equitable estoppel, which cannot arise in this case, as the jury have found that no

authority to insert the amount in the bond was given, which was not the fact in *Humphrey v. Finch.* That case might well have been decided upon the doctrine of agency.

This is not a question of the alteration of an instrument, but a question of authority to complete the instrument so as to make it binding, as is clearly stated in 2 Cyc., 159, and it is too plainly so to require any further discussion.

Nor do we think the fact that this is a statutory bond alters the case in favor of the plaintiff. If there is any difference in respect to the question under consideration between such a bond and an ordinary bond or deed, that difference in this particular case is rather favorable to the defendants. The Code, sec. 1574, requires that "a guardian, before letters of appointment are issued to him, must give a bond payable to the State with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the Superior Court, and to be jointly and severally bound. The penalty in such a case must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the infant, which value is to be ascertained by the clerk of the Superior Court by the examination, on oath, of the applicant for guardianship or of any other person." It will be observed that the bond must be acknowledged before the clerk and approved by him, and the penalty must be double, at least, the value of the personal property and the rents and profits, which value the clerk ascertains. The penalty, therefore, is not fixed at any certain sum applicable to all cases. It may not be the same in any two bonds. It is at least variable, just as in the case of the amount to be paid in ordinary bonds or notes under seal, and the insertion of it is, therefore, just as material and essential to
(362) the completeness of a statutory bond as the amount to be paid is to that of an ordinary bond. The amount must be expressed in both. We are unable to see how any authority to fill up the blank can be implied in the case of a statutory bond that would not be equally implied in the case of other bonds. Both kinds of bonds are delivered to carry out the intention of the obligors, and in the case of a guardian bond there is the additional reason against the implication that the amount of the penalty is expressly required to be ascertained by the clerk. An individual in his private capacity cannot execute a statutory power.

Our purpose has not been so much to prove that the paper-writing signed by the defendants is void as a bond, as to make clear the construction we put upon the verdict, and to show, consequently, the findings of the jury to be so conflicting that the court below could not proceed to judgment, and that this Court cannot now intelligently pass upon the

merits of the case. The view we take of the question involved leads us to the conclusion that there should be a new trial, so that the facts may be fully and consistently found by the jury. The plaintiff may be able to show that the bond is a valid obligation of the defendants.

New trial.

CLARK, C. J., dissenting: It is not controverted that the defendant F. C. Ebbs, guardian, converted the funds of his ward to his own use, nor is there any dispute over the finding as to the amount of such defalcation. The only contested fact is whether when the bond, which is in the regular form, was signed by three of the sureties, 13,000 was written after $. Upon this omission (if true) and the subsequent filling in of the blank with 13,000 by one of the sureties, who carried the bond to the clerk to be filed, the sureties now seek to avoid their obligation, which is set out in the bond distinctly, to be responsible for any (363) failure of F. C. Ebbs, as guardian, to safely keep and account for the property of his ward. The evidence of the clerk is uncontradicted that the bond was handed to him by I. N. Ebbs, one of the sureties, and that it was then complete, the $13,000 being filled in; and his deputy, who copied it, testifies to the same effect. I. N. Ebbs, one of the sureties, certified as notary public that the other sureties appeared before him and justified to the amount set opposite their respective names. These amounts, together with the sum he himself justified to before the clerk, aggregate $13,000, the sum which was written in the bond when handed in by him to the clerk and recorded.

The jury found, in response to the first issue, that "The defendants, I. N. Ebbs, M. L. Duckett, D. P. Plemmons, J. M. Rector, and Jasper Ebbs, made and delivered their bond in writing to the State of North Carolina for the benefit of James Blaine House, as alleged in paragraph three of the complaint"; and in response to the ninth issue, that it "was the purpose and intention of the defendants at the time of signing the paper-writing introduced in evidence that the same should be used and filed as a guardian bond by F. C. Ebbs, as guardian of James Blaine House."

If, upon the facts above set forth and which were uncontroverted, the filling in of 13,000 in the blank to total up the several justifications, by the surety who was intrusted by them to bring the bond to the clerk (an addition in nowise changing the nature of the obligation), can vitiate the bond, which was perfect when handed to the clerk by one of their number, then no guardian or administrator's bond is safe unless the sureties shall all sign and justify before the clerk.

The Code, sec. 1891, was intended to prevent just such defects in obligations of this nature and to avoid trivial and technical objections. It provides that "whenever any instrument shall be taken or received
(364) . . . by any person or persons, acting under or in virtue of any public authority, purporting to be a bond executed to the State for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding . . . any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the State for the benefit of the person injured by a breach of the condition thereof, in the same manner . . . as if the penalty and condition of the instrument had conformed to law."

It would seem that as the bond contained the figures 13,000 after the $ mark when handed to the clerk by one of the sureties, who had taken the justification of the other sureties and who had been intrusted by them to deliver the bond to the clerk, and as the jury has found that "it was the purpose and intention of the defendants at the time of signing the paper-writing that it should be used and filed as a guardian bond of F. C. Ebbs," that if the 13,000 was written in by said cosurety before handing the bond to the clerk it was immaterial, and the defendants cannot protect themselves by the act of their agent, of which the clerk had no knowledge. They impliedly, at least, authorized him to fill in the blank, and cannot be permitted now to deny such authority to the detriment of the ward.

But if the instrument could be taken as filed, with $..... (blank) as the defendants allege it was when signed by them, the above section (1891) provides that "any variance in the penalty or in the condition of the instrument from the provision prescribed by law" shall not invalidate it. A smaller variance than this could scarcely happen. The penalty named merely limits the liability of the sureties, and the insertion of 13,000 after $ merely restricted their liability to that sum, whereas without it their liability by the tenor of the bond extended to
(365) responsibility for the safe-keeping of any funds or property of the ward which might have come into the hands of the guardian, without limit as to the amount.

Independent of our curative statute, it is held that the bond "may be executed by the sureties while the penal sum is still blank; and although the principal may have informed them that the sum is to be a certain amount, and he afterwards inserts a larger amount by direction of the judge of probate, yet the bond holds the sureties." Crosswell on Executors and Administrators, 190; *White v. Duggan,* 140 Mass., 18, 54 Am. Rep., 437. Such bonds are unlike bonds for the payment of money (in

which the amount is material), in that in these bonds the honest and faithful performance of duty by the fiduciary is the obligation, and the amount of the penalty is simply a form, and at most merely restricts the extent of the liability. Here the amount ($13,000), even if inserted without knowledge of the defendants, aggregates exactly the sums for which they severally justified.

In 2 Parsons on Contracts, 720, it is said: "An alteration which only does what the law would do, that is, expresses what the law implies, is not a material alteration, and therefore would not avoid an instrument." All the authorities hold that an alteration, to be material, must change the legal effect of the instrument; this is true, even as to obligations for payment of money, as negotiable bills and the like. 2 Daniel Neg. Instr., sec. 1373*a*. When a fiduciary "receives money or property upon the faith of a bond he and his sureties are estopped to deny the validity of the bond." Pritchard Wills and Adm., sec. 586, construing a statute similar to our Code, sec. 1891. Here the money was paid over by the Federal court to the guardian upon a certified copy of this bond.

"The insertion of the penal sum of a bond left blank will not vitiate the instrument." *Brown v. Colquitt,* 73 Ga., 59, 54 Am. Rep., 867; *South Berwick v. Huntress,* 53 Me., 89, 87 Am. Dec., 535; (366) *S. v. Young,* 23 Minn., 551. In the case from 53 Maine, 89, *Kent, J.,* says: "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his acts. It was one before. The filling up merely perfects an imperfect sealed deed or bond." "If one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be filled up properly, according to the agreement between the parties, and when so filled, the instrument is as good as if originally executed in complete form." 2 Cyc., 159, and cases cited thereto in note 74.

"An alteration of an instrument which merely supplies an omission therein and conforms it to the intention of the parties will not vitiate the writing, especially if a naked blank is left for the insertion of the omitted words." 2 A. & E. (2 Ed.), 212; *Hunt v. Adams,* 6 Mass., 519; *Bank v. Stirling,* 13 Nova Scotia, 439; *Conner v. Routh,* 7 How. (Miss.), 176, 40 Am. Dec., 59; *Boyd v. Brotherson,* 10 Wend. (N. Y.), 93; *Clute v. Small,* 17 Wend. (N. Y.), 238. "If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same; and as between such party

and innocent third person, the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody." 2 Cyc., 159. This is not only on the ground of implied agency, but because when one of two innocent persons must suffer, the loss must fall upon him who has put it in the power of another to do the injury. *Fisher v. Dennis,* 6 Cal., 577, 65 Am. Dec., 534;
(367) *Spitler v. James,* 32 Ind., 202, 2 Am. Rep., 334; *Fullerton v. Sturges,* 4 Ohio St., 529.

It is not contended here that there was any fraud practiced on defendants, and the jury find that the instrument is of the purport and effect the signers intended. But had it been otherwise, the sureties having committed the bond, with the blank unfilled, to I. N. Ebbs to file with the clerk, not only gave him implied authority to fill it, but they are estopped to claim any protection from an act which they put it in their cosurety's power to commit, and which was unknown to the clerk. The same principle would apply if the sureties handed the bond to F. C. Ebbs or Tainter, who delivered it to I. N. Ebbs, the other surety, who handed it to the clerk.

The tenth, eleventh, and twelfth findings were that the 13,000 was "not inserted in the paper-writing at the time" each of three of the sureties respectively named signed it. But, taking this to mean that the 13,000 was not "in the writing" when respectively signed by them, the status is presented which we have discussed above. The first and ninth findings are not in conflict with such findings, for they are simply to the effect that, notwithstanding the 13,000 was filled in after such signing and before the bond was handed to the clerk, the bond was valid. If this was a conclusion of law submitted to the jury, the error was cured by the jury answering it correctly and the judgment of the court to the same effect.

There are but two exceptions in the record: first, to the submission of issues 1, 6, 8, and 9. Issues 6 and 8 were not answered and were harmless, even if erroneously submitted; and 1 and 9 arose on the pleadings. The other exception, that judgment upon the verdict should have been entered for the defendants, is discussed above.

(368) DOUGLAS, J., dissenting: I think the guardian bond is binding because it is a statutory bond, and, having been made and delivered for the purpose of carrying out the provisions of the statute, carried with it the inherent authority to insert such amount of penalty as would meet the statutory requirement. In any other view of the case I would be compelled to regard the penalty of the bond as a material and essential part thereof.

OVERRULED *on Rehearing,* 138 N. C., 141.

HOLLAND v. RAILROAD.

(Filed 20 December, 1904.)

1. Negligence—Presumptions—Master and Servant.

The killing of an employee of a railroad company does not raise a presumption that the company was negligent.

2. Negligence—Master and Servant—Last Clear Chance.

In this action for the death of an employee of a railroad company, the doctrine of the "last clear chance" is not applicable as against the defendant.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by M. H. Holland against the Seaboard Air Line Railway Company, heard by *Bryan, J.*, and a jury, at May Term, 1904, of MOORE. From a judgment for the plaintiff, the defendant appealed.

W. J. Adams and Seawell & McIver for plaintiff.
J. D. Shaw, U. L. Spence and Murchison & Johnson for defendant.

MONTGOMERY, J. The plaintiff's intestate, employed by the defendant as rear brakeman and flagman on its extra freight train No. 578, going south, was on duty when, on the morning of 18 October, 1902, the train passed into the siding over the switch at Rockingham, there (369) to await the passage of other trains of the defendant. He was acquainted with the rules of the company, one of which (Rule J) reads as follows: "When a train takes the sidetrack to be met or passed by another train, the conductor or flagman must remain at the switch used by his train to enter the siding, and when the train is clear of the main line and the switch is properly set he will take a position not less than ten feet from the switch and give the 'go-ahead' signal to the approaching train, and must remain not less than ten feet from the switch until the approaching train has entirely passed the switch. No train will pass the switch which has been used by the train in taking the siding unless the 'all-right' signal is given." The signal used after dark must be "white." When the train was well on the siding the conductor went to the railroad office on business and remained there until the collision hereafter to be described occurred, and the intestate went back to the switch and, according to the evidence of the conductor, changed it and locked it to the main line.

The intestate also had been ordered by the conductor when they left Raleigh that morning to "always when he headed in a switch to change

it and lock it to the main line, and, in my absence, to look out for the safety of the train." The intestate left the switch, returned to the caboose at the northern end of his train, entered it, and never returned to the switch. While train 578 (intestate's) was on the siding two trains of the defendant, 38 and 40, coming from the south and going north, passed along the main line in safety. Afterwards, probably twenty or thirty minutes, train No. 33, a fast passenger train with engine and several heavy coaches, coming from the north and going to the south, with the right of way and at a speed of forty miles an hour, ran (370) into the switch which the intestate ought to have closed and guarded, under the rules of the company and the instructions of the conductor, and collided with the caboose on train 578 and killed H. L. Holland, the plaintiff's intestate.

On the question of negligence the usual three issues were submitted to the jury, which, with their responses, are as follows:

1. "Was the death of Holland caused by the negligence of the defendant, as alleged in the complaint? 'Yes.'

2. "Did Holland, by his own negligence, contribute to his death? 'No.'

3. "Notwithstanding the contributory negligence of Holland, could the defendant, by the exercise of ordinary care, have prevented his death? 'Yes.'"

At the request of the plaintiff, his Honor instructed the jury as follows: "If the jury should find from the evidence that the plaintiff's intestate was an employee upon the defendant's train and was killed in the collision of the defendant's trains in the daytime, there is a presumption of negligence upon the part of the defendant, and in that case the burden is thrown upon the defendant to disprove negligence on its part."

We think there was error in giving that instruction. So far as passengers are concerned, injuries suffered by them from contact with anything under the control and direction of the carrier, or which the carrier ought to have taken precautions against, or from the want or absence of anything which the carrier ought to have furnished, is sufficient to put him to his proof to show that he was not negligent; and, therefore, upon that principle, a *prima facie* case of negligence is made out against a carrier upon the mere fact of a collision between trains. Shear. and Red., vol. 2, sec. 516. In such a case the maxim *res ipsa loquitur* applies. The affair speaks for itself. And it must be that the same rule applies as to employees of a carrier. In such case neither the passenger nor the employee has anything to do with the management or control or with the schedule of the trains. But in the case before us it cannot be said

that the maxim *res ipsa loquitur* applies. One of the trains was (371) on a sidetrack and had been there for some little time. Who was at fault because of the collision—whether the defendant, through its engineer of train 33, or the intestate, whose duty it was to guard the switch against train 33—was a matter not explained by the collision itself, but dependent entirely upon the circumstances attendant upon the collision, to be shown by the evidence. And there was evidence, outside of the rules under which he was doing service, going to show that the intestate was negligent. It would be a strange rule of law if under such conditions a presumption of negligence on the part of the carrier, the defendant, should arise upon proof of the collision.

There was another error in the failure of his Honor to give to the jury a special instruction, asked by the defendant, in the following words: "If you answer the first issue 'No,' you need not answer the other issues; that if you answer the first issue 'Yes,' then under all the evidence you will answer the second issue 'Yes' and the third issue 'No.'" There was exception made by the defendant for the failure to give each of these instructions. We think each of them should have been given.

Rule J of the company, which we have quoted in full, and of which the intestate had full notice, required him, not only when his train went in on the siding, to change the switch, but it also required him to take his position at the switch and remain not less than ten feet from it, until the approaching train had entirely passed the switch. The whole of the evidence tended to show that he left the switch and went into the caboose, and was killed in it, having never returned to the switch. There is no dispute about the truth of that evidence, and but one conclusion can be drawn from it in reason. *Hinshaw v. R. R.*, 118 N. C., 1047; *Neal v. R. R.*, 112 N. C., 841. He neglected a duty to stand by and guard that switch, and the court should have instructed the jury to (372) answer the second issue "Yes."

It was a question of law upon all the evidence. The jury answered the second issue "No," notwithstanding all the evidence tended to show that he did, and it is probable that the jury answered that issue as they did because of an erroneous instruction from the judge on that point. The following is that instruction: "If the jury find from the evidence, under the rules of the company, that Holland, the intestate, was required to throw the switch to the main line, lock it, remain at or near it, and failed to do so, and that by reason of such failure he was killed, and that such failure was the *proximate* (italics ours) cause of death, then he is guilty of contributory negligence, and the jury should answer the second issue 'Yes.'" In actions for negligence, where the three issues

are submitted, the matter of proximate cause cannot be considered by the jury on the second issue. *Dunn v. R. R.*, 126 N. C., 343.

We think, too, the jury should have been instructed to answer the third issue "No." There was evidence tending to show that because of a sharp curve in the railroad track just before reaching the switch from the direction of Hamlet, the engineer of train 33 was prevented from seeing the switch signal at a greater distance than seventy or eighty yards—a distance too short in which to stop his train if he had discovered the danger signal at the switch; and the plaintiff contends that that faulty construction of the track, taken in connection with the location of the switch, was a continuing negligence on the part of the defendant, and that even though the plaintiff might have been negligent in leaving the switch, yet the defendant, because of its continuing negligence, had the "last clear chance" to prevent the injury. We are not of that opinion.

We think that the proximate cause of the injury was the failure
(373) to stand by and guard that switch; to stand there and see that it was locked to the main line; to see that it was kept locked to the main line until the very moment the engine of train 33 reached it; to stand there and see that no other person interfered with it. If he had stood there and discharged his duty, as the rules of the company and the instructions of the conductor required him to do, he could have prevented the accident, even though the engineer had failed to observe or could not have observed, because of a defect in the construction of the track, the signal at the switch in time to have stopped his train before reaching it.

New trial.

WALKER, J., concurring: I concur in the result and in the opinion of *Mr. Justice Connor*. All things considered, the question at least is, Was the situation a safe one, if the intestate had kept the position assigned to him by the defendant at or near the switch, so that he could prevent any interference with it and guard against any resulting danger? If so, his failure so to act was the proximate cause of his death, as it was the sole efficient cause. The company had provided a perfectly safe method for the management of its train at that point, which if adopted would have saved the life of the intestate. As he alone disregarded it, and the engineer on No. 33 was not required to anticipate this negligence, his untimely death is referred by the law to his own fault in leaving his post of duty at a critical moment. If he did not leave the switch open, but it was changed by some one else after he left his place, or even by any accident, it could have been readjusted to the main track by him if he had been there, and No. 33 would have passed and not have taken the siding.

It is suggested that Rule J was introduced by the plaintiff, and on objection by the defendant was withdrawn, and that this rule prescribed the duty of Holland in respect to the switch. Let this be (374) granted, and there is still evidence in the case on the part of the plaintiff which shows that it was his duty to remain at the switch until No. 33 passed. Plaintiff's witness, Conductor Simpson, testified that he instructed Holland that morning to change the switch and lock it to the main line when he headed in, and, in his absence, to look out for the safety of the train. There was but one possible thing to do after locking the switch to the main line in order to further protect his train, which was on the siding, and that was to watch the switch and see that it was not changed by any one else so as to endanger his train. The conductor further stated that he instructed him to look after the switches in his absence. If he had done this the accident would not have occurred. There was only one inference to be drawn from the evidence, and that was against the plaintiff.

CONNOR, J., concurring: His Honor instructed the jury on the first issue that if they found that No. 33 was a first-class train and No. 578 was an extra freight train, that under the rules No. 33 had the right of way, and it was not the duty of the engineer to protect his train against the extra at Rockingham. That, under the rules of the company, the engineer had a right to presume that he could pass the switch at the siding where No. 578 was standing unless he was signaled not to do so. That if he did not know when he left Hamlet that No. 578 was on the siding a quarter of a mile east of Rockingham, then he had a right to presume that his track was clear, and he would not be required to stop or slow up for the siding; that if they believed the evidence the engineer of No. 33 did not know that No. 578 was on the siding; that if the jury find from the evidence that it was the duty of the flagman, Holland, after his train, extra 578, had entered the siding at Rockingham, if they find that it had so entered, to remain at said switch and to (375) signal the engineer of No. 33 to come ahead, if it was all right, or to stop if it was wrong, and that said Holland was not at said switch as No. 33 approached, then the engineer on No. 33 had the right to presume that the train on the siding had not used the siding switch and that the same was set to the main track.

The defendant asked his Honor to instruct the jury "that if they found that Holland, the intestate of the plaintiff, was required by the rules of the company to be at or near said switch north of Rockingham, about four hundred yards from the station, when No. 33 passed, and he was not there, and they further find that his failure to be there caused the

said train to enter said switch, then you will answer the first issue 'No.'" His Honor gave the instruction, adding the words, "provided you further find that the defendant used ordinary care." Defendant excepted.

Defendant requested his Honor to instruct the jury "that if they find from the evidence, under the rules of the company, that Holland, the intestate, was required to signal train No. 33 as it approached the switch leading to the siding upon which extra 578 was, and that the switch was set to the siding, and that he failed to do so, and that his failure contributed to and was the proximate cause of his death, then you will answer the first issue 'No.'" His Honor gave the instruction, adding the words, "if you find that defendant used ordinary care." Defendant excepted.

I am of the opinion that these two last instructions were complete and correct propositions of law, and that the words "if the defendant used ordinary care" should not have been added. His Honor had explained to the jury the defendant's measure of duty. Certainly, if the plaintiff's intestate was guilty of negligence, and such negligence was the
(376) proximate cause of his death, the first issue, "Was the death of Holland caused by the negligence of defendant, as alleged in the complaint?" could not have been answered in the affirmative, even if the defendant had not used ordinary care. It is not the failure to use ordinary care which gives a right of action, but it is such failure resulting in, that is, being the proximate cause of, the injury. *Norton v. R. R.*, 122 N. C., 910, and many other cases. The jury might well have concluded that, notwithstanding the finding that the plaintiff's intestate was guilty of negligence, which was the proximate cause of his death, yet if the defendant failed to use ordinary care, they should answer the issue in the affirmative. Of course, his Honor did not intend to so instruct them, but I think his language capable of that construction. Again, the jury were left without any instruction as to what was meant by ordinary care as applied to the facts of this case as they might find them to be. If, as his Honor had just told the jury, the engineer had a right to presume that the switch was set to the main track, and was under no obligation to slow down, I cannot see any evidence of want of ordinary care on his part. It is said that there was negligence in the construction of the road approaching the switch. In respect to this question there is not sufficient evidence in the case to enable me to form any opinion. I could not say, as a matter of law, that there was a want of ordinary care in the construction of the road. By the plaintiff's own evidence the switch was in good condition and working order. Some one must have changed it after No. 38 and No. 45 passed. There is some evidence tending to show that the plaintiff's intestate did so. The witness Crump says

that he saw the plaintiff's intestate, after No. 38 and No. 45 passed, about halfway between the caboose and the switch, when he said: "We will back out and go down on the main line where Mr. Simpson is; I reckon we can get ahead of No. 33." The testimony of the wit-
ness is not very clear; in fact, there is an embarrassing want of (377) clearness in all of the testimony. This was, however, for the jury.

I can see no reason for submitting the third issue in this case. There is to my mind no element of the "last clear chance" presented. The decision of the first issue practically settled the case.

In another trial there may be evidence in regard to the construction of the road and placing the switch and the reasons for making the curve so near to the switch. I concur in the opinion that there should be a new trial.

DOUGLAS, J., dissenting: I am unable to concur in the opinion of the Court in any aspect, either in its construction of the law or its understanding of the facts. The plaintiff, who knew nothing of the accident, introduced only two witnesses besides himself, Thompson and Simpson, both at the time of the accident being in the employ of the defendant, and now running as conductors on other roads. All the other witnesses were introduced by the defendant. The book of rules was produced by the defendant, and identified by defendant's witnesses alone. The record states that the "plaintiff offers in evidence the special rules printed on the time table, numbered Q and J. Upon objection by defendant, Rule Q was ruled out by the court, and plaintiff excepted." The record also states that "Plaintiff introduced in evidence Rules 47-I, 47-J, and 47-K, from the book of rules of defendant. Defendant objected to the introduction of these rules as not being applicable to the train in question. Plaintiff withdrew 47-J and 47-K. Rule 47-I was admitted and read in evidence, as follows: 'I. They are required to observe the position of all switches and know that such switches are right before passing over them.'" It does not directly state whether Rule J was admitted,
but in any event there is no evidence whatsoever that the intes- (378) tate had ever been given a copy of the time table containing the
rule, or, indeed, had ever seen or heard of it. The opinion says that the intestate had full notice of Rule J. I find no evidence of that fact. If the opinion means that Rule J was in the book of rules for which the defendant introduced the intestate's receipt, I can only say that I find no evidence of that fact. If it means that Rule J in the time table is the same as Rule 47-J in the book introduced by the plaintiff, I see no proof of that; but if it were, it was withdrawn upon the objection of the defendant, who contended that *these rules were not applicable to the*

train in question. If these rules are not applicable to the train in question, they should not be ground for a new trial. There is no evidence that the intestate actually knew he was required to remain at the switch. The mere receipt of the book of rules by the intestate certainly does not tend to prove his knowledge of a rule that is not shown to have been in the book. Simpson, the conductor of intestate's train, testified as follows:

"When I went to the office Holland was coming from the switch towards the caboose. I saw him change the switch and lock it to the main line. After my train went in, I saw him do that."

Q. "Did you leave anybody especially in charge of it, except as regulated by the rules?" A. "No more than the instructions I gave to the man when I left Raleigh that morning, always when he headed in a switch to change it and lock it to the main line, and in my absence to look out for the safety of the train."

Q. "How far was Holland from the switch when you last saw him?" A. "I guess he was seventy or eighty feet, coming towards the caboose. He was about where the frog would be, seventy or eighty feet from the switch tank coming towards the caboose. . . . I did not give him any instructions as to this certain switch, because I did not know (379) that we were going to use that switch. My instructions were to look after the switches in my absence."

Q. "You say you saw Mr. Holland go around there and throw the switch back to the main line?" A. "He got off the caboose at the switch and threw it to the main line and locked it."

Q. "That was done in your absence?" A. "Yes, sir."

Q. "And that was the last time you saw Holland at the switch?" A. "Yes, sir."

Q. "When you saw him he was going back to the caboose?" A. "Yes, sir."

This evidence shows that the intestate was not told to remain at the switch, but was told to lock it to the main line; that he did so in the presence of his conductor and came to the caboose with the assent of his superior officer, or at least in his presence and without any objection on his part; that no one saw him go near the switch again; and that two trains thereafter passed the switch in safety. The instruction of his conductor to "look after the safety of the train," if construed in the light most favorable to the plaintiff, as should be done on a motion for an adverse direction of the verdict, might mean that the intestate must *go back* and look after the train. We must remember that the intestate is dead, killed by the act of the defendant, and is not here to tell his story. Many a dead man is made to bear a living sin.

The opinion of the Court says that it was error to give the following instruction: "If the jury should find from the evidence that the plaintiff's intestate was an employee upon the defendant's train and was killed in the collision of the defendant's trains in the daytime, there is a presumption of negligence upon the part of the defendant; and in that case the burden is thrown upon the defendant to disprove negligence on its part." The Court seems to admit that it is correct as a general principle of law applicable equally to employees as to passengers; but that it is not applicable to this case on account of some assumed state of facts contrary to the verdict of the jury. I cannot concur in any such opinion. The opinion says that the following instruction should (380) have been given: "If you answer the first issue 'No,' you need not answer the other issues; that if you answer the first issue 'Yes,' then under all the evidence you will answer the second issue 'Yes,' and the third issue 'No.'"

The Court again says that "the intestate had full notice of Rule J," and bases its opinion upon such assumption of notice. I would be very glad to have evidence of this fact pointed out to me, as I have not been able to find it. It is not shown to be in the book of rules, receipted for by the intestate, and I find no evidence whatever offered, either by the plaintiff or the defendant, that the time table was ever issued to the intestate, or even ever seen by him. Moreover, the above instruction included the evidence of the defendant, the credibility of which can never be assumed in directing a verdict against the plaintiff. This goes far beyond *Neal v. R. R.*, 112 N. C., 841.

I am aware that this was held in *Dunn v. R. R.*, 126 N. C., 343, but I am not aware of any other case to the same effect. The contrary doctrine, that no negligence can be considered that is not directly or concurrently the proximate cause of the accident, has been since fully recognized. In the recent unanimous opinion in *Butts v. R. R.*, 133 N. C., 82, this Court held that "An instruction which makes the liability of the defendant depend on its negligence, without regard to whether such negligence was the proximate cause of the injury, is erroneous." *Edwards v. R. R.*, 129 N. C., 79; *Curtis v. R. R.*, 130 N. C., 437. It will scarcely be contended that any difference in proof, either as to nature or amount, can be required to establish the negligence of the defendant than that of the plaintiff. Both are entitled to the benefit of the same principles of evidence and the equal enforcement of the law.

The doctrine of the last clear chance would seem to apply to (381) the action of the engineer on the incoming train, as he violated the rules of the company in passing the switch without receiving the "all-right signal," as required by Rule J, and without "knowing that

such switches are right before passing over them," as required by Rule 47-I. Moreover, it would seem to be an act of continuing negligence on the part of the defendant to construct a sidetrack and switch at the end of a curve where they could not be seen in time to stop. In the equal administration of the law it would seem that rules binding upon the intestate would be equally binding upon the defendant and its other agents.

CLARK, C. J., concurs in the dissenting opinion of DOUGLAS, J.

Cited: S. c., 143 N. C., 436, 438; *Horton v. R. R.,* 175 N. C., 487; *Cole v. Durham,* 176 N. C., 295.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1905

LEWARK v. RAILROAD COMPANY.

(Filed 21 February, 1905.)

Carriers—Breach of Contract—Measure of Damage.

1. In an action against a carrier for damages for failure to deliver a shipment of ice, the measure of damage is the value of the ice at the point of destination, and not the loss on fish, in the absence of evidence that defendant knew, or should have known, from facts and circumstances connected with the shipment, or otherwise, that the ice was intended by plaintiff for packing fish.

2. When one violates his contract, he is liable only for such damages as are caused by the breach, or such damages as, being incidental to the breach as the natural consequence thereof, may resonably be presumed to have been in the contemplation of the parties when the contract was made.

ACTION by G. H. Lewark and others against the Norfolk Southern Railroad Company, heard by *Jones, J.*, and a jury, at Fall Term, 1904, of CURRITUCK.

From a judgment in favor of the plaintiffs for less than the (384) relief demanded, they appealed.

E. F. Aydlett for plaintiffs.
Pruden & Pruden for defendant.

BROWN, J. On 14 November, 1902, the plaintiffs had shipped from Norfolk, Va., to themselves at Church Island, N. C., two tons of ice over the defendant's line. The ice was never delivered, although by due course it should have reached Church Island the same day it was shipped. It

was admitted the plaintiffs were dealers in fish and desired the ice for their own use.

The sole exception in the record presents the question as to the measure of damage. His Honor in the court below charged the jury that the measure of damage was the value of the ice at Church Island on 14 November, 1902. To this instruction the plaintiffs excepted. We find no error in the instruction.

The general rule for the measure of damage is tersely stated in *Ashe v. DeRosset,* 50 N. C., 299: "When one violates his contract he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission, as the natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made." In the well-known case of *Hadley v. Baxendale,* 9 Exch., 341, the plaintiff sought to recover damages which grew out of the special circumstances under which the contract was made, *i. e.,* the stopping of plaintiff's mill in consequence of the nondelivery of a shaft which was necessary to and was ordered for its operation. This was refused, and the Court says in respect to it: "If the special circumstances under which the contract was made were communicated to the defendant and thus known to both parties, the damages resulting from the breach of such contract, which they would rea-
(385) sonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract in the special circumstances so known and communicated. But, on the other hand, if these special circumstances were unknown to the party breaking the contract, he at most could only be supposed to have had in contemplation the amount of injury which would arise generally and, in the great number of cases, not affected by any special circumstances, from such a breach of contract." See, also, *Boyle v. Reeder,* 23 N. C., 607; *Foard v. R. R.,* 53 N. C., 235.

The plaintiffs' contention is that the measure of damage is the loss on fish. Such damages are too remote, and could not have reasonably been within the contemplation of the defendant company when it accepted the ice for shipment. "If every one were answerable for all the consequences of his acts, no one could tell what were his liabilities at any moment." 3 Parsons on Cont. (5 Ed.), 179. "Every defendant shall be liable for those consequences which might have been foreseen and accepted as the result of his conduct, and not for those he could not have foreseen, and therefore under no moral obligation to take into his consideration." *Ibid.,* 180.

When the defendant accepted the ice at Norfolk for shipment, it could not foresee that the plaintiffs' fish would be spoiled or that the ice would be used for packing fish. The defendant did not know that plaintiffs had any fish at the time the ice was shipped. Nor is there any evidence that the defendant knew it at any time.

If the plaintiffs had shown by evidence that the defendant knew or should have known from facts and circumstances connected with the shipment, or otherwise, that the ice was intended by the plaintiffs for packing fish, the plaintiffs would have brought their case within the exception to the general rule.

We have examined the evidence with care and fail to find any (386) which could reasonably bring to the defendant's knowledge the fact that the shipment was other than an ordinary shipment. It had no knowledge of the special purpose.

Neal v. Hardware Co., 122 N. C., 104, pressed upon our attention by the plaintiffs' counsel in his brief and oral argument, differs materially from the case at bar. Tobacco flues are different commodities. Ice is something of general everyday use all the year round and required for many different purposes. Persons in localities where tobacco is cultivated are presumed to know what a tobacco flue is intended for, and that if tobacco is not cured promptly when cut, serious loss will result.

In *Sledge v. Reid,* 73 N. C., 440, *Mr. Justice Bynum* says: "The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. . . . The value of the mule taken and the hire of another is the measure of the plaintiffs' damage. Anything beyond this would be too remote and conjectural, and would lead the courts into a boundless field of investigation." See, also, Wood's Mayne on Damages, secs. 26 and 40. It is useless to multiply authorities, as the measure of damages in contracts for the sale or delivery of personal property has been discussed in many cases in the recent Reports of this Court, and we find nothing in any of them to support the plaintiffs' contention. The judgment of the Superior Court is

Affirmed.

CONNOR, J., concurs in result.

Cited: Lumber Co. v. R. R., 151 N. C., 25; *Peanut Co. v. R. R.,* 155 N. C., 156; *Pendergraph v. Express Co.,* 178 N. C., 346.

(387)

BRAY v. WILLIAMS.

(Filed 21 February, 1905.)

Release by Legislative Act—Constitutionality of Act—Penalty—Estoppel—Costs.

1. An act of the Legislature relieving the defendant from a statutory penalty, passed after an action was brought to recover the penalty, but before judgment, is constitutional.
2. Evidence offered to show the conduct of the defendant in procuring the preparation, introduction, and passage of an act of the Legislature for his relief was properly excluded, as the defendant, on that account, was not estopped from availing himself of its benefits.
3. There is no duty imposed upon the defendant or the General Assembly to notify the plaintiff, in a pending action to recover a penalty, of the introduction of a bill to relieve the defendant of said penalty.
4. In an action to recover a penalty, the plaintiff is not entitled to the costs that accrued prior to the passage of an act which destroyed the cause of action.

ACTION of State on relation of W. H. Bray against George W. Williams and others, heard by *Jones, J.*, and a jury, at Fall Term, 1904, of CURRITUCK.

This action was instituted for the recovery of $12,800 alleged to be due the plaintiff by the defendant, Register of Deeds of Currituck County, by reason of his failure to comply with the provisions of sections 1818 and 1819 of The Code. By the first of these sections the register is required to make a record of marriage licenses and returns thereto. For failing to make such entry within ten days after the return of the license he forfeits a penalty of $200 "to any person who shall sue for the same." The plaintiff alleged that the defendant failed to make entry of fifty-nine marriage licenses and the returns thereon (388) within the time prescribed. The defendant, among other defenses, pleaded specially an act of the General Assembly ratified on 12 February, 1903, entitled "An act for the relief of G. W. Williams, Register of Deeds of Currituck County." The terms of the act are:

Whereas, G. W. Williams, who was Register of Deeds of Currituck County, N. C., for the term ending December, 1902, and is now serving as such by reëlection, during his term of office now expired, by inadvertence and oversight failed to record the marriage licenses issued by him within ten days, as required by section 1819 of The Code, and may have failed in other respects to comply strictly with sections 1818 and 1819 of said Code, and by such failures and omissions incurred the

penalties prescribed by said sections; and whereas said Williams carefully filed and preserved in his office such licenses and recorded the same during each year in a book furnished him for that purpose by the commissioners of said county, and no harm has come to any one because of any such failure and omission; and whereas action has been brought by W. H. Bray against said Williams and his sureties to recover of them the penalties prescribed by said sections, aggregating a large sum, which action is now pending in the Superior Court of Currituck County, but in which no judgment has been rendered: therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That G. W. Williams and his sureties on his official bond for the term ending December, 1902, and each of them, be and they are hereby released and discharged from any and all penalties imposed by said sections for failure to comply with the provisions of said sections, and any amendments to the same during the term of said Williams now expired.

SEC. 2. That this act shall be in force from and after its ratifi- (389) cation, and shall apply to actions now pending and which may be brought to enforce such penalties.

This action was instituted on 18 November, 1902. The plaintiff introduced testimony tending to show that the defendant failed to enter the licenses, etc., within ten days. The defendant introduced the statute and rested.

The plaintiff proposed to show by the representative from said county in the General Assembly at the session of 1903 that the statute was prepared by the defendant's attorney and given to the witness, the agreement being that it was to be introduced and passed through its several readings, if possible, on the same day and sent to the Senate and passed on the following day; that the plaintiff should have no time to be heard, and that the statute was passed in accordance with the agreement. Upon defendant's objection the testimony was excluded, and plaintiff excepted. Judgment for defendant, to which plaintiff excepted and appealed.

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

Pruden & Pruden and A. M. Simmons for defendants.

CONNOR, J., after stating the case: The learned counsel for the plaintiff concede that the validity of the statute of 1903 may not be called into question collaterally, and that the testimony offered was not competent for such purpose. They say, however, that the purpose of the proposed testimony was to show that by reason of the conduct of the defendant in procuring its introduction and passage, he is estopped from pleading its provision or availing himself of its benefits. For this proposition

they cite Bigelow on Estoppel, 689. Mr. Bigelow, referring to the case in which it is held that persons who have procured the passage of an act of the Legislature, under which they have acted and obtained
(390) benefits, are estopped to show that the statute is unconstitutional, says that it is "a remarkable case and to be received with hesitation." *Ferguson v. Landrum,* 5 Bush. (Ky.), 230. It must be conceded that cases may be found in which it is held that parties are estopped from averring the unconstitutionality of a statute after accepting and appropriating the benefits conferred by it. They are, however, of a very narrow scope and application. The general rule is otherwise. While not in all respects in point, the language of *Bradley, J.,* in *Ottawa v. Perkins,* 94 U. S., 260, states the general principle: "That which purports to be a law of a State is a law or it is not a law according as the truth of the fact may be, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law today and not a law tomorrow.

Without undertaking to review the authorities, we are of the opinion that the case before us does not come within the principle upon which the cases cited by Mr. Bigelow are based. There was no misrepresentation of any fact to the General Assembly, nor was the act, so far as the record shows, passed in violation of any constitutional provision. It has been frequently held that, except in the case of bills coming within the provisions of section 14, Article II, this Court will not hear testimony for the purpose of showing that the notice required by the Constitution, sec. 12, Art. II, was not given. *Brodnax v. Groom,* 64 N. C., 244; *Gatlin v. Tarboro,* 78 N. C., 119; *Wilson v. Markley,* 133 N. C., 616. It is always within the power of either branch of the General Assembly to suspend its rules and pass ordinary bills through their several readings on the same day. Unless objection is made, it is usual to do so. The fact proposed to be shown, that the member introducing the bill agreed that the plaintiff should not be notified, was a matter between
(391) him and his constituents. There was no duty imposed upon the defendant or the General Assembly to notify the plaintiff. The testimony was properly rejected.

The effect of the statute upon the plaintiff's right to proceed with his action was considered and settled by this Court in *Dyer v. Ellington,* 126 N. C., 941. We can add nothing to what was said in that case by *Mr. Justice Douglas.* The question is discussed and the authorities reviewed in an able argument by *Mr. Chase* in *Norris v. Crocker,* 54 U. S., 429.

It is suggested that the act violates section 7, Article I, of the Constitution. Such legislation is not in harmony with the genius of our Constitution, but we find no express provision prohibiting the General Assembly from passing such statutes. In *Dyer v. Ellington, supra,* this Court upheld an act substantially like the one before us. The defendant presented a hard case to the General Assembly. That it should have given the relief is not surprising.

The plaintiff contends that, in any point of view, he is entitled to the costs which accrued prior to the passage of the act. We find no direct authority upon the question. The language of *Mr. Justice Douglas* in *Dyer v. Ellington, supra,* indicates an opinion against the plaintiff's contention. The act makes no reference to costs. The recovery of costs is regulated by statute. The plaintiff brought his suit, knowing that the Legislature had the power to destroy his cause of action at any time before judgment. He took chances and must abide the result. The judgment must be

Affirmed.

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(392)

BREWSTER v. ELIZABETH CITY.

(Filed 21 February, 1905.)

Instructions—Contributory Negligence—Proximate Cause—Negligence —Defective Streets.

1. An instruction on the issue of contributory negligence, which assumes that if the plaintiff failed to exercise reasonable care, then her neglect was the proximate cause of her injury, is erroneous.

2. In order to show contributory negligence, the defendant must prove that the plaintiff has committed a negligent act and that such negligent conduct was the proximate cause of the injury.

3. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury.

4. Where reasonable minds may come to different conclusions upon considering the facts in evidence, the jury are at liberty to apply the rule of the prudent man, and under such circumstances an instruction in effect that plaintiff's alleged conduct was necessarily the proximate cause of her injury is erroneous.

5. It is a question for the jury to determine, under proper instructions, whether a person walking on a defective bridge on a public street, with the head momentarily turned, observing workmen trimming a tree, is guilty of negligence.

ACTION by Matilda Brewster against Elizabeth City, heard by *Jones, J.*, and a jury, at September Term, 1904, of PASQUOTANK. From a judgment for defendant, the plaintiff appealed.

E. F. Aydlett and J. C. B. Ehringhaus for plaintiff.
J. Heyward Sawyer and R. W. Turner for defendant.

BROWN, J. The plaintiff sued the defendant to recover damages for an injury alleged to have been sustained in crossing a bridge (393) which was out of repair, and which constituted a part of a public street of the defendant. Among other defenses, contributory negligence is pleaded, and all of the plaintiff's exceptions relate to the charge of the court upon that issue. The evidence was in substance as follows:

The plaintiff lives in Danielson, Conn., and is 72 years of age. While in the defendant town on a visit she was walking along Cypress Street, on 22 April, 1903, with two other ladies, and they came to a bridge at the corner of Cypress and Road streets. One of her companions was in the middle, the other on the outside, and the plaintiff was on the inside of the sidewalk leading up to the bridge. Her companion who was on the outside stepped on the end of the middle plank of the bridge, the other end flew up and tripped the plaintiff and she fell and injured herself. The bridge was composed of three stringers and three planks, each an inch thick, about 8 inches wide and 8 feet long. The bridge, according to the finding of the jury, though there was evidence on both sides of that question, was out of repair and in an unsafe condition. The plaintiff was seriously injured. At the time of the injury a tree was being cut down in a yard adjacent to the bridge. The plaintiff and her two companions were coming down Cypress Street towards the bridge, and all three of them were looking away at the tree being cut down, when her outside companion stepped on the end of the middle plank of the bridge and tipped up the other end, which tripped the plaintiff and she fell and was seriously injured.

The jury answered the issue as to negligence "Yes" and the second issue as to contributory negligence "Yes." The court gave five separate instructions upon the second issue, to all of which the plaintiff excepted. The plaintiff offered no requests for particular instructions, and therefore cannot well complain of "errors of omission."

(394) The court instructed the jury: 1. "If you find by the greater

weight of evidence that the plaintiff in crossing the bridge, even though you find that the bridge was unsafe and defective, failed to exercise that caution and care which a person of ordinary prudence should and which it is their duty to do in using the streets and sidewalks of the city, and because of her failure to exercise this caution and prudence she was injured, then she would be guilty of contributory negligence, and you would answer the second issue 'Yes.'"

3. The court further instructed the jury that "if the plaintiff could have passed over the bridge safely by exercising ordinary care, or could have stopped in time to avoid the injury, and failed to do so, then her injury was caused by her own negligence, and the plaintiff cannot recover."

We find error in the above instruction numbered 3, as well as in Nos. 2, 4, and 5, for which a new trial must be granted. Had his Honor given instruction No. 1, with the addition that the jury must find that the plaintiff's negligence was the immediate or proximate cause of the injury, and explained what is meant by proximate cause, such instruction would have been plainly within the rule of the "prudent man," as laid down in *Hinshaw v. R. R.*, 118 N. C., 1047; *Ellerbe v. R. R., ib.*, 1024; *Sheldon v. Asheville,* 119 N. C., 610. The third instruction given above is erroneous, in that it assumes that if the plaintiff failed to exercise reasonable care, then her neglect was the proximate cause of her injury.

In order to constitute contributory negligence the plaintiff must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. The two must concur and be proved by the defendant by the clear weight of evidence. A failure to establish proximate cause, although negligence be proved, is fatal to the plea. That walking on a bridge, a part of a public street, with the head momentarily turned observing workmen trimming a tree, is *per se* negligence, we are not prepared to hold. It is exceedingly difficult (395) for a court to define and prescribe every act which one, using the public thoroughfares of a city, may do without being guilty of such carelessness as constitutes negligence; and it is equally difficult to determine what acts such persons may not do. "It is essentially the province of the jury to pass on such conduct under proper instructions, and to such acts it is best to apply the rule of the 'prudent man,' unless only one inference can be drawn. . . . When 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 instructions." *Walker, J.*, in *Graves v. R. R.*, 136 N. C., 3.

Where reasonable minds may come to different conclusions upon considering the facts in evidence, the jury are at liberty to apply the rule

of the "prudent man." *Sheldon v. Asheville, supra.* The court below practically charged that the plaintiff's alleged conduct was the immediate cause of her injury. That was erroneous.

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury. *Coley v. Statesville,* 121 N. C., 301. The proximate cause is the last negligent act without which the injury would not have resulted. *Schwartz v. Shull,* 45 W. Va., 405. Assuming that the plaintiff was looking back at the moment the defective plank flew up and by tripping her caused her to fall, how could his Honor determine that if she had been looking ahead she would not have been injured? She had a right to assume that the bridge was safe and in good repair when she entered on it. The entire evidence shows the three ladies were walking side by side;

(396) that Mrs. Wilson stepped on the end of a defectively fastened plank; that instantly the other end flew up and threw the plaintiff down just at the moment she had lifted her foot and was about to step on that end of the plank. Suppose the plaintiff had been looking the usual distance ahead that prudent persons generally look when walking, is it probable she would have seen the end of the plank "pop up" at her feet in time to have prevented being thrown to the ground? Where there were no guard-rails to a bridge and injuries resulted to a runaway mule and its driver by falling from the bridge, it was held that the absence of guard-rails, and not the conduct of the driver or the running away of the mule, was the proximate cause of the disaster. *Augusta v. Hudson,* 94 Ga., 135.

There is no evidence of facts or circumstances from which we can infer that the injury would probably not have resulted from the "popping up" of the defective plank had the plaintiff walked with "Argus eyes," looking forward, and had not turned her head to observe the workman trim the trees. It is highly probable that many prudent persons would have done just what the plaintiff did, in the confident belief that the highways of the city were kept in safe condition. The most active and alert of men, much less an aged lady, may have stepped on that bridge with most vigilant outlook for obstacles ahead, and yet have been unable to observe the plank "pop up" at the feet just as he was about to step on it, in time to avoid injury.

Tested by the definition given, as well as by the general principles of the law of negligence and by everyday experience, we are unable to see how the plaintiff's conduct was necessarily the proximate cause of her

injury. In practically so charging, the court below erred, for which reason there must be a

New trial.

Cited: Ramsbottom v. R. R., 138 N. C., 41; *Hayes v. R. R.,* 141 N. C., 198; *Brewster v. Elizabeth City,* 142 N. C., 10; *Crenshaw v. R. R.,* 144 N. C., 320; *Miller v. R. R., ib.,* 554; *Bowers v. R. R., ib.,* 686; *Blevins v. Cotton Mills,* 150 N. C., 500; *Hauser v. Tel. Co., ib.,* 559; *House v. R. R.,* 152 N. C., 398; *Rich v. Electric Co., ib.,* 692; *Barnes v. Tel. Co.,* 156 N. C., 153; *Ward v. R. R.,* 161 N. C., 184; *Hoaglin v. Tel. Co., ib.,* 398; *Alexander v. Statesville,* 165 N. C., 532; *McAtee v. Mfg. Co.,* 166 N. C., 457; *McNeil v. R. R.,* 167 N. C., 395; *Norman v. R. R., ib.,* 545; *Clark v. Wright,* 167 N. C., 647; *Hanes v. Shapiro,* 168 N. C., 30; *Buchanan v. Lumber Co., ib.,* 47; *Gregory v. Oil Co.,* 169 N. C., 456; *Wright v. Thompson,* 171 N. C., 91; *Garland v. R. R.,* 172 N. C., 639; *Atkins v. Madry,* 174 N. C., 188; *Brown v. R. R., ib.,* 697; *Lea v. Utilities Co.,* 175 N. C., 464; *Ware v. R. R., ib.,* 504; *Brady v. Lumber Co., ib.,* 706; *Ridge v. High Point,* 176 N. C., 425; *Blaylock v. R. R.,* 178 N. C., 357; *Jones v. Taylor,* 179 N. C., 297; *Goodman v. Robbins,* 180 N. C., 240.

(397)

WARD v. GAY.

(Filed 21 February, 1905.)

Contract Concerning Realty—Alteration—Parol Evidence—Description.

1. A contract conveying standing timber is a contract concerning realty; its terms must be in writing, and they cannot be altered or added to by parol evidence.

2. If upon applying a deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed and to enable the court to ascertain what was the intention of the parties in the words they have used.

3. The descriptive words in a contract conveying timber, "All the pine, poplar, and cypress trees now standing and growing on the island in the swamp on the following lands," etc., while sufficient to pass the property and permit parol testimony in order to aid in their interpretation, are so indefinite as to require the aid of such testimony to ascertain and declare their true meaning, and it must be left to the jury to determine on all the pertinent facts and circumstances whether

the timber in dispute was included in the descriptive terms; and it was error in the trial judge to instruct the jury that the timber growing on an island in the swamp did not pass under the contract.

ACTION by A. J. Ward against John L. Gay, heard by *Jones, J.*, and a jury, at Fall Term, 1904, of GATES.

On 7 April, 1900, the plaintiff, by writing sealed and delivered, conveyed to the defendant all the timber trees standing and growing in a certain swamp "down to and upwards of 12 inches across the stump." This swamp contained about 50 acres, and within the boundary of the swamp was an island from 1½ to 4 acres, on which, and above high-water mark, were growing trees of the above dimensions, sufficient to make from 19,000 to 21,000 feet of lumber. The defendant, (398) claiming to act under this deed, cut the timber growing in the swamp, including that growing on the island above high-water mark, and appropriated the proceeds to his own use. Plaintiff then instituted the present action and filed his complaint, alleging that it was not the contract between the parties that the timber on the island growing above high-water mark should pass, and that the clause excepting such portion of the timber was omitted from the deed by mistake; second, that in any event the portion of the timber on the island above high-water mark was wrongfully cut and carried away by the defendant, because, by the terms of the deed, as it stood, this portion of the timber was excepted. The defendant, admitting the conveyance, denied the allegation of mistake and claimed the right under the contract to cut all the timber within the swamp, including the timber on the island.

On the pleadings three issues were submitted to the jury: 1. Was the provision excepting the trees on the ridges omitted by mutual mistake of the parties, or by mistake of the draftsman? 2. Did defendant wrongfully cut timber from the lands of plaintiff not included in the contract? 3. If so, what damage has plaintiff sustained?

Both parties introduced evidence, and under the charge of the court the jury, as appears from the record, responded to the first issue "No," and to the second "Yes," and to the third, "$57."

The defendant excepted to the charge of the court on the second issue and moved for a new trial for the alleged error. Motion was overruled, the defendant again excepting. There was judgment on the verdict for the plaintiff, and the defendant appealed.

W. M. Bond for plaintiff.
L. L. Smith for defendant.

HOKE, J., after stating case: The descriptive words of the (399) instrument are as follows: "All the pine, poplar, and cypress trees now standing and growing on the island in the swamp on the following lands, situated in Mintonville Township, Gates County, State of North Carolina, and known as a part of the Jordan lands in the swamp bounded by the lands of Leander Howard and Elijah Modlin, leading from said A. J. Ward's gristmill to Old Town on Cathron Creek, and others, and containing 50 acres, more or less." The jury, having answered the first issue "No," and thereby found that there was no mistake in the deed, the question of the defendant's liability was made to turn on the instrument as now written. In that aspect of the case, and in his charge to the jury on the second issue, the court instructed them that "the timber growing on the island above high-water mark did not pass under the contract, and that the defendant would be liable for timber cut unless it was agreed between the parties that the timber on the island was to be included under the contract"; and to this instruction the defendant excepted.

In this charge, as we understand it, the court instructed the jury that by the terms of the instrument, as now expressed, the timber on the island above high-water mark would not pass to the defendant, and that if such timber did pass, it must do so by an agreement to that effect between the parties not now contained in the written agreement, and in this we think there was error to the prejudice of the defendant which entitles him to a new trial. Where parties have reduced their contract to writing, and the instrument contains their entire agreement, it is not permissible for them to alter or add to same by parol testimony of cotemporaneous expressions or alleged cotemporaneous agreements which change or conflict with their written agreement.

Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts (400) and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written.

In the present case the verdict of the jury finds in response to the first issue that there was no mistake in the terms of the contract. Apart from this, the contract itself, conveying as it does the timber standing and growing on the ground, is a contract concerning realty, its terms are required to be in writing, and it was not permissible to alter or add to these terms by parol evidence.

This doctrine on contracts concerning realty is very clearly expressed in *Miles v. Barrows,* 122 Mass., 581. In this case the Court said: "A conveyance of land can only be by deed, and parol evidence is not admis-

sible to control or vary a deed. If the description in it is certain and unambiguous, it is not competent to prove that the parties had any intention different from that expressed. But if upon applying the deed to the land it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed and to enable the court to ascertain what was the intention of the parties in the words they have used."

An interesting discussion of the general question will be found in the opinion of *Mr. Justice Walker* in *Cobb v. Clegg, ante,* 153.

Again, the descriptive words, "All the pine, poplar, cypress trees," etc., as set out in the beginning of this opinion, while sufficient to pass the property and permit parol testimony in order to aid in their interpretation, are at the same time so indefinite as to require the aid of such testimony in order to ascertain and declare their true meaning. They are ambiguous and uncertain and present a case for the jury to determine what the deed conveys after hearing all the pertinent facts and
(401) attendant circumstances. *Rowe v. Lumber Co.,* 133 N. C., 433; *Brooks v. Britt,* 15 N. C., 482.

Similar decisions on ambiguous terms of like import will be found in *Sargent v. Adams,* 3 Gra., 72 (Mass.); *S. c.,* 63 Am. Dec., 718; also, in *Doolittle v. Blakesley,* 4 Day (Conn.), 265; *S. c.,* 4 Am. Dec., 218.

In telling the jury that the timber growing on the island did not pass under the contract, his Honor withdrew from the jury the very question they should have been required to determine.

There will be a new trial on all the issues arising on the pleadings, with the words "not included in the contract" eliminated from the second issue, and in case it is again found that there was no mistake in the deed, and the question of the defendant's responsibility is again submitted on the contract as now written, it must be left to the jury to determine on all the pertinent facts and circumstances whether the timber in dispute was included in the descriptive terms of the deed.

New trial.

Cited: Tremaine v. Williams, 144 N. C., 116; *Midyett v. Grubbs,* 145 N. C., 88; *Modlin v. R. R., ib.,* 232; *R. R. v. R. R.,* 147 N. C., 383; *Whitfield v. Lumber Co.,* 152 N. C., 215; *Sanitarium Co. v. Ins. Co.,* 157 N. C., 555; *Boddie v. Bond,* 158 N. C., 205; *Caudle v. Caudle,* 159 N. C., 55; *Byrd v. Sexton,* 161 N. C., 572; *Neal v. Ferry Co.,* 166 N. C., 565; *Sugg v. Greenville,* 169 N. C., 617.

(402)

PERRY v. INSURANCE COMPANY.

(Filed 21 February, 1905.)

Evidence—Degree of Proof—Award—Fraud—Insurance, Proof of Loss—Waiver—Verdict.

1. The only two classifications of evidence applicable to civil actions are: (*a*) Those facts which must be established by a preponderance of the evidence or to the satisfaction of the jury; (*b*) those facts which must be established to the satisfaction of the jury by clear, cogent, and convincing proof.

2. In order to set aside an award of arbitrators on the ground of fraud, bias, or undue influence, it is not necessary to establish the facts to the satisfaction of the jury by clear, cogent, and convincing proof.

3. While an action for damages for loss on a "standard" fire insurance policy cannot be maintained unless it is alleged and proved that proof of loss has been made before action brought, yet proof of loss can be waived and is waived by an agreement to arbitrate.

4. Where the finding of a jury upon one issue is amply sufficient to support the judgment, it is not reversible error for the court to fail to give prayers directed to other issues, which should have been given.

5. An award may be vitiated by two kinds of fraud: positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the fact of its existence to be clearly indicated.

6. While inadequacy alone is not sufficient to set aside an award, yet if an award is so grossly and palpably small and out of all proportion to the amount of actual damage as to shock the moral sense and conscience, this is sufficient evidence to be submitted to the jury, tending to show fraud and corruption or strong bias and partiality on the part of the arbitrators.

ACTION by E. B. Perry, guardian, against the Greenwich Insurance Company, heard by *Moore, J.*, and a jury, at June Term, 1904, of HALIFAX. From a judgment for the plaintiff, the defendant appealed.

E. L. Travis, Claude Kitchin, W. E. Daniel, and Howard (403) *Alston for plaintiff.*

Busbee & Busbee for defendant.

BROWN, J. This is a civil action to recover a loss upon a policy of insurance on account of damage to plaintiff's dwelling by lightning, and to set aside an award of arbitrators because of fraud, corruption, bias,

and undue influence. These issues which were submitted to and answered by the jury sufficiently disclose the nature of the action:

1. "Has there been an arbitrament and award as to the amount of damages to which plaintiff is entitled under the insurance policy attached to the complaint? 'Yes.'

2. "Was the appraiser Ellington at the time of the alleged arbitration disinterested? 'No.'

3. "Was the appraiser Faucette unduly, fraudulently, and corruptly influenced and controlled in the interest of the defendant by said Ellington? 'Yes.'

4. "Were said appraisers partial to and strongly biased and prejudiced in favor of the defendant? 'Yes.'

5. "Did plaintiff file with defendant notice and proof of loss as required by said policy? 'No.'

6. "Did defendant waive notice and proof of loss? 'Yes.'

7. "What were the damages done by lightning and fire to the property included in the policy? '$750, with interest from the time it was due until paid.'"

The defendant appealed from the judgment rendered, and assigned eighteen exceptions in the record as error. Exceptions 1, 2, and 3 relate to the admission of evidence, and in our opinion are without merit. *Boggan v. Horne,* 97 N. C., 270. The contentions of defendant appellant, as summarized from the numerous exceptions, are:

1. That in this case the plaintiff must establish the allegations of the complaint by clear, strong, and convincing testimony before the (404) award can be set aside.

2. That, it being admitted that no proof of loss has been furnished defendant by plaintiff, he cannot maintain this action.

3. That there is no evidence in the record sufficient to go to the jury upon the issues 2, 3, and 4, relating to the fraud, interest, and bias of the arbitrators.

The first contention cannot be sustained. In this State the degree or intensity of proof required in civil actions has been divided into two classifications only: (1) Those facts which must be established by a preponderance of the evidence or to the satisfaction of the jury. A jury is not justified in finding any fact unless the evidence is sufficient to satisfy their minds of its truth, or, what is equivalent and practically the same thing, creates in their minds a belief that the fact alleged is true. This we take to be substantially what is said by *Chief Justice Pearson* in *Lee v. Pearce,* 68 N. C., 77. (2) Those facts which must be established to the satisfaction of the jury by clear, cogent, and convincing proof. *Ely v. Early,* 94 N. C., 1. We take those to be the two classifications

of evidence applicable to civil actions as settled by numerous decisions of this Court. *Lee v. Pearce, supra,* and *Harding v. Long,* 103 N. C., 1, represent the first named class, and *Ely v. Early, supra,* and many other similar cases represent the second. That class of cases wherein it is sought to set aside deeds, decrees of judicial tribunals, and awards of arbitrators upon the ground of fraud, belongs to the first class. "In order to establish fraud, it is not necessary that direct affirmative or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required. Like much of human knowledge, fraud may be inferred from facts established. This means no more than that the proof must create a belief, and not merely a suspicion." Kerr on Fraud and Mistake, pp. 384, 385. This subject is discussed with clearness and learning (405) by *Avery, J.,* in *Harding v. Long, supra,* which case is cited and approved in many subsequent opinions. We would be but "threshing old straw" to discuss this contention of the defendant further.

The second contention cannot be maintained. We admit that it is settled law that an action for damages for loss on a "standard" fire insurance policy cannot be maintained unless it is alleged and proved that proof of loss has been made before action brought, in accordance with the terms of the policy. But proof of loss can be waived. We are of opinion that it has been, in this case, by the agreement to arbitrate, and that his Honor was correct in so charging the jury. It has been generally held that a provision in a policy requiring proof of loss before commencing action is a reasonable one. The object is to give the insurer notice of the loss of its extent and character, so the insurer may have an opportunity to investigate and settle the loss without being subjected to an action. When the insurer agrees to arbitrate, it is presumed he has investigated and is unwilling to pay the loss as claimed by the insured. In this case there was not only an agreement to arbitrate, but an actual award of arbitrators, one of whom was selected by the defendant. If the award is abortive, it is not the fault of the plaintiff. In *Pretzfelder's case* such a defense is characterized by the present *Chief Justice* as "technical and not meritorious." 123 N. C., at page 166. In *Ins. Co. v. Hocking,* 115 Pa., 415, it is held that where arbitrators fail to agree upon an award the plaintiff is not compelled to submit to another arbitration, but may forthwith bring this action in the courts. Where the insured claims that arbitration has failed because of fraud, there is no reason whatever why he should be required to go through the empty form of filing a proof of loss before he can commence his action to establish the fraud and recover his damages. The *Hocking case* is approved in *Pretzfelder's case,* and we again give the decision the indorsement of this Court. (406)

The third contention: After a careful examination of all the evidence, we agree with the defendant that there is no sufficient evidence that Ellington had any interest in the subject-matter of the award. There is no sufficient evidence that Faucette was corruptly influenced and controlled by Ellington in the interest of the defendant. Prayers for instructions numbered 10 and 12, directed to the second and third issues, should have been given. But these are not reversible errors.

We are of the opinion that there was evidence proper to be submitted to the jury upon the fourth issue, and that the finding of the jury upon that issue is amply sufficient to support the judgment rendered by the court setting aside the award. There are two kinds of fraud which will vitiate an award: positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the fact of its existence to be clearly indicated. "A common case of inferential fraud is where the award is obviously and extremely unjust." Morse on Arbitration and Award, 539. "Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators." *Goddard v. King,* 40 Minn., 164. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award, but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality
(407) and bias. Ostrander on Fire Insurance (2 Ed.), 596; 3 Cyc., 749; Bispham Equity (6 Ed.), 312; *Dorsett v. Mfg. Co.,* 131 N. C., 260.

The jury have assessed the damages to the house at $750. The arbitrators, Ellington and Faucette, assessed the damages at $73.50, not one-tenth of the sum awarded by the jury. Dr. Perry, one of the plaintiffs, testified that he had known Faucette twelve or fifteen years; that Faucette advised witness to take him as an arbitrator; that Faucette is a good contractor and builder and had examined the house, and told witness that the damages were $750, and advised witness not to take less, and for this reason the witness selected him. There was evidence offered by plaintiff tending to prove that the actual damage to the house was fully $750. The court below charged the jury that the award is presumed to be legal and valid; "that if the award is so grossly and palpably inade-

quate, that is, so grossly and palpably small and out of all proportion to the amount of actual damage, as to shock the moral sense and conscience and to cause reasonable persons to say 'he got it for nothing,' then the jury may consider this as evidence tending to show fraud and corruption or strong bias and partiality on the part of the arbitrators."

This charge is not only sustained by the law, but is expressed in well chosen language, for the use of which his Honor has the authority of the great names of *Pearson* and *Thurlow*.

"An inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it" are the words in which *Lord Thurlow* expresses the idea. *Gwynne v. Heaton*, 1 Bro. C. C., 8; Bispham Equity (6 Ed.), 312, and many cases cited by that author in the notes, sustain his Honor's clear and well-expressed language. The judgment is

Affirmed.

Cited: Gaskins v. Allen, post, 428; *Leonard v. Power Co.,* 155 N. C., 16; *King v. R. R.,* 157 N. C., 65; *Daniel v. Dixon,* 161 N. C., 380; *Lyon v. R. R.,* 165 N. C., 145; *Causey v. R. R.,* 166 N. C., 10; *McPhaul v. Walters,* 167 N. C., 184; *Lester v. Lane, ib.,* 269; *Wilson v. Scarboro,* 169 N. C., 656; *Ray v. Patterson,* 170 N. C., 228; *Poe v. Smith,* 172 N. C., 73; *Knight v. Bridge Co., ib.,* 397; *McNair v. Cooper,* 174 N. C., 569; *Brewer v. Ring,* 177 N. C., 485; *Long v. Guaranty Co.,* 178 N. C., 506.

(408)

VINSON v. KNIGHT.

(Filed 21 February, 1905.)

Return of Justice of the Peace—Nature of Action—Trover and Trespass—Pleadings—Burden of Proof—Presumption.

1. The statement of the testimony heard by a justice of the peace is not properly a part of the return to notice of appeal.

2. In an action begun before a justice of the peace, the character of the action and of the relief sought is fixed by the language used in both the summons and complaint; and where the summons and complaint, construed together, set forth a cause of action in trover or detinue, the mere recital that the property was forcibly taken from the possession of plaintiff's servants does not set forth a cause of action in trespass.

3. In an action of trover or detinue the plaintiff must allege and show title, and it is open to the defendant, upon a denial of plaintiff's title, to

show that the property belonged to a third person, without setting up in his answer the outstanding title.

4. In an action of trover or detinue, the admitted possession of property in the plaintiff at the time of the taking by the defendant raises a presumption of title which puts upon the defendant the burden of showing that title is not in the plaintiff.

ACTION by J. C. Vinson against M. J. Knight, heard by *Hoke, J.,* and a jury, at October Term, 1904, of HERTFORD.

The plaintiff in the summons stated the cause of action to be "for the recovery of the possession of one red steer, . . . it being the steer the defendant took from Jacob Everett and Jordan Hill on the road today, of the value of $20, alleged by the plaintiff to be in the possession of the defendant and unlawfully detained by him from the plaintiff; the plaintiff further claiming to be entitled to the immediate possession of said property." The cause was heard by a justice of the peace, (409) who in his return upon the appeal stated that "the plaintiff complained for the possession of one red steer, described in the summons, of the value of $20, and alleged that the said steer was in his actual possession and that the defendant . . . forcibly took said steer by force and violence from . . . the servants of the plaintiff on the public highways in N..... County, and that said defendant unlawfully detained the possession of said steer from the plaintiff." The defendant, answering the complaint, "denied the plaintiff's title to the steer and his right to recover possession of the same or its value." The defendant in testifying admitted that the steer was not his, and that he claimed no interest in it, and that he with his son forcibly took the steer from the possession of the plaintiff's servants on the public highway. . . . The plaintiff in the Superior Court moved for judgment upon the return of the justice of the peace. The motion was denied, and the plaintiff excepted.

Without objection, the court submitted the following issues to the jury:

1. "Is the plaintiff the owner of the steer sued for? Ans.: 'No.'

2. "Does defendant wrongfully detain said steer from plaintiff? Ans.: 'No.'

3. "What is the value of the steer?" Not answered.

4. "What damage has plaintiff sustained by wrongful detention of same by defendant?" Not answered.

From a judgment for the defendant, the plaintiff appealed.

Winborne & Lawrence for plaintiff.

D. C. Barnes and L. L. Smith for defendant.

CONNOR, J., after stating the case: The plaintiff's motion for judgment upon the return of the justice is based upon the oral pleadings; the statement of the testimony heard by him is not properly a part of his return. Considered from this point of view, it becomes neces- (410) sary to inquire whether the summons and complaint, construed together, set forth a cause of action in trespass, or whether by the allegations it is confined to an action for the recovery of the possession of the property. The plaintiff's contention that in an action for trespass—an injury to his possession—the question of title is not involved, save on the quantum of damages, is sustained by the authorities cited in his brief. The difficulty confronting him, however, is that he has stated a cause for action in trover or detinue and not in trespass. The action is for the possession of the property or its value; that was the judgment which he recovered before the justice. There is nothing in the summons, pleadings, or return of the justice, or in his motion, to indicate that he was asking any other relief. While it is well settled that under The Code system, wherein forms of action are abolished, the plaintiff may have such judgment as upon the facts stated he is entitled to, it is equally true that the facts must be so stated that the defendant and the court may see what relief the plaintiff seeks. The plaintiff expressly tells the court that he is complaining "for the possession of one red steer," and that such possession is unlawfully detained by the defendant. It is true, he says, that the property was forcibly taken from the possession of his servants. The character of the action and of the relief sought is fixed by the language used in both the summons and complaint.

In *Clark v. Langworthy,* 12 Wis., 444, it is said: "The trespass, if one is relied on, should be so distinctly set forth that it may be seen with reasonable certainty what is the principal act complained of, and not of facts which might furnish ground for several different actions, stated in one count, leaving it impossible for the other party to know which to reply to." The trespass should not be laid by way of recital. 21 Enc. Pl. and Pr., 810. (411)

It is evident from an inspection of the entire record that the plaintiff believed the steer to be his. He says that it is in his mark. His declared purpose is to recover the possession of the property. The answer of the defendant put him upon notice that the real issue was the question of title. He does not deny the trespass. The plaintiff takes his judgment before the justice in strict accordance with the summons and complaint. There can be but one reasonable construction put upon the record. His Honor would have permitted him either to amend his complaint or make it more definite if he had so requested. Our view is strengthened by the fact that after the refusal of the judge to render

judgment upon the pleadings, he submitted issues, without objection, appropriate to an action in the nature of trover or detinue. His Honor properly denied the motion.

The plaintiff objected to the introduction of testimony by the defendant tending to show the property in a third person. He says to do so would permit the defendant to take advantage of his own wrong. This assumes the very fact in controversy. If the steer was not the property of the plaintiff, the wrong done was in the trespass, and for this he could only recover such damage as he sustained in that respect. For the purpose of showing his actual damage, the question of title was material; but, as we have seen, the action being in trover or detinue, it is well settled by a long line of authorities that he must allege and show title. *Russell v. Hill,* 125 N. C., 470, in which the authorities are reviewed. It was open to the defendant upon this issue to show that the property belonged to a third person, otherwise he might be subjected to an action for conversion by the true owner. This principle is elementary and recognized and enforced in this State since the case of *Laspeyre v. McFarland,* 4 N. C., 620. The plaintiff says that the defendant should have set up in his answer the outstanding title. We have exam-

(412) ined the cases cited to sustain this proposition:

Rowland v. Mann, 28 N. C., 38, was an action of replevin in which the defendant pleaded the general issue. *Nash, J.,* said: "Under the plea of *non cepit,* all that the plaintiff has to do is to prove the taking or having the goods, or a part of them, in the place specified. As the defendant under this plea merely denies the taking, he cannot controvert the plaintiff's title." In the case before us the defendant expressly denied the plaintiff's title. The distinction is obvious.

In *Craig v. Miller,* 34 N. C., 375, *Ruffin, C. J.,* clearly points out the distinction between a case wherein it did not appear that the property belonged to a third person, as in *Armory v. Delamirie,* 1 Str., 504 (1 Smith L. C., 631), and where it was shown that the title to the property was in a third person. In *Barwick v. Barwick,* 33 N. C., 80, discussing *Armory v. Delamirie,* wherein it was held that the finder of a jewel could maintain trover against one taking it out of his possession, there being no evidence as to the true owner, it is said: "But the result of that case would have been very different if the owner had been known . . . The distinction between that case, where the possessor was the only known owner, and the ordinary case of one who himself has the possession, wrongfully and sues another wrongdoer for interfering with his possession, the true owner being known and standing by ready to sue for the property, is as clear as daylight." We could not make the distinction

clearer by further discussion or citation of authorities. The plaintiff must recover upon the strength of his own title.

The same questions are raised by exceptions to the charge of his Honor. He properly put upon the defendant the burden of showing that the steer was not the property of the plaintiff, the admitted possession at the time of the taking raising a presumption in his (413) favor. *Boyce v. Williams,* 84 N. C., 275.

The plaintiff seeks to distinguish the case before us from those cited, for that the steer was taken from the possession of the plaintiff's servants by violence; and for this he cites *Lain v. Gaither,* 72 N. C., 234. In that case the property sued for was borrowed by the defendant from the plaintiff, and he sought to prevent its recovery by showing that the plaintiff had been adjudged a bankrupt. The Court held that, having acquired possession under the plaintiff, he was estopped to show an outstanding title in another, unless he should connect himself with it. This is elementary learning. In an action for trespass, the violence of the defendant in taking the property should be considered in fixing the damages, either actual or punitive, but does not affect the right of action. The slightest trespass is sufficient to entitle the plaintiff to an action, as, in the case of realty, treading upon the grass. *Chaffin v. Mfg. Co.,* 135 N. C., 95.

We have carefully examined the authorities cited by the plaintiff's counsel in his excellent and exhaustive brief. The disposition of the case turns upon the cause of action set forth in the pleadings and which, as we have seen, involved the title to the property, and upon the strength of which the plaintiff must recover, if at all. This having been decided against him, the court below properly rendered judgment for the defendant. We find no error in the record, and the judgment must be

Affirmed.

HOKE, J., took no part in the decision of this case.

(414)

FURGERSON v. TWISDALE.

(Filed 21 February, 1905.)

Chattel Mortgage—Description—Construction of Contract.

1. A mortgage executed by two defendants (who cultivated a crop together) for guano used exclusively on the joint crop, using the descriptive words, "all crops cultivated by us" on designated lands, and directing

in the event of sale the payment of "any surplus *to us*," does not convey an individual crop raised by one of the defendants on another part of the same plantation, in which crop the codefendant had no interest and the mortgagee knew of the individual crop.

2. The intention of parties must be collected from the whole instrument, and the words used are to be understood in their plain and literal meaning; where the meaning is not clear, courts will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention.

3. When conflicting descriptions are contended for and cannot be reconciled, courts will adopt that construction which best comports with the manifest intention of the parties and the surrounding circumstances of the case at the time the instrument was executed.

ACTION by H. B. Furgerson against James H. Twisdale and J. H. Fenner, heard before *Webb, J.*, at November Term, 1904, of HALIFAX. From a judgment in favor of plaintiff, the defendant Fenner appealed.

Albion Dunn and Daniel & Green for plaintiff.
E. L. Travis for defendant.

BROWN, J. This action is brought to recover possession of a lot of peanuts and corn. The facts are embodied in a statement of "agreed facts," the substance of which is as follows: The two defendants cultivated the crop together on the W. E. Fenner plantation during
(415) 1903. During the same year the defendant J. H. Fenner individually cultivated a crop on another part of the same plantation, in which Twisdale had no interest. The defendants needed guano for their "copartnership crop" and purchased it from the plaintiff and used it exclusively on the Twisdale crop. Fenner used none of it for his individual crop. The crops seized in this action are those raised by Fenner exclusively, and embrace none of the Twisdale joint crop. Twisdale was a subtenant of his codefendant on the half-share plan—J. H. Fenner furnishing the land and team and Twisdale furnishing the labor and guano, the crop raised to be equally divided. The plaintiff had no notice of the terms of the contract between Fenner and Twisdale, but knew J. H. Fenner had an individual crop on the same plantation, separate and distinct from the Twisdale crop. To secure the plaintiff for the guano used on the Twisdale crop, the defendants executed a note and crop lien. The descriptive words used in the latter are "all crops cultivated by us this year, 1903, on the lands known as the W. E. Fenner lands and situated in Halifax County, including tobacco, peanuts," etc. The lien directs the sale of the crop for "payment of the debt and interest and for any surplus to *us*."

His Honor in the court below held that the crop lien or mortgage conveyed the Fenner individual crop as well as the Twisdale joint crop, and gave judgment against the defendant.

In this we think there is error. The intention of the parties to the crop lien is to be collected from the whole instrument, and the words used are to be understood in their plain and literal meaning. Where the meaning is not clear, in ascertaining it courts will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain the intention of the parties. "Courts will not make an agreement for the parties, but will ascertain what their agreement was, (416) if not by its general purport, then by the literal meaning of its words." Clark on Contracts (2 Ed.), 404; *Roberts v. Bonaparte,* 73 Md., 191, 10 L. R. A., 689. In all written contracts and agreements the language used is the primary guide to the meaning. But sometimes the language is ambiguous. In such cases the meaning must be derived from the interests and relations of the parties as appearing in the contract. "Wherever the promise is by two or more persons, as where the words 'we promise,' etc., are used, the liability is *prima facie* joint." *Clark, supra,* 415.

The intention of the parties determines both the quantity of estate as well as the property conveyed. The terms and phraseology of description must be interpreted with that view, if it can reasonably be done. When conflicting descriptions are contended for and cannot be reconciled, courts will adopt that construction which best comports with the manifest intention of the parties and the circumstances of the case. "The intention must be collected from the surrounding circumstances at the time the mortgage was made, and the language of the instrument itself." 20 A. & E., (2 Ed.), 919, and cases cited.

What were the "surrounding circumstances" when this mortgage was executed? It appears that Twisdale and Fenner were the owners of a joint crop, which they were cultivating in copartnership on the W. E. Fenner land, and that J. H. Fenner owned individually another crop on another part of the same plantation. Fertilizers were needed for the joint crop. By the terms of their farming agreement, Twisdale was to furnish them. To enable him to do so, J. H. Fenner, coöwner of the crop they were cultivating together, joined in the execution of this crop mortgage to the plaintiff. All the fertilizers were used by Twisdale on the joint crop and none on the individual crop of Fenner. If it had been the intention of the mortgagee to include the individual (417) crop of Fenner, knowing, as he did, that Fenner had a separate crop, it is very likely that he would have used words broad enough to

cover it and leave no room for dispute. The words, "all crops cultivated by us on the W. E. Fenner land," do not necessarily mean all crops cultivated "by us or either of us." The natural and ordinary meaning and significance of those words would limit the crop conveyed to that crop cultivated by the two defendants jointly. It is not likely that J. H. Fenner intended to mortgage his individual crop for fertilizers which Twisdale himself had contracted to furnish.

But to leave the question almost free from doubt, the plain terms of the mortgage provide for a sale of the crop in default of payment of the debt, and plainly provide that after the debt is paid the mortgagee shall "pay any surplus to us," that is, to Fenner and Twisdale jointly. It is not likely that J. H. Fenner intended to share the surplus from his own individual crop with one who had no interest whatever in it. Yet that is the legal and proper disposition of any surplus from the joint crop remaining after the debt is discharged.

Neither the diligence of counsel nor our own researches have been able to find any very apposite authority in our own Reports. The nearest approach to a pertinent case is *Taliaferro v. Sater,* 113 N. C., 76, wherein it is substantially held that "lumber to be sawed by one does not include lumber sawed by that person and another."

We have considered with care the well-prepared brief of counsel for plaintiff, as well as the able oral argument of Mr. Dunn, but we are unable to conclude that the mortgage conveys more than the joint crop of Twisdale and Fenner. Let the cause be remanded to the Superior Court of HALIFAX, with direction to render a judgment upon the facts agreed in accordance with this opinion.

Reversed.

Cited: Millard v. Smathers, 175 N. C., 60.

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(418)

TAYLOE v. PARKER.

(Filed 28 February, 1905.)

Usury—Code, Sec. 3836—What Recoverable—Estoppel.

1. In an action brought to recover twice the amount of interest paid, under section 3836 of The Code, the plaintiff is entitled to ecover back double the entire interest paid at the time of the usurious transaction, and not merely double the usurious excess, provided it occurred within two years before action brought.

2. A debtor is not entitled to recover anything on account of a distinct payment of interest, within two years, which is not tainted with usury.

3. In an action to recover usurious interest, it is immaterial whether the debtor solicited an extension of time upon his own suggestion of a bonus or whether the creditor suggested the usury.

ACTION by Lee Tayloe against C. W. Parker, heard by *Hoke, J.*, and a jury, at Fall Term, 1904, of HERTFORD. From a judgment in favor of plaintiff for less than the sum demanded, he appealed.

George Cowper and Pruden & Pruden for plaintiff.
Winborne & Lawrence for defendant.

CLARK, C. J. The plaintiff was indebted by bond in the sum of $580. In January, 1895, the defendant, at the plaintiff's request, purchased the bond from the obligee therein upon the plaintiff's payment to defendant of all interest then accrued and a bonus of about $35 for further extension. In January, 1896, the legal interest then due was paid. On 20 March, 1899, the defendant again extended the debt upon payment of the sum of $156.04, which included $50 usury, the interest due to that date at 6 per cent being $106.04. On 4 February, 1901, the defendant again extended payment upon receipt of $63, being the amount (419) of interest then due. This is an action to recover back double the above sum under The Code, sec. 3836, which provides that when a greater interest than 6 per cent has been paid, the debtor or his legal representative "may recover back in an action in the nature of an action of debt twice the amount of interest paid, provided such action shall be commenced within two years from the time the usurious transaction occurred."

The payment of usury in 1895 was beyond the two years prior to the beginning of this action, which was instituted on 4 March, 1901, and need not be considered. It would be otherwise under chapter 69, Laws 1895, but that statute by its terms does not apply to this case, as the bond was executed before its passage. The two-year statute was pleaded, and even if it had not been pleaded, the defendant was entitled to its protection. *Roberts v. Ins. Co.*, 118 N. C., 435; *Carter v. Ins. Co.*, 122 N. C., 339. The payment of $63 was within two years, but not a "usurious transaction," only the legal interest then due being paid. This case differs from *Roberts v. Ins. Co., supra.*, where the Court gave judgment for double the entire interest paid in two years before suit, in that here there was no usury other than the payment of 20 March, 1899. The $63 payment was a separate transaction and not usurious.

The payment of $156.04 on 20 March, 1899, was a usurious transaction, for the legal interest then due was only $106.04, and it occurred within two years before this action was brought. Under the clear terms of the statute the plaintiff is entitled to recover back double the entire interest paid at that time, *i. e.*, $312.08, not merely double the usurious excess. *Smith v. B. and L. Assn.*, 119 N. C., 255; Laws 1895, ch. 69; *Cheek v. B. and L. Assn.*, 127 N. C., 121.

The evidence is conflicting whether the debtor solicited the extension of time upon his own suggestion of a bonus or whether the credi-
(420) tor suggested the usury. Besides, it is immaterial. *Faison v. Grandy*, 126 N. C., 830. The payment of more than legal interest was in either case caused by the debtor's necessity, and the lawmaking power has forbidden it under a penalty deemed by it heavy enough to discourage such transactions by making them unprofitable. The terms of the statute are identical with those used in the U. S. Revised Statutes, sec. 5198, in reference to usury by National banks, to which the Federal courts give the same construction placed on our statute.

Usury laws have prevailed among all nations, whether "Greek or Barbarian." 29 A. & E., (2 Ed.), 453. At common law the taking of any interest was punishable. 16 A. & E. (2 Ed.), 991. Among the Hebrews it was forbidden as to their brethren, but was not forbidden as to Gentiles. Deuteronomy xxiii: 19, 20. A very interesting discussion of the origin and history of usury legislation will be found in *Durham v. Gould*, 16 Johns., 367, by *Chancellor Kent* (8 Am. Dec., 323). In New York the charging interest in excess of 6 per cent in certain cases is still an indictable offense under a recent statute. The whole subject of usury is a matter of public policy resting in legislative discretion, and the courts have no concern save to execute the law as it is written. The charge of the court that the plaintiff could recover only $100, *i. e.*, double the excess of interest paid 20 March, 1899, was contrary to the statute, which authorized the recovery of double the entire interest paid at the time of the usurious transaction, and was

Error.

HOKE, J., took no part in the decision of this case.

Cited: *Gulledge v. R. R.*, 147 N. C., 236; *Hall v. R. R.*, 149 N. C., 110; *Smithwick v. Whitley*, 152 N. C., 369; *Riley v. Sears*, 154 N. C., 517; *Reynolds v. Cotton Mills*, 177 N. C., 426.

(421)

JONES v. WOOTEN.

(Filed 28 February, 1905.)

Administration—Accounting—Plea in Bar—Reference—Appeal—Verdict.

1. If an administrator *d. b. n. c. t. a.* has a full accounting and settlement with the administrator of a deceased executor who died before fully administering his testator's estate, it is a good plea in bar in an action for an accounting brought against the estate of said deceased executor by plaintiffs as special legatees, and will protect said estate from any further accounting, unless the settlement shall be successfully impeached for fraud or specified error.

2. Where a good plea in bar is set up in the pleadings, it is error to order a reference until such plea is disposed of.

3. Where a plea in bar is overruled or sustained as a matter of law by the trial judge, it is optional with the party to take an appeal at once or preserve his right by having an exception noted.

4. Where an order of reference is made after the right to an account is established by the verdict of the jury, an appeal can only be taken from a final judgment after report.

ACTION by Alice Jones and others against J. L. Wooten, administrator *d. b. n.* of Travis E. Hooker, and others, heard by *Councill, J.*, at December Term, 1904, of GREENE. From an order of reference, defendant Wooten appealed.

George M. Lindsay and Moore & Fleming for plaintiffs.
Jarvis & Blow for defendant.

HOKE, J. It appears from the pleadings that John H. Freeman, having made his will, died in the county of Greene in December, 1885; that Travis E. Hooker qualified as his executor on 31 December of the same year and proceeded to administer on said estate; that Travis E. Hooker died in March, 1887, about fourteen months after his (422) qualification as executor, and without having fully administered the estate. After the death of Hooker, John Sugg was appointed and qualified as administrator *d. b. n.* with the will annexed of John H. Freeman. J. Q. Jackson was appointed and qualified as administrator of Travis E. Hooker, and in due time settled his estate, filed his final account, and was discharged, and has since died. Before the present ac-

tion was begun the defendant John T. Sugg was appointed as second administrator *d. b. n.* of said John H. Freeman, and the defendant Wooten was appointed administrator *d. b. n.* of said Travis Hooker.

The plaintiffs are special legatees under the will of John H. Freeman, whose legacies are made a primary charge on his personal estate and a secondary charge on his real estate, and bring this suit against J. T. Sugg, administrator *d. b. n.* of John H. Freeman, and John L. Wooten, administrator *d. b. n.* of Travis E. Hooker and others, alleging (1) that their legacies have never been paid; (2) that Travis E. Hooker, as executor of John H. Freeman, had received large sums of money for which he had never accounted, and (3) that John Sugg, former administrator *d. b. n.* of John H. Freeman, had negligently and wrongfully failed to call him to account; that such accounting was necessary to the recovery of their legacies, and that before bringing this suit they had demanded of the defendant John T. Sugg, the present administrator *d. b. n.* of John H. Freeman, that he bring suit against the defendant Wooten to recover from him the amount due from Travis E. Hooker's estate to the estate of John H. Freeman, and that he had refused to comply with such demand.

The defendant answered, denying the principal allegations of the complaint, and John L. Wooten specially answered that there had been a full, true, and complete accounting between his predecessor in (423) office, J. Q. Jackson (former administrator of Travis E. Hooker), and John Sugg, who was then administrator *d. b. n.* of John H. Freeman; that a balance had been struck, finding a small amount due from the estate of Freeman, which said amount had been paid and all claims against the estate of Travis E. Hooker settled and adjusted.

The form of this plea is set out in section 36 of the defendant's answer, as shown in the record at pp. 31, 32, 33, 34, 35, 36, and 37. The court, on motion of plaintiff's counsel, and on the pleadings, ordered a reference to take and state an account "as against John L. Wooten, administrator of Travis E. Hooker, former executor of John H. Freeman, as to the personal estate of John H. Freeman and the dealings of said Travis E. Hooker as executor of John H. Freeman." The defendant John L. Wooten, administrator of Travis E. Hooker, excepted and appealed.

The administrator *d. b. n.* of John H. Freeman's estate is the proper person to call the administrator of Travis E. Hooker to account. *Ham v. Kornegay,* 85 N. C., 119; *Gilliam v. Watkins,* 104 N. C., 180. And if John Sugg, who was formerly administrator *d. b. n.* of John H. Freeman, while he held that office, had a full accounting and settlement with J. Q. Jackson, administrator of Travis E. Hooker, as set out in the answer, it is a good plea in bar and would protect the estate of Travis E.

Hooker from any further accounting, unless the same should be successfully impeached for fraud or specified error.

In 1 Enc. Pl. and Pr., page 100, it is said: "A plea of account stated is a good bar to a bill for account, for there is no rule more strictly adhered to in courts of equity than that, when a defendant sets forth a stated account, he shall not be obliged to go into a general one." *Costin v. Baxter,* 41 N. C., 197; *Suttle v. Doggett,* 87 N. C., 203. In this last case *Ruffin, J.,* says that "the well-established principle of a court of equity is, that an account once settled is conclusive, unless assailed for fraud or mistake; and, in order thus to assail it, the complaint must not simply insinuate fraud, but aver the particulars with such definite certainty that issues may be raised in regard to them." The plaintiff has done this in his reply, and the cause is properly at issue. As a matter of pleading, however, there is in the answer a good plea in bar of any further accounting. *Grant v. Hughes,* 94 N. C., 231, the authority most relied upon by the plaintiff, does not conflict with this position. In that case there had been an *ex parte* settlement by the administrator with the clerk, and the Court said, concerning the answer, that the allegations thereof in reference to such settlement were "vague, indefinite, questionable, and unsatisfactory," and an order of reference was therefore approved. But there are no such defects in the plea here set out. These administrators at the time of this alleged settlement held adversary positions, and were the persons whose duty it was to adjust the matter. The allegation is that they had "a full and complete accounting and settlement to and with each other for and on account of all moneys, goods, and chattels belonging to the estate of said Freeman which went into or should have gone into the hands of Travis E. Hooker, executor of John H. Freeman, and that in such settlement the correct balance was ascertained and payment made." The accounts are further set out in full in the way of exhibits showing an ascertained balance, and the allegation made that such accounting was full, true, and complete, the balance ascertained and agreed upon as correct, and payment thereof made.

(424)

Whether the defendant can make his plea good by proof is another question, but on the pleadings it is a good plea in bar. This being true, it was error to order a reference until such plea was disposed of. *Royster v. Wright,* 118 N. C., 152.

This decision is also an authority for the position that the order in question is one from which an appeal can be immediately taken. The practice in this respect is further declared in *Kerr v. Hicks,* 131 N. C., 90; *Shankle v. Whitley, ibid.,* 168. It is decided in these cases that where a plea in bar is overruled or sustained, as a matter of law, by the judge, it is optional with the party to take an appeal at

(425)

once or preserve his right by having an exception noted. Where, however, the issues are tried by a jury and the right to an account is established by a verdict, and an order of reference made, it is proper to proceed with the reference, and an appeal can only be taken from a final judgment after report.

Let this be certified, to the end that the order of reference be stricken out and the cause proceeded with in accordance with this opinion.

Error.

Cited: *Duckworth v. Duckworth,* 144 N. C., 621; *Oldham v. Rieger,* 145 N. C., 260; *Riely v. Sears,* 151 N. C., 188; *Pritchett v. Supply Co.,* 153 N. C., 346; *York v. McCall,* 160 N. C., 279; *Alley v. Rogers,* 170 N. C., 539; *Garland v. Arrowood,* 172 N. C., 594; *In re Utilities,* 179 N. C., 165.

(426)

GASKINS v. ALLEN.

(Filed 28 February, 1905.)

Alteration in Deed—Degree of Proof—Powers of Justices of the Peace—Ratification—Deed of Married Woman, of Infant—Disaffirmance—Laws 1899, Ch. 78.

1. To establish an alteration in the date of the probates of a deed it is only necessary to satisfy the jury by the preponderance of the evidence.

2. Justices of the peace in 1871-'72 had not original jurisdiction to take acknowledgments of deeds or privy examinations of married women, and under a commission issued by the probate judge to a justice of the peace to take a privy examination, the justice had no authority to take the probate and privy examination to any other deed except the one described in the commission.

3. The mere signing of a deed, without probate or privy examination, by a married woman and her husband, after she became of age, is not a ratification of a deed executed by her and her husband when she was a minor.

4. The presumption of ratification of a voidable deed by long acquiescence will not arise against a woman under disability of coverture, and three years after removal of disability is a reasonable time within which she must disaffirm.

5. A deed by an infant is avoided by his executing, upon his arrival at full age, another deed of the same kind and for the same land to a different person.

6. In an action of ejectment commenced in 1902 the plaintiff, who was an infant at the time the deed was executed to her, and was married and an infant, both, until 1898, is not barred of a recovery by chapter 78, Laws 1899, which eliminates married women from those saved from the operation of the statutes of limitation.

ACTION by Zenia A. Gaskins and others against Victoria Allen, heard by *Councill, J.*, and a jury, at Fall Term, 1904, of PAMLICO.

This action was brought to recover a tract of land. The following issue was submitted to the jury: "Is the plaintiff Zenia Gaskins the owner in fee and entitled to the immediate possession of the land described in the complaint? Ans.: 'Yes.'" From a judgment (427) rendered, the defendant appealed.

Simmons & Ward for plaintiff.
D. L. Ward for defendant.

BROWN, J. Mary F. Swindell was seized in fee of the land in controversy. She and her husband, David, executed a deed to W. H. Rawls in 1871, at which time she was married and a minor. On 22 June, 1872, the day after she became of age, Mary F. Swindell and her husband signed another deed for the same land to W. H. Rawls. This deed was pinned to the first and both recorded under one probate taken by J. S. Fowler, justice of the peace. The defendant claims by mense conveyances under Rawls. On 10 October, 1894, Mary F. Swindell and her husband executed a deed to the plaintiff Zenia, their daughter, for the land. She was then 17 years of age. This action was commenced on 3 April, 1902.

"Hard cases are the quicksands of the law." We remembered this adage in considering this appeal and gave it a minute and careful investigation. It is with natural reluctance we feel impelled to affirm a judgment which deprives the defendant of land in the possession of which she and those under whom she claims have been so long. But "such is the law."

1. As to the probate of the deed of 22 June, 1872: We can find no evidence that it was ever probated or any privy examination taken. The commission issued by West, probate judge, is dated 19 August, 1871. It refers in specific terms to the deed of 1871, when Mary F. Swindell was under age. The probate of the justice of the peace Fowler (428) is at the bottom of this commission and admitted to be a blank form, all on one paper, and filled out by the probate judge and the justice of the peace. This probate is dated 22 June, 1872, in the record sent here, and if actually taken then, would have been a confirmation of the act of the infant grantor after arriving at full age. His Honor

charged the jury that "the plaintiffs claim that the date of this probate has been altered, that one date has been erased and another substituted. If the plaintiffs have satisfied you by the preponderance of the evidence that this is so, and further that she neither executed nor acknowledged the deed after she was 21 years of age, you should answer the first issue 'Yes.'" The jury answered the issue "Yes."

We approve this instruction in general, and more particularly as to the degree of proof required to establish the alteration in the date of the probate. *Harding v. Long,* 103 N. C., 1, and cases cited; *Perry v. Ins. Co., ante,* 402. The finding of the jury under such instruction destroys the value of that probate as a confirmation by Mrs. Swindell of her deed made when a minor. The probate could not possibly refer to the deed of 22 June, 1872. In 1871-'72 justices of the peace had no original jurisdiction to take acknowledgment of deeds or to take privy examinations of married women. The probate judge, who was also clerk of the Superior Court, took the acknowledgment of the husband, and when the wife was not present to take her privy examination himself he issued a commission to some convenient justice of the peace to take it. The blank forms for the justice to fill up were printed on the same paper with the commission, as was admitted in this case. The commission described the deed and named the grantor and grantee, as this commission does, and empowered the justice to take the privy examination of the wife. This commission is dated 19 August, 1871. Under it the justice had no
(429) authority to take the probate and privy examination to the deed of 22 June, 1872, or to any other deed except the one named in the commission. The two deeds were pinned together with this one commission and certificate of probate. The commission issued by West and the certificate of probate signed by Fowler evidently belonged to the deed of 1871. The certificate of the justice is on the same paper as the commission, and refers to the "foregoing deed of conveyance," viz., the deed described in the commission. There is no other reference to any deed in it. The deed of 22 June, 1872, was not probated and its registration was void.

2. Did Mary F. Swindell ratify and confirm her deed of 1871 after she became of full age? We see no evidence of ratification or confirmation. She was married when the deed was made and her husband was living at the time of the trial. The deed of 22 June, 1872, is no ratification, because, as we have shown, it was never properly executed and no probate or privy examination taken. Lapse of time is not a confirmation in this case. "The presumption of ratification of a voidable deed by long acquiescence will not arise against a woman under disability of coverture." *Epps v. Flowers,* 101 N. C., 158.

So far as Mrs. Swindell is concerned, this matter seems to have been "quiescent" and *"in statue quo"* from the attempt to make a deed on 22 June, 1872, until 10 October, 1894, when she made the deed to her daughter Zenia, her coplaintiff, and who is the real plaintiff in this action. The deed of October, 1894, was an absolute disaffirmance, and the only disaffirmance, so far as this record discloses, by Mrs. Swindell of her act and deed of 1871 made when a minor. "A deed of bargain and sale made by an infant is avoided by his executing upon his arrival at full age another deed of the same kind and for the same land to a different person." *Ruffin, C. J.,* in *Hoyle v. Stowe,* 19 N. C., 320. There is no conflict with *Weeks v. Wilkins,* 134 N. C., 516. Three (430) years after majority is a reasonable time within which an infant must disaffirm a deed. Where the infant is under the disability of coverture, the three years begin to run when the disability is removed. Mrs. Swindell was under disability of coverture in 1871, when a minor, and it continued up to the time of the trial in the court below.

3. Does the act of 13 February, 1899 (Laws 1899, ch. 78), bar a recovery in this action by plaintiff Zenia Gaskins? We think not. As we have shown, Mrs. Swindell disaffirmed in 1894, before the act of 1899. Zenia Gaskins was 17 years of age when the deed to her was executed, and was married and an infant, both until October, 1898. The first section of the act eliminates married women from those saved from the operation of the statutes of limitation mentioned in the act. But for the second section, a married woman might under proper facts be barred at the end of three years from the ratification of the act. This section enacts "that in all actions commenced after the ratification of this act by married women heretofore protected by subsection 4 of sections 148 and 163 of The Code, in which the defense of adverse possession shall be relied upon, the time computed as constituting such adverse possession shall not include any possession had against such married woman prior to the passage of this act." It is clear to us that there is nothing in the act of 1899, or any statute of limitation, which bars a recovery in this action by the plaintiff Zenia Gaskins.

The three questions we have briefly discussed are the only ones presented in the record of much importance. The other exceptions are without merit. The judgment is

Affirmed.

Cited: Wicker v. Jones, 159 N. C., 111; *Hogan v. Utter,* 175 N. C., 335.

(431)

LUMBER COMPANY v. LUMBER COMPANY.

(Filed 28 February, 1905.)

PLAINTIFF'S APPEAL.

Agreement of Parties — Powers of Court — Waiver of Jury Trial— Reference—Costs—Nominal Damages.

1. In an action for trespass, it was agreed by the parties, through counsel, "That if the jury should answer the first issue as to title 'Yes,' then it is admitted that the defendant has trespassed, and the amount of damages is reserved, to be ascertained by a reference under The Code," and the jury answered the first issue 'Yes," but the trial judge refused to refer, and submitted, over plaintiff's objection, the following issue, "Has the defendant cut timber or committed other acts of trespass on the land described in the complaint?" To which the jury answered, "No": *Held*, that the trial judge committed no error, and reconciling the agreement and verdict as far as possible, the plaintiff was entitled to judgment for nominal damages by virtue of the agreement admitting a "technical" trespass.

2. Agreements and admissions made by attorneys of record are binding upon their clients in all matters relative to the progress and trial of the case, and will, in the absence of fraud or mutual mistake, be enforced by the court, but only to the extent that they do not interfere with the legitimate powers of the court.

3. The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a jury trial shall be waived or that a reference shall be made.

4. Error in the judgment of the lower court, to which exception was taken, entitles the plaintiff to costs in the Supreme Court, although he does not recover more than nominal damages.

(432) DEFENDANT'S APPEAL.

Forfeiture of Land for Nonpayment of Taxes—Unconstitutional Act— Trespass—Issue—Judgment.

1. Chapter 243, Laws 1889, declaring a forfeiture of land to the State for failure to list and pay taxes assessable against it, without provision for some judicial inquiry before condemnation or forfeiture, is unconstitutional.

2. In an action for trespass on land, an issue as to the ownership of the land is not appropriate, and it was error to include in the judgment a declaration, though pursuing the language of the verdict upon said issue, that plaintiff is the owner of the land.

THIS is a petition filed by plaintiff to rehear the above-entitled case, which was decided at February Term, 1904, and is reported in 135 N. C., 744. The action was brought to recover damages for cutting timber on land which plaintiff alleges was owned by it at the time the trespass was committed by the defendant, and to which it claimed ownership by virtue of a grant to Weeks and Valentine and mesne conveyances by which it acquired the title so granted and conveyed to them. The defendant, not denying that plaintiff is the owner of whatever land is covered by the Weeks and Valentine grant, denies that the grant includes any part of the land on which it has cut any timber, though it admits that it has cut timber on a tract of land in the lower part of Camden County, which it had a lawful right to cut, as it owned the land.

Issues were submitted to the jury which, with the answers thereto, are as follows:

1. "Is the plaintiff the owner of the land described in the complaint, or any part thereof?" "Yes."

2. "If so, what part?" Ans.: "All the land conveyed to Weeks and Valentine by accurate measurement, except the M. D. Gregory and Joseph Burgess grants."

3. "Has the defendant cut timber or committed other acts of trespass on the land described in the complaint and inside the Weeks and Valentine grant?" Ans.: "No." (433)

Before these issues were submitted, the parties, through their counsel, in open court, entered into the following agreement in writing: "In this cause it is agreed that if the jury should answer the first issue as to title 'Yes,' then it is admitted that defendant has trespassed, and the amount of damages is reserved to be considered by a reference under The Code." This agreement was filed with the papers and made a part of the roll in the case.

After all the evidence was introduced and after all the speeches had been made, except the last speech on each side, the court decided to submit the third issue, and to restrict the consideration of the jury, under the first issue, to the question of title as conveyed by the grant and deeds under which the plaintiff claimed, and under the third issue to the location of the said grant and deeds. Counsel on both sides had, prior to this ruling, argued the question of the location of the grant and deeds under the first issue, treating it as involved in that issue. The plaintiff objected to the third issue; the objection was overruled, and the plaintiff excepted. Evidence was introduced by the plaintiff tending to show that the grant and deeds covered the *locus in quo,* and defendant introduced evidence tending to show that they did not.

The court charged the jury upon the first issue that the grant and deeds were sufficient to vest the title to the land described in the complaint in the plaintiff, and that if they believed the evidence they should answer the first issue "Yes"; that they should not consider the question of location under that issue, but simply the question of title, as the location should properly be considered under the third issue. As to the third issue the court charged that, if the plaintiff had located its land by the evidence, the jury would answer the issue "Yes"; otherwise, "No." Plaintiff excepted. The plaintiff then insisted that the
(434) submission of the third issue, in view of the agreement of connsel, was erroneous, and that the court should instruct the jury to answer that issue "Yes," in accordance with the admission in the agreement.

After the return of the verdict, the plaintiff moved to strike out the third issue and the answer thereto as immaterial, and for judgment declaring the plaintiff to be the owner of the land as agreed by the jury, and ordering a reference to ascertain the damages. The court refused to order a reference, and entered judgment declaring that the plaintiff was the owner of the land in accordance with the findings of the jury, and further adjudged that the plaintiff take nothing by its suit, but that defendant go without day and recover of plaintiff the cost of the action. Plaintiff excepted and appealed.

Rodman & Rodman, W. M. Bond and Shepherd & Shepherd for petitioner.

E. F. Aydlett and W. K. Clark in opposition.

WALKER, J., after stating the case: When this case was before us at a former term, the learned justice who wrote the opinion of the Court assumed in the course of the argument that the first issue, as prepared at the time of the agreement of counsel, embraced all the land described in the complaint and called for a finding of the jury as to whether the plaintiff was the owner of all, and not merely the owner of a part thereof, and that, afterwards, the issue was so divided as to require the jury to determine, not only whether the plaintiff owned all the land, but, if it did not, whether it owned any part thereof. And so the Court thought at the time. It now appears that no change was ever made in the first issue. It is in precisely the same language now as it was when
(435) the agreement was made. The erroneous assumption of the Court led to the conclusion that the agreement of the counsel had been annulled, as the change in the form and substance of the issue rendered the contingency upon which the admission was to operate impossible.

The fact is, that as the agreement and the first issue were drawn, the parties intended, as the law construes their agreement, that if the jury answered "Yes" to the first issue, that is, if they found that the plaintiff was the owner of the land or any part thereof, the defendant had trespassed upon the land described in the complaint, and in that event there should be a reference to assess the damages. The Court was led into a misapprehension of the true state of the issues, we suppose, by reason of the fact that the second issue required the jury to find what part of the land was owned by the plaintiff, if it owned not all, but only a part thereof. But that was one of the issues when the first issue was prepared and when the agreement was drawn, and was intended only to complete and perfect the finding under the first issue, if the jury answered that the plaintiff was the owner only as to a part of the land. It now appears most clearly that the first issue was never so drawn as to be confined to all the land and require a response only as to the entire tract, but has remained intact from the beginning to this time and required the jury to find whether the plaintiff was the owner of the land or any part thereof. The jury answered that issue "Yes," and therefore the agreement between the parties became operative, but, as we will presently see, not in its entirety.

The defendant contends that we should not enforce the agreement, as the parties contemplated, at the time, that the question of trespass should be tried under the first issue, or, in other words, should be considered as of the substance of that issue and a material part of it. We cannot so hold. We are not permitted to introduce any new provision into the agreement of the parties without the consent of both, nor can we embody in the issue something that in law constitutes no part of (436) it, without a like consent of the parties. We cannot make a contract for the parties, but only construe it as they have themselves made it. Their words must be given their natural and ordinary meaning, and, in this case, the issue referred to in the agreement must be interpreted according to its plain legal import. How an issue as to ownership can involve the question of a trespass on the land we are unable to conceive. If the plaintiff is the owner of the land, he has the constructive possession of it, which will support an action of trespass to recover damages for an unlawful invasion of his right; but this does not include the idea that the defendant has made an unlawful entry on the land. Therefore, it follows that the question of trespass was not germane to the first issue, and we cannot consider it in passing upon the agreement of the parties. The fact, if conclusively established, that the parties actually intended to try that question under the first issue would not help the defendant. It is not the understanding, but the agreement, of the parties that con-

trols, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled. *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249; *Prince v. McRae,* 84 N. C., 674; *McRae v. R. R.,* 88 N. C., 534; *King v. Phillips,* 94 N. C., 558. In *Bailey v. Rutjes,* 86 N. C., 520, it is held that however reasonably one of the parties to an agreement may be induced to act with reference thereto in a particular way by the conduct of the other, the latter is not bound by such conduct as evincing the measure of his contractual duty or obligation, unless there is some equitable element or an estoppel involved, which in
(437) law binds him by his conduct to assume that duty or responsibility as if he had expressly promised to do so. To the like effect is *Thomas v. Shooting Club,* 121 N. C., 238. The same idea is differently expressed in *Gregory v. Bullock,* 120 N. C., 262, namely, when the terms of an agreement are ascertained its effect is determined by the law, and does not depend upon the uncertain or undisclosed notion or belief of either party. But *Stump v. Long,* 84 N. C., 616, would seem to be conclusive against the defendant upon this point. In that case the plaintiff had instituted proceedings supplementary to execution against the defendant. During the course of those proceedings the parties agreed to the appointment of a receiver, and an order by consent appointing a receiver to take charge of defendant's assets and apply the same to the payment of his debts was accordingly entered, nothing being said therein about defendant's exemption. He afterwards asked the court to modify the order by providing for his exemptions, upon the ground that his counsel had misunderstood him, and that he did not intend to waive his exemption and did not believe that he had done so. The court refused the application, and, after holding that the defendant was bound by the act of his attorney, who had implied authority to consent to the order, it proceeded, by *Ruffin, J.,* who wrote the opinion, to say: "We are bound, then, to treat the case as if the petitioner had been actually present and given his assent to the order as drawn. He agreed to it, because his attorney did. Can a party, after having given his assent to a judgment or order of the court, be afterwards heard to say that such assent had proceeded from a mistake, on his part, as to the effect thereof, and for that reason have the same modified? If so, then the court would be making a consent judgment for the parties, not according to the agreement of both, but according to the understanding of one of them. If this was a bill for the correction of a mistake in a deed, the plaintiff could
(438) get no relief upon the facts stated in his application, for in such

a case one of two things must appear, either that the mistake was that of both the parties, or that of one with a fraudulent concealment on the part of the other. There is no pretense here of any fraud or mutuality of mistake, and we cannot see why the same principle does not apply." That the parties are bound by the acts of their attorneys of record in making agreements is too well settled to be now disputed. *Morris v. Grier,* 76 N. C., 410; *White v. Morris,* 107 N. C., 92; *Stevenson v. Felton,* 99 N. C., 58. Nor are we able to see why the admission of the trespass was made, if the first issue involved that question, because if it did, an affirmative response by the jury would have determined the mere fact of trespass as certainly as any agreement of the parties could have done, however explicity it may have been drawn. It was just because an answer to that issue did not in law include any such finding that the defendant made the admission. At least it so appears to us.

While we are compelled to enforce the agreement, we do not concur with the plaintiff's counsel in his view as to its scope and extent. Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into and are committed to writing, and when, too, they bear directly upon the matters involved in the suit. Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them as substitutes for legal proof, and there is no good reason why they should not. "Admissions of attorneys bind their clients in all matters relating to the progress and trial of the cause, and are, in general, conclusive." 1 Greenleaf Ev., 186. "Unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission, which the court will proceed to act upon, (439) not as the truth in the abstract, but as a formula for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice." *Ibid.,* 206. Wharton Ev., 1184, 1185, 1186. While this is so, the court will not extend the operation of the agreement beyond the limits set by the parties or by the law.

The agreement in this case contains two branches. The first is an admission of fact, to wit, that defendant had trespassed; the second is a stipulation to refer the question of damages. The parties had the right to make the admission, but did they have the right to agree to the reference without the assent of the court thereto? By The Code, sec. 416, it is provided that trial by jury may be waived by the parties to an issue of fact in actions on contract, and, with the assent of the court, in other actions. This section appears under the chapter entitled "Trial by the

Court," and that chapter further provides for the trial of the issue by the court when a jury trial is waived. Section 398 provides that an issue of fact must be tried by a jury unless a trial by jury is waived under section 416, or a reference is ordered. Section 420 provides that all or any of the issues, whether of fact or of law, or both, "may be referred" upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation. This section is in the chapter entitled "Trial by Referees." The Constitution, Art. IV, sec. 13, provides, "that in all issues of fact joined in any court the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict of the jury." We do not think it was intended by this provision that the waiver should operate *proprio vigore,* and without the assent of the court, to dispense with a trial by jury. The Constitution confirmed and guaranteed the ancient right of trial by jury, and section 13 of Article IV was (440) intended merely to permit that right to be waived and to substitute the findings of the judge for the verdict of the jury, with all the force and conclusiveness of the latter. To extend its effect and meaning so as to take away the power and jurisdiction of the court to control its own proceedings as it had theretofore been accustomed to do, is a construction not required by the exigencies of the case. What is said *arguendo* in *Stevenson v. Felton,* 99 N. C., 58, does not militate against this view, and, if it did, we can easily see that such a question was not at all involved in that decision. In that case the judge who ordered the reference had, of course, assented thereto, and it was not competent, as the court correctly decided, for another judge to set aside the report of the referee upon the ground that the reference was improperly ordered by his predecessor. The Constitution provides only for a trial by the court upon waiver of a jury trial, and says nothing about a reference. Unless restricted by that instrument, as it is not, the Legislature undoubtedly had the right to provide, not only that there should be no waiver of trial by jury in actions other than actions on contract without the assent of the judge, but it could also provide that all references should be with his consent. Any other conclusion would, we think, be contrary to the accepted construction of the Constitution and statute as indicated by the uniform practice in the courts since their adoption. While we have not been able to find any case in our own Reports directly bearing upon this question, there are cases which have been decided in the other states upon substantially similar constitutional and statutory provisions, which sustain the views we have expressed.

In *Wittenberg v. Onsgard,* 78 Minn., 348, the Court thus refers to the subject: "The authorities are generally, if not uniformly, to the effect

that the judge may disregard the waiver of a jury by the parties, and, on his own motion, require the issues of fact to be submitted to a jury; that this is a matter addressed to his sound discretion" (441) (*citing Burke v. Breazeale,* 1 Rob. La., 73, and other cases). The Court further says: "The authorities seem to be also to the effect that a waiver of jury trial, so long as not yet acted on, may be withdrawn, with the consent of the court, and a trial by jury demanded, at least where the withdrawal will not prejudice the opposite party. All that is decided in *S. v. Bannock,* 53 Minn., 419, 55 N. W., 558, is that the waiver cannot be recalled at will, or as a matter of right. The law zealously guards the right of trial by jury. Waivers of the right are always strictly construed, and are not to be lightly inferred, or extended by implication. It is reasonably apparent that the waiver of a jury in this case was made only with reference to the exigencies of the then current term of court, and should not be extended so as to apply to a subsequent term. The action of the court in ordering the case to be tried by a jury may be sustained on any of these grounds." *Wittenberg v. Onsgard, supra.* "The right of trial by jury is deemed a valuable right, and is guaranteed in actions at law by our Constitution. The effect of the above statutes merely is to allow the parties to waive that right, if they should see fit to do so; but they do not extend so far as to oblige the judge to try the issues of fact in a case at law, although requested so to do by both parties, if he should deem it a proper case for trial by a jury. Ordinarily, the judge will accede to the wishes of the parties where they waive a jury, and try the issues of fact himself (or, it may be added, will refer the same); but there may be reasons in the breast of the judge why he should call a jury, although parties may prefer that the issues should be tried by him (or referred). Whether he will do so seems to be, like many other matters relating to the conduct of civil trials, a question for the exercise of a sound discretion on his part, which exercise of discretion will not be reviewed on appeal, except in manifest cases (442) of abuse. Not only is there no abuse of discretion apparent in this case, but as the question is here presented the very statement of it seems to suggest its answer. What more is it, then, than the case of one party to an action at law objecting that the facts were tried and ascertained in the usual mode pointed out by the Constitution and the laws?" *McCarthy v. R. R.,* 15 Mo. App., 388. "The Court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of by the court, citing *Doll v. Anderson,* 27 Cal., 249. The action there, as in the case at bar, was

upon a contract." *Bullock v. Lumber Co.,* 31 Pa., 367. Even if it were not for these authorities and for what we conceive to be the reasonable construction of the Constitution and statute, we would still be reluctant to hold that it was intended to deprive the trial court of a function so essential to its efficiency and so important in every well-regulated system of judicial procedure, unless compelled to do so by the expression of that intention in a clear and unmistakable manner.

Having reached the conclusion that the court had the power to submit the third issue, notwithstanding the agreement of counsel, it only remains to be considered, what effect that issue and the response of the jury thereto have upon the result. The agreement admitted the fact of a trespass, and to this extent it is valid and effective, and the court could not in any way disregard it. The issue directs the jury to inquire, not only whether the defendant had cut any timber on the land described in the complaint, inside the Weeks and Valentine grant, which was the particular trespass alleged, but whether the defendant had committed any other acts of trespass. The finding of the jury, so far as it is re-
(443) sponsive to the last branch of the issue, is in direct conflict with the agreement of the parties as to the technical trespass, and must be disregarded; but the finding that there had been no substantial trespass upon the land is not at variance with any valid stipulation of that agreement, and it must stand and receive from us its proper weight in the determination of the case. The agreement ascertains only that there has been a trespass, that is, a technical violation of the plaintiff's right or a simple invasion of his possession. Nothing else appearing, this would entitle plaintiff to nominal damages only, and, as the finding of the jury excludes the existence of actual damages, the recovery must be confined to that compensation which the law gives for the technical wrong, or, in other words, to nominal damages. *Chaffin v. Mfg. Co.,* 135 N. C., 95; *S. c.,* on rehearing, 136 N. C., 364. While we will enforce the agreement, it must be done only to the extent that it does not interfere with the legitimate powers of the court, and, as the court submitted the issue in the rightful exercise of its authority or jurisdiction, we must reconcile the verdict upon the third issue and the agreement, if it can be done, and reject so much of either as conflicts with any valid portion of the other, and in doing so the result is that plaintiff is entitled to a judgment for nominal damages by virtue of the agreement and *non obstante veredicto,* both the clause in the agreement as to the reference and the finding of the jury that not even a technical trespass had been committed being rejected. *Harris v. Sneeden,* 104 N. C., 369.

We do not agree with counsel in the contention that the jury have found by their answer to the first issue that plaintiff is the owner of the land

on which the timber was cut. Defendant says in its answer that they have cut no timber on the land described in the complaint, and the jury have so found. The plaintiff must have shown, even if there had been a reference, that the cutting of timber was done on its land, (444) as described in the complaint, in order to recover actual damages. The agreement goes no further than to admit a technical trespass. There may have been such a trespass on the lands described in the complaint, and yet not a tree have been cut or other substantial injury done on the land. Because the defendant is admitted to have trespassed upon the lands described in the complaint, it does not follow, therefore, that those are the same lands upon which defendant cut the timber. Indeed, the verdict would seem to show that no trespass at all was committed; but we are bound by the admission to hold that there was a trespass, though there was none in fact, or at least a technical, though not a substantial trespass. *Harris v. Sneeden, supra.*

The former decision is modified in accordance with this opinion and judgment will be entered in the court below in favor of the plaintiff for a penny and the costs. As there was, in contemplation of law, substantial error in the judgment of the lower court, to which exception was duly taken, plaintiff is also entitled to costs in this Court, although it does not recover more than nominal damages.

Petition allowed.

DEFENDANT'S APPEAL.

WALKER, J. The defendant has also asked us to rehear the decision in this appeal, though no separate petition has been filed, as should have been done. From an examination of the record and the former opinion, it appears that two points only were made and considered by the Court, namely: (1) Is chapter 243, Laws 1889, amending section 2522 of The Code, constitutional? This involved the question whether the Legislature could by said act declare a forfeiture of land to the State, and vest title to the same in the board of education, for failure to list and pay the taxes properly assessable against it, without provision for some judicial inquiry before condemnation of forfeiture. We decided (445) then, 135 N. C., 742, as we had before in *Parish v. Cedar Co.*, 133 N. C., 478, after an able and exhaustive discussion of the subject by *Douglas, J.*, for the Court, that no such power existed, as it would be a violation not only of the natural, but of the constitutional, right of a citizen to take his property without notice, hearing, or judgment. We adhere to the decision, which, by the way, was in favor of the defendant,

and we take it that it does not intend to except to that ruling, but to the one we are now about to consider.

We further decided that it was error to include in the judgment a declaration, although pursuing the language of the verdict upon the first and second issues, to the effect that the plaintiff is the owner of the land inside the Weeks and Valentine patent, not including any part of the land described in the Gregory and Burgess grants, because this is not an action for the recovery of real property (ejectment), but solely for the recovery of damages for an unlawful entry upon the land described in the complaint (trespass). The issue as framed was not appropriate to an action of trespass, which should be substantially, Did defendant trespass upon the land of the plaintiff, as alleged in the complaint? and this, coupled with an issue as to the damages, is quite sufficient to present the matter in dispute. Proof of title may be competent under the first of those issues, but an inquiry as to the title is no part of the issue itself.

The form of the issue, though, worked no harm to the plaintiff, as the answer of the jury merely ascertained that, being the owner, the plaintiff was entitled constructively to the possession, which will support trespass for an injury to the close. But the fact so found by the jury was not proper to be stated in the judgment, and it was ordered by this Court to be stricken out. We do not now see any error in this ruling. The
(446) plaintiff's recovery must be limited to nominal damages for the admitted technical trespass and the costs, as we have held in the plaintiff's appeal, and this is all that should be stated in the judgment.

There is no other ruling of the court below, as far as appears in the defendant's appeal, which prejudiced the defendant, or to which it is entitled to take exception. This dimisses his petition.

Petition dismissed.

HOKE, J., concurring: I do not understand the proceedings in the court below in the same way as stated in the opinion of the Court, nor put exactly the same interpretation upon them. The parties litigant had a right to make the agreement set out in the case, and the court was required to accept it. But in my judgment there is nothing to indicate that the agreement had been disregarded, for the reason that by the finding of the jury the agreement never came into effect.

As the issues were originally drawn, the first two were addressed to the question of title, and on the pleadings there were two additional issues, one to the question of trespass and one to the amount of damages.

There were two elements in this question of title, (1) that the claimant should connect himself with the State grant by valid and proper deeds; (2) that the claimant should locate the deeds so as to cover the land in

controversy. Instead of submitting these two elements of title in the issues as framed, his Honor had the second element determined by the jury on a third issue framed by himself. This was no doubt done because the court thought the evidence addressed to the question of location could be more clearly presented by a charge on the issues as framed by him. The issue was unfortunately worded, because in its terms the same is in apparent conflict with the agreement of the parties. (447) But it is not really so. The true interpretation of the agreement was simply to this effect: That if the parties plaintiff could show title covering the land in controversy, then the defendant admitted the physical act of trespass, and the question of amount should be referred.

The verdict on the issues determined that while the plaintiff had a line of deeds connecting him with the Weeks and Valentine grant, he had not been able to locate either the grant or the deeds, and therefore had shown no title covering the *locus in quo*.

The facts stated in the case on appeal and the charge of the court show clearly that on the third issue the parties debated the question of location, and the jury determined that the plaintiff had failed to locate any land. Note the charge of the judge on the issues:

1. That upon the first issue they were to consider only whether the plaintiff had title to the Weeks and Valentine grant, and he further charged that the grant and the deeds introduced by the plaintiff were sufficient to pass that title, and if they believed the grantors in the deed to the plaintiff were the heirs of Jacob Valentine (and if they believed the evidence, they were), then it was their duty to answer the first issue "Yes."

2. That they were not to take into consideration, in answering the first issue, the location of the grant, but it was only a question whether or not the plaintiff had the title to the land of the Weeks and Valentine grant, without reference to the fact whether or not it could be located; that under the issues as now submitted by the court to the jury, the question of title simply arose under the first issue as to the land described in the complaint; that its location was to be considered by the jury in passing upon the third issue.

3. The court charged the jury upon the third issue, among other things, that when they came to consider the same they would consider whether or not the plaintiff had located its land; that if they (448) find from the evidence that the land was not located, they would answer it "No"; if they find the plaintiff had located it, then they would answer it "Yes." Under the charge the jury answered the third issue "No."

This shows that on the third issue the jury passed upon the question of location and determined that the plaintiff had shown no title covering the land. The agreement, which was simply as to acts of physical trespass, in case this was done, never came into operation. I think that on the verdict the judgment should simply be that the defendant go without day and recover costs.

Inasmuch, however, as the judgment of the Court substantially carries out the results of the trial as understood and contemplated by the parties, I concur in the decision as made.

Cited: Knitting Mills v. Guaranty Co., post, 570; *Lumber Co. v. Lumber Co.,* 140 N. C., 438; *Machine Co., v. Chalkley,* 143 N. C., 183; *Board of Education v. Remick,* 160 N. C., 568; *Mfg. Co. v. Assurance Co.,* 161 N. C., 96; *Wilson v. Scarboro,* 163 N. C., 388; *Leffel v. Hall,* 168 N. C., 409; *Potato Co. v. Jenette,* 172 N. C., 4; *Hutton v. Cook,* 173 N. C., 499; *Turner v. Live Stock Co.,* 179 N. C., 460.

(449)

FALKNER v. PILCHER.

(Filed 8 March, 1905.)

Appeal—Issues.

1. In an action brought before a justice of the peace, against two defendants to recover damages for breach of contract, both defendants being nonresidents, and being brought into court by publication and attachment, where judgment by default was rendered against one of the defendants, condemning the attached property to the payment of the judgment, it was error in the trial judge, upon appeal by the other defendant, to refuse to submit an issue, made between the parties, as to the breach of the contract.

2. It is mandatory upon the trial judge to submit issues that present the material facts in controversy, and, when answered, they must be sufficient to dispose of the controversy and to enable the court to proceed to judgment.

ACTION by Eugene Falkner against Pilcher & Co. and American National Bank, heard by *Shaw, J.,* and a jury, at October Term, 1904, of VANCE. From a judgment in favor of the defendant bank, plaintiff appealed.

Plaintiff sued defendant Pilcher and the American National Bank before a justice of the peace, to recover $200, "due for damages for breach

of contract in failing to deliver 600 bushels of corn in good condition after payment for same and demanded by plaintiff." The defendants, being nonresidents, were brought into court by publication and an attachment was issued and levied on another and later shipment of corn. Pilcher did not appear, and judgment by default was rendered against him for $141, with interest and costs. It was further adjudged that Pilcher owned the corn which had been attached, and it having been sold, the proceeds in the hands of the constable were condemned to the payment of the judgment against him. The bank, who had (450) appeared by attorney and resisted the suit, appealed from the judgment. At the trial in the Superior Court the judge ruled that "the ownership of the corn was the sole question for trial," the burden being upon the bank to show its title. Plaintiff excepted. The court, after the testimony had been introduced, submitted this issue: "Was the corn attached the property of the American National Bank?" Plaintiff excepted to this issue upon the ground that it was insufficient to determine the rights of the parties, because, if the jury should find that the bank is the owner of the corn, he would still be entitled to recover damages from the bank for the breach of the contract mentioned in the summons and in the return of the justice. The court declined to submit any other issue, and instructed the jury that the only question for them to consider was the ownership of the corn, and then gave further instructions as to the law upon that issue. Plaintiff in apt time excepted. The jury answered the issue "Yes." A motion by plaintiff for a new trial was overruled, and he again excepted. Judgment was rendered for defendants, and plaintiff appealed.

H. T. Powell and T. M. Pittman for plaintiff.
T. T. Hicks and A. J. Harris for defendant bank.

WALKER, J., after stating the case: It may be conceded as a general proposition that a party cannot complain because a particular issue was not submitted to the jury, unless he tendered it; but the rule is subject to this qualification, that the issues submitted must in themselves be sufficient to dispose of the controversy and to enable the court to proceed to judgment, for in that respect the duty of the court to submit issues is mandatory. *Tucker v. Satterthwaite,* 120 N. C., 118; *Burton v. Mfg. Co.,* 132 N. C., 17. It was certainly not incumbent on the plaintiff to tender the issue when the court had already announced at the (451) outset that it would not submit it, nor to offer evidence in support of such an issue. *Davidson v. Gifford,* 100 N. C., 18. In this case the plaintiff alleged distinctly in the summons a cause of action against

defendant bank, as well as one against Pilcher. The justice's return to the court also shows that such a cause of action was alleged, and it further appears therein that the bank denied its liability. So that here was an issue squarely made between the plaintiff and the bank as to the alleged breach of the contract to sell the plaintiff sound corn. The appeal of the bank brought to the Superior Court for trial, not only the issue as to the ownership of the corn, but also the issue as to the bank's liability for breach of the contract, for the trial was *de novo,* and therefore embraced all litigated matters pending between the plaintiff and the bank. When the court, in the beginning, refused to submit an issue as to the breach of contract, the plaintiff excepted, and when the evidence had been introduced and the court undertook to settle the issues, the plaintiff again excepted to the submission of the single issue as to the ownership of the corn and to the exclusion of any other issue. We have seen that all material issues must be submitted unless waived. *Gordon v. Collet,* 102 N. C., 532. How has the plaintiff waived his right to have the issue submitted? At every turn he has insisted upon it. It was surely not necessary to make a formal tender of the issue when the court had positively ruled that it would not submit it. It would have been indecorous to do so. Again, the issues submitted must present the material facts in controversy, and they must, when answered, be sufficient to enable the court to proceed to judgment, and must also support the judgment rendered. *Vaughan v. Parker,* 112 N. C., 96; *Paper Co. v. Pub. Co.,*
(452) 115 N. C., 147; *Hatcher v. Dabbs,* 133 N. C., 239; *Pearce v. Fisher, ib.,* 333. The jury have found that the bank is the owner of the corn; but how can the court upon this finding, when considered with reference to the case made by the pleadings, proceed to judgment? The issue as to the ownership of the corn was ancillary to the main issue in the case as to liability, and was necessary only to determine whether, if the liability was established, it could be enforced by a condemnation of the corn or its proceeds, the defendant being a nonresident and the property having been attached in order to give the court jurisdiction, and to secure the payment of any judgment recovered. *Fisher v. Ins. Co.,* 136 N. C., 217. If the bank is liable to the plaintiff and is the owner of the corn, the latter can be applied to the satisfaction of that liability. If the bank is liable to the plaintiff, but is not the owner of the corn, the latter, of course, cannot be so applied. The liability is, therefore, the principal question involved, and the court cannot give judgment upon the verdict as it now stands. It must be supplemented by another finding as to the liability of the bank for a breach of the contract alleged in the pleadings, or, more correctly speaking, in the summons and the return of the justice, and the case will therefore be remanded with direction to

submit an issue or issues presenting that question. The verdict upon the issue as to ownership of the corn will not be disturbed. If the jury find for the plaintiff upon the new issue, he will be entitled to judgment and to have the corn or its proceeds applied to the payment of the amount so found to be due; otherwise, the bank will be entitled to the judgment.

Error.

Cited: *Mast v. Sapp,* 140 N. C., 545; *Clark v. Guano Co.,* 144 N. C., 71; *Holler v. Tel. Co.,* 149 N. C., 339; *McKenzie v. McKenzie,* 153 N. C., 243; *Potato Co. v. Jeanette,* 174 N. C., 240.

(543)

KIRKMAN v. WADSWORTH.

(Filed 8 March, 1905.)

Trust—Execution of Power of Appointment—Deed—Husband as Trustee.

1. Where a son executed a deed in fee simple to his father, in trust for the son's wife during her life, and to convey said property to such persons and for such estate as said wife should appoint under her hand and seal, and where the trustee (father) died leaving said son as his only heir, a deed in fee simple with warranty executed for value thereafter by the son and his wife conveyed a good title in fee to their grantee, though the deed did not refer to the power.

2. Where a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass, although the power is not referred to in the deed. But if the donee of the power has any independent estate, and makes a deed, the terms of which will be satisfied by such independent estate, it will be presumed that the donee intended to convey his independent estate only.

3. A husband may be trustee for his wife.

ACTION by Emeline Kirkman and others against Enoch Wadsworth and others, heard by *Councill, J.,* at November Term, 1904, of CRAVEN, upon an agreed statement of facts. From a judgment in favor of defendants, plaintiffs appealed.

On 15 April, 1841, Joseph Merkell executed a deed in fee simple for the *locus in quo* to his father, John Peter Merkell, upon the following trust: "In trust for the sole and separate use of Caroline M. Merkell, wife of the said Joseph Merkell, during the life of the said Caroline M.

Merkell, so that said real estate, slaves and their increase, and other personal property hereby granted shall not be liable or in any manner subject to the debts, contracts, or engagements of the said Joseph
(454) Merkell; and further, to grant and convey said property or any part thereof to such person or persons for such consideration and for such interests and estates as the said Caroline M. Merkell shall by any writing under her hand and seal during her coverture direct, limit, or appoint, and upon the dissolution of the said marriage by the death of the said Caroline M. Merkell and on her failure to make the appointment above mentioned, in trust to surrender and deliver up said property to such child or children of the said Joseph Merkell and Caroline M. Merkell, his wife, as may be living at her death, to be held by such child or children in absolute property; but should said Caroline M. Merkell die and leave no issue living at her death, then in trust to surrender and deliver up said property hereby granted to the said Joseph Merkell, or, if he should die before said event, then to the proper heirs at law and next of kin of the said Joseph Merkell, to be held by him or them as their absolute and indefeasible estate."

Prior to 6 May, 1843, John Peter Merkell, the trustee under said deed, died, leaving Joseph Merkell, the grantor in said deed, his only son and heir at law, to whom said trust estate descended. On 6 May, 1843, while said trust estate was vested in Joseph Merkell, the said Joseph Merkell and his wife, Caroline M. Merkell, the donee of the power of appointment under said trust deed, executed a deed in fee simple for the *locus in quo* to A. Mitchell. A. Mitchell immediately entered into the possession of the *locus in quo,* and he and those claiming under him, down to and including the defendant S. E. Wadsworth, have been in possession thereof ever since.

On 9 December, 1843, Joseph Merkell and his wife, Caroline M. Merkell, executed a deed to J. T. Lane as trustee for the *locus in quo,* providing that the property conveyed therein should be held upon the same trust as those expressed in the original deed to John Peter Merkell.
(455) The plaintiff Emeline Kirkman is a surviving child of the said Joseph Merkell and Caroline M. Merkell, both being dead at the commencement of this action. The plaintiff Ella Moore is the only child and heir at law of another child of the said Joseph Merkell and Caroline M. Merkell, who died during the lifetime of the said Caroline M. Merkell. Caroline M. Merkell died on 27 December, 1903.

The plaintiffs claim the *locus in quo* under the provision of the deed of trust to the said John Peter Merkell and J. T. Lane, and the defendant S. E. Wadsworth claims said property under the deed from the said Joseph Merkell and Caroline M. Merkell to A. Mitchell and by mesne conveyances in fee.

W. D. McIver for plaintiffs.
W. W. Clark for defendants.

BROWN, J., after stating the facts: The plaintiffs contend that the deed of 6 May, 1843, from Joseph and Caroline Merkell to A. Mitchell, while purporting on its face to convey a fee, conveyed in fact only the life estate given to said Caroline by the deed to John Peter Merkell, trustee, by Joseph Merkell, dated 15 April, 1841; and that Caroline Merkell having died 27 December, 1903, without having properly exercised the power of appointment given her by said deed, the plaintiffs are now entitled to the property as the beneficiaries under the provisions of the trust.

The defendants contend that under the terms of said trust deed Joseph Merkell not only gave his wife Caroline a life estate in the property, but he also gave her by express words a valid power of appointment, whereby, by a "writing under her hand and seal during her coverture," said Caroline could direct, limit, or appoint through the trustee a conveyance of said property in fee. Defendants contended that when John Peter Merkell died the fee descended to his only heir and son, Joseph (456) Merkell, husband of Caroline, and that thereafter Caroline and her husband, who was her trustee, executed to A. Mitchell the deed in fee of 6 May, 1843, with full covenant of warranty; that the execution of this deed was a valid exercise of the power of appointment given to said Caroline, although in it there is no reference to the power.

In the appellants' brief it is stated that "his Honor below announced his opinion as adverse to the claim as an execution of the power, but held that the plaintiffs were barred by the statute of limitations." Our view is quite to the contrary of his Honor's.

We are of opinion that the statute of limitations would not bar a recovery, but that the execution of the deed of 6 May, 1843, does. The court below rendered the correct judgment, but put it on the wrong ground.

This deed is a conveyance in fee simple, and nowhere purports to convey a less estate. The draftsman, as if "to make assurance doubly sure," has added in the *tenendum* the words "free and discharged of any and all encumbrances in fee simple absolutely forever," and then follows a covenant of warranty in fee "to Alexander Mitchell, his heirs and assigns, against the claims of all persons whatsoever." If the English language is capable of making known the thought and intentions of the mind, the words used in that deed convey the most unmistakable purpose and intention on the part of Caroline Merkell and her husband Joseph to convey a fee-simple estate in the property described there.

The plaintiffs contend in reference thereto:

1. That the deed must refer to the power, otherwise it is not a valid exercise of the power.

2. That the husband cannot be trustee to the wife, and that the conveyance is void as an exercise of the power of appointment, because (457) no legal trustee joined in it.

We are against the plaintiffs on both propositions. We take it that the following propositions are established law: If a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass, although the power is not referred to in the deed. If the donee of the power has an estate in the property outside and independent of the instrument creating the power, or any separate estate in the property, however created, and makes a deed, the terms of which will be fully satisfied by such independent estate, which deed contains no reference whatever to the power, his conveyance will be referred to his own independent estate, and it will be presumed that the donee intended to convey his independent estate only, and that he did not intend the deed as an exercise of the power of appointment under a trust.

Caroline Merkell had no interest or estate whatever in the property conveyed to Mitchell, except what was given her in the deed creating the power. Having no estate whatever in herself that can satisfy the terms of that deed, when she and her husband and trustee executed it, for a valuable consideration in fee and with full warranty, she manifested a most unmistakable purpose to convey under the power given her, and to its full extent. It is not necessary that the deed should refer to the power. Under such circumstances it is a valid exercise of the power of appointment without it.

The authorities are full and in complete accord upon these propositions. *Ashe, J.*, says: "It is not necessary to refer to the power if the act shows that the donee had in view the subject of the power at the time." *Taylor v. Eatman,* 92 N. C., 607; 4 Washburn R. P. (4 Ed.), 658; 4 Kent Com., marg. p. 334. "An intent apparent upon the face of the instrument to dispose of all the estate is deemed a sufficient reference to the power to make the instrument operate as an execution (458) of it, inasmuch as the words of the instrument could not be otherwise satisfied." 1 Sugden on Powers, 460.

It is not necessary that Joseph Merkell, the trustee, and his wife, the donee of the power, should have executed separate instruments. Neither is it necessary that she should have requested or directed the trustee in a separate writing to make the deed. Joining in the same deed with the trustee was the most effectual manner of indicating her wishes and pur-

poses by a writing under seal. When a trustee, having a power to sell land in fee by the written direction of the *cestui que trust* for life, joins with her in a conveyance of the property on valuable consideration with warranty, this is a good and valid execution of the power, although the conveyance does not refer to the power. *Gindra v. Gas Co.,* 82 Ala., 604. Where the deed would be useless and inoperative, and convey nothing except as an exercise of a power, it will be so construed, although there be no reference in it to the power. *Mathews v. Capshaw,* 109 Tenn., 480. The estate Mrs. Merkell acquired under the trust deed was a life estate. It could not satisfy the terms of the deed to Mitchell. The authorities are abundant to the effect that where one who owns an estate in property and is also clothed with a power resulting from a trust in the same property, if the donee executed a conveyance under such circumstances as to make it apparent that it was his intention to execute the power, the conveyance will be referred to the execution of the power, and not to a disposition of the estate owned by him in the property. *Lumber Co. v. O'Neal,* 131 Ala., 119, the case cited. Where a person conveys land for a valuable consideration in fee, he engages with the grantee to make the deed as effectual as he has the power to make it.

In addition to the authorities cited, the propositions laid down are fully sustained by the following cases: *Warner v. Ins. Co.,* 109 (459) U. S., 357; *Campbell v. Johnson,* 65 Mo., 439; *Yates v. Clark,* 56 Miss., 212; *Rinkenberger v. Meyer,* 155 Ind., 152; *Ladd v. Chase,* 155 Mass., 417; also, by an elaborate opinion of *Judge Taft* in the Circuit Court of Appeals, in which many authorities are cited. *Smith v. McIntyre,* 95 Fed., 591.

It is insisted by the plaintiffs that it is against the policy of the law for a husband to be a trustee for his wife, and that Joseph Merkell, the husband, when the trust estate vested in him by descent from John Peter Merkell, had no power to convey under the appointment of his wife. The plaintiffs' position as to this is equally as untenable as their first contention. In *Croom v. Wright,* 39 N. C., 250, *Chief Justice Ruffin* says: "He (meaning the husband) therefore can take no beneficial interest in the property under the will, whether the legal estate be vested in his wife's brother as trustee, or be vested in the husband himself for want of the interposition of another trustee, since it has been long held that where there is a clear intention to give a separate estate to a married woman, it shall not fail for want of a trustee, but be effectual by converting the husband in respect to the legal estate, which comes to him *jure mariti,* into a trustee for her."

In *Stearnes v. Fraleigh,* 39 L. R. A., 705, the wife appointed her husband her trustee. The Supreme Court of Florida sustained the appoint-

ment and declared that the husband's acceptance binds him to execute the trust, according to its terms, as fully as any other trustee, and that the husband becomes vested with the same powers and responsibilities, and no others, as any other trustee. If the husband trustee attempts to coerce the wife, she may have him removed. 25 A. & E. (2 Ed.), 431, where many authorities are collected.

(460) When John Peter Merkell died, the estate in the land descended upon his only heir, Joseph Merkell, clothed with all the powers and charged with all the duties, responsibilities, and trusts declared in the deed, which trust the courts will enforce. When Joseph and his wife afterwards conveyed in fee for value and with warranty, their grantee acquired a good title to the fee. The judgment is

Affirmed.

Cited: Cherry v. Power Co., 142 N. C., 409.

WILLIAMS v. HARRIS.

(Filed 8 March, 1905.)

Instruction Without Evidence—Exception.

It is error to give to the jury an abstract proposition of law without any evidence to support it, and an exception thereto is valid, if entered within ten days after adjournment of the term.

ACTION by H. G. Williams & Co. against J. R. Harris, sheriff, heard by *Moore, J.*, and a jury, at April Term, 1904, of EDGECOMBE. From a judgment for defendant, the plaintiff appealed.

Bunn & Bunn and F. S. Spruill for plaintiff.
Gilliam & Bassett for defendant.

CLARK, C. J. This is an action to recover one barrel of whiskey. The evidence was that the plaintiffs shipped the barrel of whiskey to one Cuthrell without any order from him and without his knowledge; that he wrote plaintiffs at once that he had not ordered it and would not receive it, but had taken it out of depot to save storage charges against plaintiffs—paying freight on it for them (which they paid back); that it was subject to their order, though if they chose to let it stay till he should want it for use, he would take it, but

(461) could not use it at that time; to this plaintiffs assented by letter.

Cuthrell never included the whiskey in any settlement with plaintiffs and on an execution against him declined to allow this barrel to be

included in the allotment of his exemption because not his property. The defendant is the sheriff who seized the property under execution against Cuthrell. The only issue found was whether the plaintiffs were the owners of the whiskey, to which the jury responded "No."

The court charged the jury that upon the evidence Cuthrell did not order the whiskey, and that plaintiff's reply to Cuthrell's letter did not constitute a sale, but added that invoicing the whiskey to Cuthrell was an offer to sell, and "if Cuthrell in receiving it from the common carrier and taking it into his possession did so with the intention of accepting the offer thus made, this amounted to an acceptance and vested title to the whiskey in Cuthrell." This was excepted to. This instruction was unsupported by the evidence, which was uncontradicted, that Cuthrell had then no such intention. Upon the question whether the subsequent offer by Cuthrell to hold the whiskey till he should have use for it did not constitute a conditional sale, the court charged that the plaintiff's reply was not sufficient to constitute such sale, and the defendant is not appealing.

It was error in the judge to give to the jury an abstract proposition of law not supported by any view of the evidence. *Brown v. Patton,* 35 N. C., 446; *King v. Wells,* 94 N. C., 344. It has been uniformily held by this Court that a failure to instruct the jury that there is no evidence (cases cited in Clark's Code (3 Ed.), p. 511), or, indeed, an omission or failure to give any proper instruction, is waived unless there is a prayer for such instruction. Clark's Code (3 Ed.), p. 514, and numerous cases cited. But none the less, if there is an error in the instruction given an exception thereto is valid if entered within ten days after adjournment for the term. Code, sec. 550. An error (462) upon the face of the charge (unlike a mere failure to charge, which is waived by not requesting an instruction) is only waived by not entering an exception thereto in the time allowed by law. Rule 27; Clark's Code (3 Ed.), pp. 920, 777, 778, 512, 513; Code, sec. 550. The instruction here given of a proposition of law, without any evidence to support it (*King v. Wells,* 94 N. C., 344), was duly excepted to and was

Error.

DAWSON v. THIGPEN.

(Filed 8 March, 1905.)

Nonsuit—Rights of Interpleader—Renewal—Burden of Proof.

1. A plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant.

2. In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader.

3. In an action involving the title to property, an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such title.

4. The taking of a second note and mortgage, of itself, does not discharge the original security, unless it is intended so to operate, and in the absence of any express agreement and of any circumstances showing such intention, the renewal of the note does not affect the security, and the burden is upon the mortgagor to show the existence of such an agreement.

(463) ACTION by N. B. Dawson against I. L. Thigpen and wife, heard by *Moore, J.*, and a jury, at Spring Term, 1904, of EDGECOMBE.

The plaintiff, N. B. Dawson, instituted this action on 12 February, 1902, against the defendants Thigpen and wife for the recovery of four mules, one mare, carts, etc., and all crops raised by defendants during the year 1901. At the time of issuing the summons the plaintiffs obtained an order for the immediate delivery of the property. Defendants executed an undertaking pursuant to the statute, retaining possession thereof. Defendants Thigpen and wife filed an answer denying the plaintiff's right of action and alleging that the indebtedness for which the plaintiff's mortgage was executed had been paid, except a small sum, which was tendered in full satisfaction.

G. A. Stancil filed an application to interplead in said action, setting forth that the defendants were indebted to him in the sum of $550, which indebtedness was secured by mortgage registered on 15 March, 1900, on the mules and other personal property claimed in plaintiff's complaint and seized by him as aforesaid. No formal order was made permitting said Stancil to interplead, but plaintiff filed an answer to his affidavit, denying his right to the property.

L. E. McDuffie filed an affidavit as a basis for the application to interplead, setting forth that she was the owner of the property claimed by the plaintiff, by virtue of crop lien and chattel mortgage recorded 2 February, 1901. An order was duly made making her party defendant and permitting her to file an answer setting up any right or title she might have to the property in controversy. She thereupon filed her interplea, alleging that she was the owner of the property described in the complaint by virtue of two crop liens and chattel mortgages executed by defendants Thigpen and wife, one recorded 27 January, 1900, and (464) the other 2 February, 1901, and that there was due her on account of the indebtedness secured therein the sum of $760. The plaintiff filed an answer to her interplea, denying that she was entitled to the

property, and further alleging that the mortgage of 27 January, 1900, had been fully discharged, and that in respect to the mortgage of 2 February, 1901, that said mortgage was filed for registration on 2 February, 1901, but was withdrawn from the office of the register of deeds by the interpleader and was not returned to said office until 2 February, 1902, when it was actually recorded. That plaintiff's mortgage was recorded 3 May, 1901.

The case on appeal states, "When the case was called for trial, the plaintiff caused the following entry to be made in the record: 'The plaintiff, N. B. Dawson, comes into court and states that he has been settled with for the amount of his claim upon the agreement of the original defendants to pay the cost, and thereupon prays the court for a nonsuit of the action so far as he is concerned. Thereupon the interpleader, Mrs. L. E. McDuffie, comes into court and applies to the court for leave to amend her pleading,'" by alleging that since last continuance she has learned that the plaintiff in this action received into his possession before the commencement of this action a large amount of the crops grown on the land of the defendant Thigpen, described in the mortgage and lien held by her. That said crops were not taken by the sheriff pursuant to the process in this action. That the plaintiff should account to her for the value of the said property and crops so received. Thereupon the following entry is made: "The court in its discretion would permit the interpleader to file the amendment to her pleadings as above requested; but, believing the court has no power to allow such amendment, after the announcement made by the plaintiff, declines to allow the amendment to be made, for want of power, to which ruling the interpleader Mrs. McDuffie excepts." The court thereupon submitted the (465) following issues:

"1. Is the interpleader Mrs. L. E. McDuffie the owner, by virtue of the crop lien and chattel mortgage introduced, of the crops in controversy?" Ans.: "Yes."

"2. What was the value of said crops at the time of the seizure?" Ans.: "$189.25."

"3. Is the interpleader Mrs. L. E. McDuffie the owner, by virtue of the crop liens and chattel mortgages introduced by her, of the personal property in controversy, or any part thereof; and if only a part, what part?" Ans.: "Yes; of the personal property, except the hoes, the hames, and the weeder; but the mules and mare are subject to G. A. Stancil's mortgage."

"4. What was the value of said personal property at the time of the seizure?" Ans.: "The value of the mules and mare is $335, and the value of the other property is $54.63."

"5. Are the defendants indebted to the interpleader Mrs. McDuffie on account of the bond and crop lien and chattel mortgage introduced; and if so, in what sum?" Ans.: $1,000 and interest, as shown by the note, less $300, as credited on note."

"6. Is the interpleader G. A. Stancil the owner, by virtue of the chattel mortgage and crop lien introduced by him, of the personal property in controversy, or any part thereof; and if only a part, what part?" Ans.: "Yes; of the mules and mare."

"7. What was the value of such personal property at the date of the seizure?" Ans.: "$335."

"8. Are the defendants indebted to the interpleader G. A. Stancil on account of the chattel mortgage and crop lien introduced; and if so, in what sum?" Ans.: "Yes; $550, with interest from 1 November, (466) 1900."

"9. As between the interpleaders, Mrs. L. E. McDuffie and G. A. Stancil, which has the first lien on the mules and mare in controversy?" Ans.: "G. A. Stancil."

Mrs. McDuffie introduced testimony tending to show the value of the property seized in this action. She also introduced a bond, dated 19 January, 1901, for $1,000 for agricultural advances, subject to a credit of $300; also bond for $1,000, payable to her, dated 11 January, 1900, the witness testifying that Mrs. McDuffie delivered the papers to her attorney, that she had them in her possession, that he was not and had never been her agent, that he did not know there was anything due on the note of 1900, that it was in the possession of the interpleader and not marked paid.

The interpleader Stancil put in evidence the original mortgage and lien made to him by defendants, recorded 5 March, 1900, for $750. He then introduced the defendant Thigpen, who testified that he did not owe anything on the note of 1900 to Mrs. McDuffie; that the note of 1901 was given to renew the note of 1900; that he borrowed $1,000 from her in 1898 and executed a mortgage on his property and crops; that each year he gave a new note and mortgage; that in 1901 he gave the note to D. E. Cobb for Mrs. McDuffie, who was away from home. "We had no agreement. I prepared a new note and lien and gave it to Cobb for Mrs. McDuffie. After she came back I asked Cobb to get it for me. Mrs. McDuffie boarded at his house. The note of January, 1901, was given to take up a prior note. It was given to renew a debt due 1 November, 1900." To this testimony Mrs. McDuffie excepted. The witness further testified that he executed a lien and mortgage to G. A. Stancil, and that there was due on it a balance of $550; that Mrs. McDuffie did not furnish any money to make the crop; that each year he would go to her

with a new note and mortgage, and that she was satisfied; that he kept the lien and paid her interest on it; that the team described in the mortgages of Mrs. McDuffie was the same as described in the mortgage to Stancil. (467)

The court charged the jury that if they believed the evidence, and if there was a balance due on the Stancil debt, he was entitled to recover the possession of the property, and that they should answer the sixth issue "Yes" and the ninth issue "G. A. Stancil." Mrs. McDuffie excepted. She assigns as error, first, the refusal of the court to permit her to amend her plea, and permitting the plaintiff to take a nonsuit; second, the instruction to the jury that the mules, etc., were the property of Stancil. She appealed from the judgment rendered.

G. M. T. Fountain and John L. Bridgers for appellant.
Gilliam & Gilliam for appellees.

CONNOR, J., after stating the facts: The assignments of error present but two questions for our consideration: First, the right of the plaintiff to withdraw from the action pending the controversy, by taking a nonsuit. He had, by the order of the court, at the institution of the action, procured the seizure of the property, and the defendants had retained it by filing the undertaking, which was available to the plaintiff only in the event of a recovery. While the complaint does not set out the source of the plaintiff's claim to the property, it does allege an indebtedness by the defendants, and they in their answer admit the execution of a mortgage to the plaintiff to secure the payment of the same indebtedness. It is also manifest from the pleadings that the controversy arose out of conflicting claims, based upon several mortgages executed by defendant Thigpen to the plaintiff and the interpleader. It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect (468) such titles. *McLean v. Douglas,* 28 N. C., 233. He does not, speaking with accuracy, become a party to the action in the same sense and with the same status as the original parties, or those made so pending the action either by the court *ex mero motu* or upon application. In *McKesson v. Mendenhall,* 64 N. C., 502, *Rodman, J.,* states the rule in regard to the rights of the original plaintiff to take a voluntary nonsuit: "The principle seems to be that a plaintiff may elect to be nonsuited in every case when no judgment, other than for costs, can be recovered against him by the defendant, and when such judgment can be recovered, he cannot." If the plaintiff had taken the property into his

possession and retained it, he could not, either as against the defendant or the interpleader, have submitted to a nonsuit and gone out of court by simply paying the costs. *Manix v. Howard,* 82 N. C., 125. In the case before us, the property having been retained by the defendants, it was open to the interpleader, by complying with the provision of section 331 of The Code, to either secure possession of the property or an undertaking for its delivery or the value thereof. It would seem to be clear that in no event could the interpleader recover any other judgment against the plaintiff than for costs. If he had received from the defendants crops to which the interpleader was entitled, he was liable therefor in a separate action. By moving for judgment of nonsuit, the plaintiff conceded that he was not entitled to the property in controversy. This was all that in any event the interpleader, as against the plaintiff, was entitled to. We are of opinion that his Honor properly permitted the plaintiff to submit to the nonsuit.

In *McKesson v. Mendenhall, supra,* it is held that, although nonsuited, the action would go on for the interpleader, and the person nonsuited would be bound by the result of the suit as privy thereto. This (469) is an additional reason for sustaining the ruling of the court below. The plaintiff is bound by his action, and cannot again assert title to the property. This in no degree affected the right of the interpleaders to litigate as between themselves the title to the property and their interests therein.

In regard to the second assignment of error, the instruction of the jury that the mules were the property of Stancil: We are of opinion that his Honor should have submitted to the jury the question as to the intent with which the second mortgage was executed by Thigpen and received by the interpleader. It will be noted that she held the mortgage on the personal property, recorded 27 January, 1900, and that on 2 February, 1901, the mortgagor signed and sent to her a mortgage by one D. E. Cobb. Cobb testified that he was not her agent and had never been, and that he simply delivered the mortgage to her. The defendant Thigpen testified that he executed a mortgage of January, 1900, and that he prepared a new note and lien and gave it to Cobb, January, 1901; that there was no agreement between them; that it was given to renew the debt due 1 November, 1900. She retained both notes and mortgages. It may well be that she accepted the note and mortgage of 1901 for the purpose of securing a mortgage on the crop of that year, retaining the original mortgage as the first lien on the personal property. Thigpen had executed a mortgage on the same property to Stancil, recorded 5 March, 1900. If she had notice of this mortgage, it would explain her conduct

in retaining her mortgage registered prior thereto. However this may be, it was a question for the jury to decide.

In *Smith v. Bynum,* 92 N. C., 108, it was held that when there was a settlement between the mortgagor and mortgagee, and a new note and mortgage taken, the property in the first mortgage was released. *Ashe, J.,* says: "If the plaintiff had not come to a settlement with the mortgagor and taken a new note with another mortgage to secure it, his lien under that mortgage would have continued, and he would have (470) had the right to recover in this action; but by his settlement, etc., the mortgage of January, 1882, was discharged." The decision is based upon the fact that the parties came to a settlement. In *Joyner v. Stancil,* 108 N. C., 153, the referee expressly found that Stancill "accepted said note in full satisfaction of and in payment of and in discharge of said Rountree & Co.'s note . . . and treated it as a discharge of preëxisting securities." *Shepherd, J.,* after reviewing the decision, says that "The finding of the referee is explicit upon this point, that the new note was accepted in full satisfaction of and in payment of the former one." These cases are distinguished from *Hyman v. Devereux,* 63 N. C., 624; *Vick v. Smith,* 83 N. C., 80, and *Collins v. Davis,* 132 N. C., 106, by the fact that a settlement was had and a new note taken in payment of the discharge of the original. The general rule is well settled that the taking of a second note and mortgage, of itself, does not discharge the original security, unless it is intended so to operate. Jones on Mortgages (6 Ed.), sec. 924. "Whether a new note shall be treated and have effect between the parties as a payment of a former one for which it is substituted will depend upon the purpose and understanding of the parties to the transaction; but not only will the intention of the parties be determined by the express agreement of the parties, but, in the absence of this, by the circumstances attending the transaction from which such intention may be inferred. . . . In the absence of any express agreement and of any circumstances showing intention, the renewal of the note does not affect the security. The burden is upon the mortgagor to show the existence of an agreement that the mortgage lien should be released upon the execution of the new note, and not upon the mortgagee to show an agreement that the mortgage should continue as a security for the debt covered by the new note." *Ibid.,* (471) sec. 926. Again, "the taking of further security for the mortgage debt, whether it be by a second mortgage upon the same land or real or personal security upon other property, is generally no waiver of the original mortgage." *Ibid.,* sec. 929.

There was evidence fit to be considered by the jury upon the issue, with what intent Thigpen executed and Mrs. McDuffie received the note

and mortgage of 1 January, 1901. This exception of Mrs. McDuffie, therefore must be sustained, and a new trial ordered upon the third, sixth, and ninth issues. In view of our decision, we are of opinion that the costs should be divided equally between the appellant Mrs. McDuffie and the interpleader Stancil.

New trial.

Cited: *Forbis v. Lumber Co.*, 165 N. C., 407.

(472)

CARRAWAY v. STANCILL.

(Filed 8 March, 1905.)

Bond for Rents and Profits—Judgment by Default—Judicial Sales.

1. The trial judge, in his discretion, may permit a defendant at the trial to file the bond required by section 390 of The Code.

2. The bond required by section 390 of The Code does not apply to a defendant who is not in possession of the land in controversy.

3. In an action for debt and foreclosure and to recover land, brought against the administrator and heirs at law of a deceased mortgagor and against a defendant who claimed title under a judicial sale to foreclose the mortgage referred to in the complaint, and who is in sole possession and resisting in good faith the action, and is the only defendant interested in the result of the action, it was not error in the trial judge, in his discretion, to refuse a motion for judgment by default against the administrator and heirs at law who failed to answer or file bond, where granting the motion would have been a serious disadvantage to the contesting defendant.

4. A purchaser at a judicial sale has a right to look to the court to protect him. Courts of equity do not knowingly offer a disputed and litigated title for sale to the public.

ACTION by George W. Carraway and others against G. A. Stancil and others, heard by *Councill, J.*, at November Term, 1904, of PITT, upon motion by plaintiffs for judgment by default against certain defendants. From a refusal to grant the motion, the plaintiffs appealed.

George M. Lindsay for plaintiffs.
Moore & Fleming for defendant Stancill.

BROWN, J. The plaintiffs moved the court in writing for judgment under section 390 of The Code "for the failure of the defendants to file a bond required by law for defendants in action to recover land; as against G. A. Stancill for recovery of the land described in the (473) complaint, without damages; and as against all of the defendants, except G. A. Stancill, for judgment by default final for the debt set out in the complaint, and for foreclosure of the mortgage set out in the complaint, upon the ground that the defendants, other than G. A. Stancill, have been duly made parties and served with process, and the plaintiffs having filed their verified complaint and the defendants having failed to appear either in person or by attorney, and having failed to file any bond or answer or demurrer." The court permitted the defendant Stancill, who is solely in possession of the land, to file the bond required. The motion was denied by his Honor, and as he states in the order, in his discretion. Plaintiffs excepted and appealed.

Notwithstanding the able and well-considered argument of Mr. Lindsay for the plaintiffs, we have no difficulty in reaching a conclusion that the court below committed no error.

It appears from the pleadings that on 5 February, 1878, B. S. Atkinson executed a deed of mortgage to his mother, S. V. Whitehead, for $19,200, with interest at 8 per cent from date. Atkinson died intestate in 1884 and the defendant S. V. Joyner qualified as his administrator, and the other defendants (except G. A. Stancill) are his widow and heirs at law. His estate has never been settled. Prior to her death, which occurred in December, 1895, S. V. Whitehead instituted an action to foreclose said mortgage against the widow and heirs at law of Atkinson, which action was pending at her death; she made a will in which she devised and bequeathed to her granddaughter, Inez B. Carraway (*née* Atkinson), one of the plaintiffs, all of her property, real, personal, and mixed, and appointed R. L. Davis her executor. He proved the will and made himself a party to the action to foreclose the mortgage, and at November or December Term, 1897, of PITT Superior Court, a consent judgment was rendered. The plaintiff Inez B. Carraway, (474) sole devisee and legatee for life under said will, claims that she was not made a party to the action. The judgment provided for a sale by a commissioner of the land conveyed by the mortgage. The sale was made by the commissioner, and the defendant G. A. Stancill became the purchaser. The sale was reported and confirmed and Stancill went into possession, and is still in sole possession. This action is brought by G. W. Carraway and wife, Inez, George M. Lindsay, administrator *d. b. n. c. t. a.* of S. V. Whitehead, to recover the land and damages for waste as against G. A. Stancill, and to recover the debt due by the mort-

gage and for foreclosure as against the defendants, the administrator and heirs at law of B. S. Atkinson. The defendant Stancill employed counsel to file an answer. The administrator and heirs at law filed neither answer nor bond.

From these facts appearing in the complaint of the plaintiffs and the answer of the defendants Stancill, it will be seen that the plaintiff Inez Carraway seeks to recover possession of the land from defendant Stancill, and in the same action G. M. Lindsay, administrator of S. V. Whitehead, seeks to recover a judgment on a certain note and to foreclose a mortgage securing said note on the same land, which note and mortgage were given to S. V. Whitehead by B. S. Atkinson, deceased, who was a former owner of the land. The defendant Stancill is the only person in possession of the land, and as far as we can see is the only defendant who is interested in setting up a defense and traversing the allegations in the complaint.

It is true, the defendant Stancill had not filed the bond required by section 390 of The Code securing the rents and profits of the land, but his Honor in his sound discretion permitted it to be filed, and therefore the plaintiffs properly asked no judgment against Stancill. Clark's
(475) Code (3 Ed.), sec. 390, and cases cited. The bond required by section 390 is not for costs only, but secures to the plaintiff such damages as he may sustain in the loss of rents, and may be increased in the discretion of the court if the defendant shows a disposition to delay the trial. It is not required to be given by the defendant in an action where the plaintiff alleges that such defendant is not in possession of the land, and is not therefore in receipt of the rents and profits. Therefore, the fact that defendants, other than Stancill, had failed to file such bond was no ground for judgment against them. The failure of Stancill's codefendants to file an answer should not be allowed to prejudice him, and his Honor acted with a due regard to the merits of the controversy in exercising a sound and wise discretion in refusing the plaintiff's motion.

We have carefully examined the cases pressed upon our attention by Mr. Lindsay and cited in his brief. None of them are of value in determining this motion. *Hall v. Hall,* 131 N. C., 186, was an action for divorce, and decides among other things that an appeal lies from the refusal of a judgment to which a party is entitled. The plaintiff's right to his appeal in this case has not been questioned. *Timber Co. v. Butler,* 134 N. C., 50, was an action to remove a cloud from title. *Griffin v. Light Co.,* 111 N. C., 434, was a motion for judgment upon a failure or refusal to verify a complaint. *Curren v. Kerchner,* 117 N. C., 264,

was an action on two notes, the liability on one of which the defendant had not denied. None of those cases are pertinent.

It is claimed by the defendant Stancill that he purchased the land at a large price at a judicial sale to foreclose the S. V. Whitehead mortgage referred to in the complaint; that he has paid the purchase money and that it was applied to the discharge of B. S. Atkinson's debts, which were liens on this land; that the plaintiff Inez Carraway received the benefit of it, and that when he purchased he had the right to (476) believe the court was giving him a good title. He further claims that the plaintiff Inez was a party to that action and is bound by the decree in it. It will be observed that one of the plaintiffs is now endeavoring to get judgment as administrator of S. V. Whitehead against the administrator and heirs of B. S. Atkinson upon the same debts embraced in the decree under which Stancill bought, and also to foreclose the same mortgage again, and to have another judicial sale, and offer the same land to an uninformed public by a decree in this cause, utterly regardless of the possibility that Stancill may establish a good title to the land and the innocent purchaser get nothing.

Courts of equity do not knowlingly offer a disputed and litigated title for sale to the public, and especially by decree in the very action in which one of the defendants sets up a bona fide title to the land. Bidders and purchasers at execution sales have to look out for themselves, and they get only such title as the sheriff can convey. They may get something; they may get nothing; they know this when they bid. Judicial sales are decreed and conducted upon entirely different principles. Under such sales the purchaser has a right to look to the court to protect him. If the title fails and the money is still in *custodia legis,* the court will refund it or make such orders and decrees as are necessary and proper to perfect the title, if that be practicable. If the court had made the decree asked for, it would really be perpetrating a wrong on the public in ordering a judicial sale of a tract of land the title to which is energetically contested in this very action.

Besides, it would be a gross injustice to the defendant Stancill, who is really the only defendant, so far as we can see, interested in the result of the action. All the other defendants, as well as the plaintiff Inez and the former administrator of S. V. Whitehead, as Stan- (477) cill avers, have received their money from him for the interest they had formerly owned in the land. To grant the plaintiff's motion would be a serious disadvantage to Stancill, and possibly a fatal one, in working out the equities Stancill will doubtless invoke in case his legal title fails. In such event he may seek to be subrogated to the original rights of S. V. Whitehead under her mortgage; he may seek to charge

the land with the purchase money he has paid, upon the ground that it discharged liens on the land. A judicial sale of the land before the title is settled would put a cloud upon the title, and if Stancill should win, this cloud would be hanging over his title and he would be compelled to seek the aid of the court in removing it. The judgment of the Superior Court is

Affirmed.

Cited: *Whitlock v. Lumber Co.*, 152 N. C., 194.

(478)

MEREDITH v. RAILROAD COMPANY.

(Filed 8 March, 1905.)

Carriers—Intermediate Points—Contract of Carrier—Damages and Delay—Presumption—Burden of Proof.

1. Chapter 590, Laws 1903, does not supersede or alter the duty of a carrier at common law, but merely enforces an admitted duty and superadds a penalty.

2. Chapter 590, Laws 1903, providing that a carrier shall not allow any freight to remain at any "intermediate point" for more than forty-eight hours, does not authorize the carrier to hold it at each of such points the extreme limit, without any necessity for detaining it at all; and fourteen days consumed in carrying household goods from one point to another in the State, a distance of 277 miles, with only one terminal point requiring change, is unreasonable.

3. Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier.

4. In an action against a carrier to recover damages for delay and injury to goods, upon proof that the goods were accepted for transportation in good condition by defendant and delivered by a connecting carrier to plaintiff at destination, after an unreasonable delay, in a damaged condition, the court should have submitted the case to the jury, and in the absence of any evidence by defendant rebutting the *prima facie* case, should have instructed the jury that they would be justified in finding that the delay and injury occurred while the goods were in defendant's possession.

5. When it is proved that goods delivered for shipment are shown to have been injured while in the possession of the defendant carrier, the law raises a presumption that such injury was caused by the negligence of the defendant.

6. On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power.

ACTION by George W. Meredith against the Seaboard Air (479) Line Railroad, heard by *Councill, J.,* and a jury, at November Term, 1904, of CRAVEN.

The plaintiff, on 16 February, 1904, delivered to the defendant railway company at Charlotte, N. C., a quantity of household goods and furniture, to be shipped to New Bern, N. C., and prepaid the freight thereon to the last-named point. On 3 March, 1904, the goods, etc., were delivered to the plaintiff at New Bern, by the A. C. L. Railroad Company in a damaged condition. Plaintiff testified, and for the purpose of disposing of this appeal his testimony is to be taken as true, that the furniture was carefully packed. That he told defendant's agent at Charlotte that the goods consisted of his household furniture and clothing of his family, and he would like to have them shipped by first train. That he received the goods on the morning of 3 March—they having arrived on the afternoon of 2 March. That Charlotte is 187 miles from Wilmington, the terminus of defendant's road. That Wilmington is 90 miles from New Bern. That Wilmington is the starting point of the A. C. L. Railroad. The plaintiff offered testimony in regard to the damage sustained. He proposed to show the condition of the goods upon their arrival at New Bern as compared with the condition when delivered to the defendant at Charlotte. Objection by defendant. The court asked plaintiff's counsel if he proposed to offer evidence tending to show that the goods were in a damaged condition when delivered by the defendant to the A. C. L. Railroad Company. Counsel replied that he had no evidence on the point, but relied on the length of time shipments were on defendant's road to infer the injury which he wished to show occurred. The court sustained the objection. Plaintiff excepted.

Testimony was introduced in regard to the damage sustained (480) by plaintiff. The record presents several exceptions based upon the exclusion of evidence of special damages. At the conclusion of the evidence the defendant moved for judgment of nonsuit. Motion allowed. Plaintiff excepted and appealed.

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

CONNOR, J., after stating the facts: The plaintiff sues for injury to his goods and for damages sustained by unreasonable delay in their de-

livery. The grounds upon which judgment of nonsuit was rendered do not appear upon the record. From the defendant's brief we gather that it was contended that the delay was not in excess of the time allowed by chapter 590, Laws 1903, and Rule 10 of the Corporation Commission deducting the number of days allowed for "intermediate points," Sundays and holidays. The act of 1903 provides that the carrier shall not omit or neglect to transport goods received by it and billed, for a longer time than four days, nor allow any such goods to remain at any intermediate point for more than forty-eight hours, unless otherwise provided for by the Corporation Commission. For a violation of the act the party aggrieved may sue for a penalty. It is to be noted that the basis of this action is the alleged breach of the duty imposed by the common law upon carriers to safely carry and, within a reasonable time, deliver goods tendered them for that purpose. For failure to perform this duty the person injured has a cause of action in which he may recover such damages as he sustained within the reasonable contemplation of the parties to the contract. To this common-law duty the Legislature added a statutory duty, fixing, for that purpose, a definite time within which such duty should be performed, giving to the person injured an action for a fixed penalty. "The act does not supersede or alter the
(481) duty of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty." *Branche v. R. R.*, 77, N. C., 347. Neither the construction of the act of 1903 nor the rule made by the Corporation Commission are before us for construction. What is meant by the words "intermediate points" is not very clear. It would work a singular result if they should be so construed that an act intended to enforce "an admitted duty" and expedite shipment of freight should give to a common carrier the right to consume fourteen days in carrying household goods which it was requested "to ship by first train"—a distance of 277 miles—with only one terminal point requiring change. We should be slow to hold that because the statute prohibits the carrier from holding the goods more than forty-eight hours at "any intermediate point," it could—without any suggestion that there was any necessity for detaining it at all—hold it for the extreme limit at each of such points, or that in these days of rapid transit the carrier could be said to discharge its duty by consuming fourteen days, deducting two Sundays and a holiday, to carry goods from Charlotte to New Bern in this State. The plaintiff's right to maintain the action is clear. The plaintiff did not introduce any bill of lading, therefore the contract of carriage is dependent upon the construction given to his testimony. He says: "I had my furniture carefully packed and had it delivered to the defendant's depot at Charlotte, N. C.,

for shipment on 16 February, 1904. I was along at the time of delivery. I received a bill of lading; I told the agent that the goods consisted of my household and kitchen furniture and clothing of my entire family, and that I would like for him to ship by first train. The Coast Line Railroad delivered the goods to me in New Bern. When I delivered my freight the agent, before he would receive the shipment, demanded and rquired me to prepay the charges on them, which I did." The (482) goods could have arrived from Charlotte to New Bern in three days if shipped. The defendant admits the receipt of goods at Charlotte, N. C., to be shipped to plaintiff at New Bern. It does not admit the quantity or value. The questions presented by the testimony are, What was the contract between plaintiff and defendant? What duty was assumed by defendant, and upon whom does the burden of proof rest to show the breach thereof? The motion for nonsuit admits that the goods were delivered to and received by the defendant company at Charlotte on 16 February, 1904, for shipment to New Bern; that they were delivered to plaintiff by the A. C. L. Railroad at New Bern on 3 March, 1904, in a damaged condition. That Wilmington is the terminus of defendant road and that the A. C. L. Railroad is the connecting line from Wilmington to New Bern. That the goods could have arrived from Charlotte to New Bern in three days if shipped. No bill of lading or other writing was introduced by either party. We are called upon to decide the questions presented by invoking the principles of the common law respecting the relative rights and duties of the parties. If we were permitted to be guided by the law as declared in *Muschamp v. R. R.*, 8 Mees. and W., 421, we should find no difficulty in holding that, upon the facts testified to by the plaintiff, the defendant contracted to carry the goods from Charlotte to New Bern and was liable for any unreasonable delay in doing so and any damage to the goods, whether such delay or damage occurred while in its possession or in the possession of A. C. L. Railroad Company. This is the settled English rule which has been adopted by many courts in this country. It must be conceded, however, that a majority of the American courts, including the Supreme Court of the United States, have not followed *Muschamp's case.* Hutchison on Carriers, sec. 149; 6 Cyc., 479. The doctrine known as the (483) American Rule is thus stated: "In the absence of any other contract than such as is generally to be implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the transportation to the end of its route and a delivery then to the next succeeding carrier to further or complete the transportation. In order to be bound further, there must be a positive agreement, either express or implied, extending the liability." Hutchison on Carriers, sec. 149.

Among the cases cited to sustain the text are *Phillips v. R. R.*, 78 N. C., 294; *Knott v. R. R.*, 98 N. C., 73. The question has received the most careful consideration by many of the ablest courts in this country. The cases discussing and holding the several views will be found collected in Hutchison on Carriers, note to sections 148, 149; also in 6 Cyc., 479, 480. *Phillips v. R. R., supra,* has been frequently cited with approval by this Court, and while several of the cases may be distinguished from the one before us, we are not disposed to disturb the conclusion reached in that case. *Phifer v. R. R.*, 89 N. C., 311; *Weinberg v. R. R.*, 91 N. C., 33.

Smith, C. J., lays down the proposition which he regards as established in respect to the liability of carriers for goods shipped beyond their lines. He concludes as follows: "Where no association exists and no special contract is made, and goods are delivered to a road for transportation over it, though to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road, and then delivering to the next connecting road in the direct and usual line of common carrier toward the point of ultimate destination." *Phillips v. R. R., supra, Lindley v. R. R.*, 88 N. C., 547. Accepting this as the correct construction of the contract, the defendant road assumes the duty of safely carrying, within a rerasonable time, the plaintiff's goods to the end
(484) of its line and delivering them in like condition to the connecting carrier. Plaintiff contends that, having shown the delivery of the goods in good condition, the delay in the shipment, and the damaged condition in which they were delivered to him at New Bern, he established a *prima facie* case, and casts upon defendant the duty of showing that such delay and damage did not occur while the goods were in its possession. It must be conceded that the question thus presented is not free from difficulty. The defendant insists that the plaintiff having alleged a breach of duty, it is incumbent on him to establish it, and that the goods having been received by it in good condition, there is a presumption that such condition continued and that it discharged its duty, which prevails until rebutted by testimony on the part of the plaintiff. The plaintiff invoked the well-established principle that a party is not bound to prove a negative, nor a fact peculiarly within the knowledge of the opposite party. The rule is thus stated in 1 Elliott on Evidence, 141: "As a rule, it is only where the fact negatived is peculiarly within the knowledge of the adversary that the burden is in any sense shifted to the latter, and even then it is the burden of going forward rather than the burden of ultimately establishing the case. The fact that the party having peculiar knowledge of the matter fails to bring it forward, may raise a presumption or justify an inference in favor of his adversary's

claim, and thus to shift the burden of proceeding in order to win, but the burden of establishing the issue is not shifted, nor is it ordinarily determined in the first instance by the mere fact that a negative is involved or that some fact is peculiarly within the knowledge of the adverse party."

The principle is stated by *Mr. Justice Brown* in *U. S. v. R. R.*, 191 U. S., 84, thus: "When a negative is averred in the pleading or the plaintiff's case depends on the establishment of a negative, and the means of proving the fact are equally within the control of each (485) party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party who is in possession of the proof should be required to adduce it; but upon his failure to do so we must presume it did not exist, which of itself establishes a negative." He further says: "This burden, however, which was simply to meet the *prima facie* case of the Government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff." The exact question was considered by the Supreme Court of Vermont in *Brintnall v. R. R.*, 32 Vt., 665, *Poland, J.*, saying: "The argument is, that showing the box did not arrive at Boston, the end of the route, but was lost, does not prove or tend to prove the defendants did not deliver it to the next carrier, because it might have been lost between Castleton and Boston. It must be admitted that it is very inconclusive proof of the fact, but still we think it has some tendency to establish it. The box is proved to be in the hands of the defendants; there is no evidence that anybody else ever had it, or that it was ever in the possession of any other carrier in the line. The usual and ordinary course of things, what is always expected and what generally proves true, is that goods forwarded upon such a line arrive at their destination, and therefore the fact that goods do not arrive at one end of the line is some evidence they were not sent from the other. . . . But we place it upon the ground mainly that this was really all the proof the nature of the case permitted to the plaintiff, and that proof of a delivery by the defendants to the next road was a matter that was peculiarly within the power of the defendants, and not at all in the power of the plaintiff, unless the defendants and the connecting roads (486) preserved evidence of the transfers of all freight from one road to another." "And on proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the con-

signee, it being peculiarly and almost solely within its power to make such proof." 3 Wood on Railroads, 1926; *R. R. v. Tupelo Co.*, 67 Miss., 35; *R. R. v. Emrich*, 24 Ill. App., 245.

In *Brintnall's case*, the goods having been lost, the question arose upon which of the several connecting roads the loss occurred. We can see no reason why the same rule adopted in that case should not apply where the delivery is delayed or the goods damaged. The reason of the law is the same in both cases—the knowledge or information in respect to the time and place of loss, injury, or delay being peculiarly within the knowledge of the defendant. 1 Greenleaf Ev., sec. 79.

This Court has applied the principle in prosecutions for sale of liquor without license. *S. v. Morrison*, 14 N. C., 299; *S. v. Emery*, 98 N. C., 668. To indictments for entering upon land without a license. *S. v. Glenn*, 118 N. C., 1194. The principle is also illustrated in *Ellis v. R. R.*, 24 N. C., 138. This was an action for damages sustained by burning the plaintiff's fence. It was shown that the fence was burned by the defendant's engine. It introduced no evidence to show what care was used to prevent the injury, and *Gaston, J.*, for the Court, held that the *prima facie* case of negligence entitled the plaintiff to recover, unless rebutted by evidence of the exercise of care. *Aycock v. R. R.*, 89 N. C., 321. In *Lindley v. R. R., supra, Smith, C. J.*, said: "The obligation resting on each attaches as the goods pass into its custody, and ceases only when safely carried and delivered to its successor."

This case comes clearly within the rule which throws upon the defendant the burden of showing, or at least introducing evidence
(487) tending to show, that it has discharged its duty. The goods are placed in the defendant's care and control, put into its car, carried over its road, and delivered to its agent at Wilmington. The plaintiff could not accompany them on the route, nor is it possible for him to show, save by the agents and the books of the defendant, the time of delivery or their condition when delivered to the Atlantic Coast Line. It is said that he should seek for his evidence from the latter road. The same difficulty confronts him. He would find it a difficult undertaking to show the fact. He would not know which of its agents to summon, or what paper, books, or records they should bring. On the contrary, it is not unreasonable to assume that when the goods were delivered to the Coast Line the defendant took a receipt for them, showing date and condition of the goods, and that this is in its possession. We can see no reason why it should not be required to repel the *prima facie* case, as was the trespasser or retailer who relies upon a license. In *Burwell v. R. R.*, 94 N. C., 451, *Merrimon, J.*, says: "The receipt and manifest were evidence going to prove a *prima facie* liability against it (the defendant), but were not conclusive." In *Mitchell v. R. R.*, 124 N. C.,

236, the principle is applied in an able and exhaustive opinion by *Mr. Justice Douglas.* It is true that he was discussing the question in respect to the burden of proof as applied to the last carrier, but we can see no reason why the same rule does not apply when the first or contracting carrier is sued. In both cases the plaintiff's cause of action is based upon the assumption of a duty and the breach thereof. The same reason which requires the last carrier to show performance of the duty applies with equal force to the first—that the sources or means of proving the exculpating facts are peculiarly within its knowledge, and not otherwise open to the plaintiff. It would be a difficult if not a vain undertaking on the part of the plaintiff to locate the time and place at which his goods were injured, or their delay of fourteen (488) days occurred. Every reason which justifies the rule as to the first carrier applies with equal force to the other. It assumed the duty of safely, and within a reasonable time, conveying the goods to Wilmington and delivering them to the Coast Line. For some reason, and by some one's default unknown to the plaintiff, the goods were delayed many days, while he with his family of wife and children were at New Bern without furniture or clothing. The time, place, and cause of delay are known to the defendant, or at least, if not occurring while in its control, the proof thereof is in its possession; it cannot be that it may admit the facts testified to by the plaintiff and withhold the facts in its own possession. To permit this, the law would "keep the promise to the ear and break it to the heart." If we felt ourselves impelled to sustain the defendant's contention in this respect, we should not hesitate to return to the doctrine of the English courts and simplify the matter by holding, as we think there would be good reason for doing, that the contract, in the absence of any stipulation to the contrary, was one of carriage for the entire route.

When this Court adopted the view maintained by the defendant in *Phillips' case, supra,* which permitted the first carrier to deliver the goods to the connecting carrier and relieve itself of further liability, we feel quite sure that it did not contemplate that the first or contracting road, as in this case, receiving the entire cost of transportation, could compel the shipper to cast about in the dark seeking for some one to sue, when his goods were unreasonably delayed and delivered in a damaged condition.

Chapter 46, Laws 1897, has no application to this case. In the absence of any bill of lading limiting liability, the defendant was an insurer of the goods, and hence liable for the damage if it occurred on its line. We fail to see that the act works any change in the law. It is uniformly held by the courts that when it is shown that goods delivered for shipment are shown to have been injured (489)

while in the possession of the defendant carrier, the law raises a presumption that such injury was caused by the negligence of the defendant. The question here is as to the mode of proof that the goods were delayed or injured while in the defendant's possession. His Honor should have permitted the plaintiff to show, if he could, the damage, etc., and in the absence of any testimony by defendant, he should have instructed the jury that they would be justified in finding that such delay and injury occurred while the goods were in the defendant's possession.

We forbear to discuss the exceptions to the exclusion of other testimony. We simply hold that there was error in excluding the proposed testimony in regard to the condition of the goods when delivered to the defendant at Charlotte and when delivered to the plaintiff at New Bern and in directing judgment of nonsuit.

Error.

Cited: Furr v. Johnson, 140 N. C., 161; *Moore v. McClain,* 141 N. C., 478; *Overcash v. R. R.,* 144 N. C., 578; *Furniture Co. v. Express Co., ib.,* 645; *Walker v. Carpenter, ib.,* 681; *Davis v. R. R.,* 145 N. C., 214; *Watson v. R. R., ib.,* 239; *Allen v. R. R., ib.,* 41; *Robertson v. R. R.,* 148 N. C., 324; *Jones v. R. R., ib.,* 452; *Jones v. R. R., ib.,* 583; *Kissenger v. Fitzgerald,* 152 N. C., 253; *Boss v. R. R.,* 156 N. C., 74; *Beville v. R. R.,* 159 N. C., 229; *Bell v. R. R.,* 163 N. C., 184; *Lyon v. R. R.,* 165 N. C., 146; *Brinson v. R. R.,* 169 N. C., 431; *Mewborn v. R. R.,* 170 N. C., 207; *Ange v. Woodmen,* 173 N. C., 37; *Trading Co. v. R. R.,* 178 N. C., 179; *Singleton v. Roebuck, ib.,* 204.

DISOSWAY v. EDWARDS.

(Filed 8 March, 1905.)

Bond—Penalty—Stipulated Damages.

Where a bond in a certain sum is given, conditioned upon an agreement not to engage in a particular business, there is a presumption that it was a penalty and was not intended to cover stipulated damages, and it must be left to the jury to determine from the evidence whether said sum was intended as stipulated damages.

ACTION by Mark Disosway against A. M. Edwards, heard by *Council, J.,* and a jury, at October Term, 1904, of CRAVEN. From (490) a judgment for the plaintiff, the defendant appealed.

No counsel for plaintiff.
W. D. McIver for defendant.

CLARK, C. J. The defendant sold out his liquor business in New Bern to the plaintiff and stipulated that he would not engage in said business in the limits of said town for the space of twenty years. He executed his bond in the sum of $1,000, conditioned that if he should violate that stipulation, "then this bond to be in full force and effect . . . otherwise, to be null and void." The first issue was whether such bond was in substance an agreement to "pay the plaintiff the sum of $1,000 as stipulated damages for the breach" of such stipulation. The court charged that the question for the jury was whether such contract (to pay stipulated damages), "the language of which is the substance of the bond entered into between the parties," was entered into at the time of contract of sale made by the defendant to the plaintiff, that is, whether it was part of the trade and understanding between the parties. This was error. It was not merely essential that such contract should be made, as a part of the contract of sale, but it must appear that the $1,000 was for stipulated damages, and not a penalty.

When the case was here before (134 N. C., 254) the Court pointed out that the $1,000 bond did not state that it was intended to cover stipulated damages; that the presumption was that it was a penalty, and this could be overcome only by evidence. And in *Wheedon v. Bond and Trust Co.*, 128 N. C., 69, it was held that even if it had been stated that it was for "liquidated damages," that it would not be conclusive, but the true intention of the parties must be ascertained, whether in truth the sum stated was not in fact a penalty against which the courts would relieve upon ascertainment of the true damages. (491) It is true, the second issue left it to the jury to determine whether stipulated damages were intended, but the judge on the first issue had already told them that was the purport of the bond. There are other exceptions, but it is not necessary to discuss them.

Error.

KING v. BYNUM.

(Filed 8 March, 1905.)

Hearsay Evidence—Trust—Issues.

1. In an action brought to convert defendants into trustees of land for plaintiffs' benefit, testimony as to the general understanding prevailing among the bidders at a sale, not based upon personal knowledge of the

fact gathered at the sale, but merely upon information derived from others after the sale, is incompetent, as hearsay, and in this instance was very material and highly prejudicial to the defendants.

2. Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it.

3. In an action to establish a trust and for an accounting it is proper to submit an issue to ascertain the entire rents and profits, and not merely three years rents and profits preceding suit, as they can be charged off against any claim asserted by defendants for the purchase money and betterments.

CONNOR, J., dissents.

ACTION by T. B. King and others against A. S. J. Bynum and others, heard by *Councill, J.,* and a jury, at November Term, 1904, of PITT.

This was an action brought for the purpose of having the defendants declared trustees for the use and benefit of the plaintiffs, as their (492) interest might appear, in the land described in the complaint, and for an accounting for the rents and profits received from said land.

The court submitted the following issues tendered by the plaintiffs, to which the defendants excepted:

1. Did the defendants purchase the land described in the complaint for the joint use and benefit of themselves and the plaintiffs, their cotenants, as alleged in the complaint?

2. What amount in rents and profits have the defendants received from said lands since the purchase thereof?

The defendants tendered the following issue:

Did the defendants purchase the lands in controversy under a parol agreement with the plaintiffs, which was subsisting at the time of the sale, to hold said lands in trust for the plaintiffs and defendants, and to convey said lands to the plaintiffs upon their payment to the defendants the purchase price of said lands?

His Honor declined to submit the issue tendered by the defendants, to which the defendants excepted.

The other facts and exceptions are stated in the opinion.

Skinner & Whedbee and Moore & Fleming for plaintiffs.
Jarvis & Blow for defendants.

BROWN, J. Although the record in this case is voluminous and the exceptions many, a brief statement only is necessary to a proper understanding of the exceptions of the defendants sustained by this Court, in consequence of which a new trial is made necessary.

R. A. Bynum, deceased, by his will devised the land described in the pleadings to the plaintiffs and defendant as tenants in common owning equal interests therein. The executor of R. A. Bynum, to wit, J. N. Bynum, instituted a special proceeding to sell this and (493) other tracts of land belonging to the testator's estate to pay debts. At the sale made in pursuance of the decree in said proceeding, the defendant A. S. J. Bynum, called Zeb Bynum, purchased the tract of land described in the complaint, known as the "Askew land," for $800, and had it set down to himself and his brother and codefendant, Ben. Bynum. They paid the purchase money and a deed was made to them by the executor.

The *feme* plaintiffs, Mary King and Priscilla Turnage, bring this suit to convert said defendants into trustees for their benefit in respect to one undivided fourth, each, of the land. The plaintiffs allege that they are tenants in common with the defendants; that the land was sold to pay the assessment agreed upon as necessary to liquidate the testator's debts; that the *feme* plaintiffs were minors and their mother was their general guardian; that she was aged and infirm and relied solely on Zeb Bynum, her son, to attend to her business affairs; that Zeb Bynum attended to the proceeding to sell the land and represented the interests of the plaintiffs; that he agreed that this Askew land should be assessed at $800, and agreed with his mother to buy it in for the benefit of all the owners thereof. The plaintiffs further alleged that it was known at the sale that the land was to be bid off for the mother by Zeb, and in consequence no one bid, and Zeb secured the land at $800, worth $2,500. Upon the trial the court below submitted two issues, one of which is: "1. Did the defendants purchase the land described in the complaint for the joint use and benefit of themselves and the plaintiffs, their cotenants, as alleged in the complaint?" Upon the trial of that issue much evidence was introduced.

We do not deem it necessary to consider the many interesting questions argued, or to pass upon all the exceptions in the record. As a new trial is to be had, they may not again arise.

There is one exception in the record which we feel compelled (494) to sustain. That relates to the erroneous admission of evidence, and the error is of sufficient importance to justify another trial. Exception 7. P. J. Bynum testified for the plaintiffs that he was at the sale, and that "he did not know whether there was any general understanding among bystanders present as to who was bidding for the land, for whom it was to be bid in, and to whom it was cried off." In response to another question, he again stated that he did not know "whether it was talked or understood among those present at the sale that the land was to be bought for all the children of J. P. Bynum.

(meaning the plaintiffs and defendants), and did not know that was the reason the land did not bring a larger price at the sale." This witness was then asked by the plaintiffs, "Why was it that the land you say was worth $2,500 did not bring but $800 at the sale?" The witness answered: "The reason was that it was understood my mother was going to buy the land for the children, and people did not want to bid against her, at least several told me so." The question and answer were both objected to in apt time by the defendants, and their objections were overruled and they excepted. In the admission of this evidence we are of opinion there is reversible error, the evidence being incompetent, very material, and well calculated to influence the jury in a manner prejudicial to the defendants.

The objection to the evidence is that it is hearsay. We are of opinion that the evidence comes clearly within the rule prohibiting hearsay evidence, and that it is hearsay of a vague and indefinite character. The evidence of a person present at the sale as to what was done at the time of the sale and as to the general understanding prevailing among the bidders and bystanders, tending to explain why the land sold for so small a price, is competent. We do not mean to hold otherwise. This witness does not pretend to testify to that. He states he was at the sale, but from his answers to the questions asked him it is plain (495) he did not undertake to testify to what occurred there. In response to questions by the plaintiffs for the purpose of eliciting such information, he stated he did not know.

He was permitted, over the objection of the defendants, to state that several persons told him why it was the land sold for so little, viz., because it was understood the mother was to buy the land for the children. From the entire testimony of this witness, we are bound to conclude he referred to what "several persons" told him after the sale. This is evidently hearsay, the words not implying personal knowledge of the facts, but merely information derived from others. *Snodgrass v. Caldwell,* 90 Ala., 323.

It is not under oath, not subject to cross-examination, not a part of *res gestæ,* and not in the presence of the defendants, and could not be corroborative. The witness does not even give the names of those "several persons" who told him. "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 A. & E. (2 Ed.), 520, and cases cited; *Coleman v. Southwick,* 9 Johns. (N. Y.), 45; *S. v. Haynes,* 71 N. C., 79. There are exceptions to this general rule excluding hearsay evidence laid down in the text-writers on evidence, such as admissions, confessions, dying declarations, declarations against interest, ancient

documents, declarations concerning matters of public interest, matters of pedigree, and the *res gestæ*. The most ingenious mind can hardly bring the testimony pointed out within any recognized exception to the general rule excluding hearsay evidence. 1 Greenleaf Ev., ch. 6 (13 Ed.), gives the recognized exceptions to the general rule. *Cheek v. Watson,* 85 N. C., 196, is relied upon by the plaintiffs. The distinction is very apparent. In that case *Chief Justice Smith* says: "It would seem this general impression controlling the conduct of (496) bidders was susceptible of proof as a fact in the case. . . . If the offer was to ascertain from the opinion of one witness the opinion of others, it was properly refused. If the purpose was to prove as a fact the influence operating on a large number of others, which restrained the brother-in-law from participating in the sale, it was certainly competent evidence in charging the estate thus acquired with a trust." This authority is well sustained by *Judge Gaston's* opinion in *Neely v. Torian,* 21 N. C., 410.

The witness Bynum did not testify to what was the general understanding at the sale, as a fact. Under the high authority quoted, that would have been competent, had he known of his own knowledge gathered at the sale. He had already stated twice that he did not know what that general understanding was, and it was in response to the repeated questions of the plaintiff's counsel that he stated finally why the land brought so little, and qualified what he said with the words, "at least several persons told me so." This falls far short of proving as a fact within his own knowledge, gathered at the sale, what the general understanding was.

To constitute reversible error, the evidence admitted must not only be incompetent, but it must be prejudicial and calculated to influence the minds of the jury against the appellant. In our view, the testimony was highly prejudicial to the defendants. The chief contention of the plaintiffs (in fact, before the jury, doubtless their strongest plea) was that the land was bought in by the defendants at a third of its value because the bystanders believed it was being purchased for the mother and the young girls, as well as for the defendants themselves, and therefore no one would bid. The hearsay evidence improperly admitted was well calculated to sustain this plea, and to greatly influence the minds of the jurors.

It is unnecessary to notice the other exceptions. They refer (497) to alleged errors which may not arise on another trial. We deem it proper, however, to observe that the first issue is rather indefinite in form, and while we do not formulate the issue, we suggest that the first issue tendered by the defendants more nearly presents the issue raised by the pleadings, but this is not intended to preclude the submis-

sion of others. The second issue is correct. While the plaintiffs in an action of ejectment would be confined to three years rents and profits preceding suit, in this action it is necessary to ascertain the entire rents and profits. They can be charged off against the purchase money and betterments in case the plaintiffs shall finally succeed, if such claim is made by the defendants. For the error pointed out there must be a New trial.

CONNOR, J., dissents.

Cited: Candler v. Jones, 173 N. C., 428.

(498)

HANCOCK v. TELEGRAPH CO.

(Filed 8 March, 1905.)

Telegrams, How Interpreted—Mental Anguish—Instructions.

1. If a telegraph message is delivered to the company in one State, to be transmitted by it to a place in another State, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former State where the contract originated.
2. In an action to recover damages for mental anguish, a charge that "the damages are such as the jury shall find the plaintiff has suffered from 'disappointment and regret' occasioned by the fault of the company" is erroneous.
3. Where a telegram to the father announced the death of his son and named the hour of arrival, in the absence of any evidence to prove that the father could and would have met the sender promptly and would have had all arrangements made for the interment, it is error to instruct the jury that they might presume the father would do these things.

ACTION by H. S. Hancock against Western Union Telegraph Company, heard by *Councill, J.,* and a jury, at November Term, 1904, of CRAVEN.

This was an action for damages on account of mental anguish. The court submitted the following issues: 1. "Did the defendant negligently fail to transmit and promptly deliver plaintiff's telegram, as alleged in the complaint?" Ans.: "Yes." 2. "What damages has plaintiff sustained by reason of defendant's nondelivery of such telegram?" Ans. "$300." From the judgment for the plaintiff, the defendant appealed.

W. D. McIver for plaintiff.

F. H. Busbee & Son and W. W. Clark for defendant.

BROWN, J. We gather from the record these facts: The plaintiff and his brother resided in North Carolina, and their father, S. M. Hancock, at New Church, Va. The family burial-ground is Goodwill Cemetery in Maryland, eight or ten miles from the father's home. Its nearest depot is Pocomoke City, Maryland, four and a half miles away. New Church and Pocomoke City are about eleven or twelve miles distant. On Saturday, 11 July, 1903, the plaintiff was at Johns Hopkins Hospital, with his brother, Thomas, and his wife. Thomas had gone there for an operation, under which he died. At the defendant's office in the hospital, about 6 p. m. Saturday, the plaintiff filed a telegram as follows:

S. M. HANCOCK, New Church: (499)
Thomas dead. Will arrive at Pocomoke 3 a. m.
H. S. HANCOCK.

This telegram was not delivered until Monday, 13th. There being no earlier train, the plaintiff, with his brother's body and the widow, arrived at Pocomoke City Monday morning a half hour late, at 4 o'clock. A storm prevailed which prevented the plaintiff leaving the train until 6:30 a.m. There was no one to meet him and no preparation had been made for the burial. The plaintiff again telegraphed by the Postal Company to his father, who arrived between 9 and 10 a. m. Preparations were made and the interment took place about 5 p. m.

1. The contract in this case was made in Maryland, and the contracting parties are presumed in law to have had in contemplation only such damages arising from the breach of it as could be awarded under the law of Maryland at the date of the telegram. In this case the sender was in Maryland at the time he filed his telegram. The sendee was in Virginia. The defendant, we judge by depositions in the record, was under the belief that the law of Virginia in some way affects this contract. The law of Virginia has no relation to it.

If a telegraphic message is delivered to the company in one State to be transmitted by it to a place in another State, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former State where the contract originated. *Bryan v. Tel. Co.*, 133 N. C., 607, citing *Reed v. Tel. Co.*, 58 Am. St. (Mo.), 609. If under the law of Maryland, as interpreted and expounded by its highest court, damages on account of mental anguish, not connected with or growing out of a physical injury (500) to the plaintiff's person, could not be awarded, then the plaintiff in this action can recover only the cost of the telegram and costs. Where,

as on the trial had in this case, the defendant relied upon the testimony of an attorney at law in Maryland, who testified by deposition as to what he believed the law of that State to be, the court very properly submitted to the jury the testimony to be passed on by them as to its credibility and value. If the jury render a verdict in any case contrary to the clear weight of the evidence, the remedy is, and it is the duty of the trial judge, to set it aside, but we cannot ordinarily review the exercise of such power. Possibly the jury were not satisfied from the deposition of the attorney (Mr. Cross) as to what is the law of Maryland. The defendant will have an opportunity on the next trial to further enlighten the court and jury more specifically upon the law as to the proper measure of damages for mental anguish, as it is administered in Maryland.

2. The judge, among other things, charged the jury that "upon the question of damages the message upon its face disclosing its urgency and relating to death, the defendant had notice that a failure to deliver might reasonably cause mental anguish to the sender, and in such case the damages for mental anguish are such damages as the jury shall find the plaintiff has suffered from disappointment and regret occasioned by the fault or neglect of the company in its failure to notify the sendee, in order that preparations and arrangements might be made for the reception and interment of the body." The court erred in using the words "disappointment and regret." There is a very material difference between the significance of those words and that keen and poignant mental suffering signified by the words "mental anguish." The (501) right to recover damages for purely mental anguish, not connected with or growing out of a physical injury, is the settled law of this State, and it is too late now to question it. Our authorities are up to this time uniform and unanimous as to the general doctrine. Differences, of course, arise as to its application in particular cases. *Young v. Tel. Co.*, 107 N. C., 370, to *Hunter v. Tel. Co.*, 135 N. C., 459. The language used in nearly all the cases in this and other States where such damages are allowed is "grief and mental anguish."

We do not find anywhere that damages are allowed for "disappointment and regret." The lexicographers define anguish to be "intense pain of body or mind." It is derived from the Latin word *anguis,* a snake, referring to the writhing or twisting of the animal body when in great pain. Stormonth's Dict. *Mr. Justice Douglas,* speaking for the Court, said: "We use the word 'anguish' as indicating a high degree of mental suffering, without which the plaintiff could not recover substantial damages. Mere disappointment would not amount to mental anguish or entitle the plaintiff to more than nominal damages." *Hunter v. Tel. Co., supra.* The addition of the word "regret" by his Honor

does not help the matter. Regret indicates no greater degree of mental suffering than does disappointment. Both are of very frequent occurrence in the lives of most men, and with some scarcely disturb their mental poise. In this connection we desire to supplement what was said by *Judge Douglas* in *Hunter's case,* as to what particular mental anguish is to be considered by the jury in awarding damages. Jurors may possibly confound the mental anguish naturally arising from the loss of a near relative with that which grows out of the defendant's negligence. The jury have no right to consider anything except the latter in awarding damages. (502)

We commend to the careful consideration of the Superior Court judges the language of the opinion in the *Hunter case* upon that subject, and that they explain the law in reference thereto with great care to the juries, whether requested to do so or not, lest injustice be done the defendant by confounding the natural grief at the loss of a near kinsman with that anguish which is claimed to result from the negligence of telegraph companies.

3. The judge charged the jury that they might consider the failure of the father to arrange for the interment of the deceased, if they should find from the evidence that such arrangements would naturally be presumed to have been made by the sendee, if the telegram had been delivered prior to the arrival of the train on Monday. It is plain that the plaintiff has no cause for complaint that his father did not meet the 3 a. m. train Sunday, for the plaintiff did not arrive until Monday at 4 a. m. The only contention the plaintiff makes is that if the telegram had been delivered with reasonable promptness his father would have met him promptly on Monday morning and would have had all arrangements made for the interment, so that it would not have been delayed from about 10 a. m. until 5 p. m. Monday, in consequence of which delay the plaintiff avers he suffered great mental anguish, and claims damages on that account. The plaintiff must, therefore, prove that his father could and would have met him promptly on Monday morning on arrival of the train at 4 o'clock, and that he could and would have made on Sunday, or prior to the plaintiff's arrival, all necessary arrangements for the prompt interment of his brother's body on Monday morning and avoided the delay in the obsequies from 10 a.m. until 5 p. m., thereby saving the plaintiff from the pangs of mental anguish which he avers he endured.

The law does not presume that the father could have done (503) these things. Many contingencies, such as illness, absence from home, inability to get the work done on Sunday, may have prevented, however willing the father may have been to discharge such a parental duty. There was no evidence tending to prove such facts and the jury

had no right to presume them. In *Bright v. Tel. Co.*, 132 N. C., 326, *Justice Walker* says, referring to defendant's objection to the testimony of Cooper, the addressee, that he would have gone to Wilkesboro had he received the telegram, that the testimony was not only competent, but indispensable, and uses the following language: "We are unable to understand why this is not competent; it tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plaintiff to prove in order to recover substantial damages, and it was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for mental anguish which resulted from his failure to go to Wilkesboro."

As there is to be a new trial, it is unnecessary to consider the defendant's further exceptions. They relate to alleged errors that may not again occur.

New trial.

Cited: Dayvis v. Tel. Co., 139 N. C., 83, 89; *Hall v. Tel. Co., ib.*, 373; *Hancock v. Tel. Co.*, 142 N. C., 164, 166; *Cannady v. R. R.*, 143 N. C., 443; *Helms v. Tel. Co., ib.*, 394; *Johnson v. Tel. Co.*, 144 N. C., 413; *Battle v. Tel. Co.*, 151 N. C., 631; *S. v. Butler, ib.*, 676; *Beal v. Tel. Co.*, 153 N. C., 333; *Penn. v. Tel. Co.*, 159 N. C., 312; *Ellison v. Tel. Co.*, 163 N. C., 14.

SCHOOL DIRECTORS v. CITY OF ASHEVILLE.

(Filed 21 March, 1905.)

Law of the Case—Practice of Supreme Court—Fines—Ordinances—Statute of Limitations.

1. Where no rights of property have become vested or change made in the status of the parties by reason of a ruling at some former stage of the litigation, a court should not be concluded under the doctrine of "the law of the case" from reviewing itself and correcting its errors; and especially is this true in a case involving the construction of the Constitution.
2. When questions of law have been considered and decided, the Court will not reëxamine the questions and reverse its former decision, unless it clearly appears that it is erroneous.
3. The Legislature has no power to appropriate to a town or city all or any part of the fines imposed upon conviction of misdemeanors committed by violating its ordinances, but under Article IX, section 5 of the Constitution, such fines belong to the general school fund of the county.

4. A city or town cannot be called upon to account for fines collected beyond two years. *Board v. Greenville*, 132 N. C., 4, approved.

ACTION by County Board of School Directors against the (504) city of Asheville, heard by *Justice, J.*, at September Term, 1904, of BUNCOMBE. From a judgment in favor of the plaintiff, the defendant appealed.

Locke Craig and J. D. Murphy for plaintiff.
Davidson, Bourne & Parker for defendant.

CONNOR, J. This action was before us upon complaint and demurrer at February Term, 1901 (128 N. C., 249). It was then decided that the plaintiff was entitled to maintain the action for the recovery of the fines collected by the defendant in the manner set forth in the complaint. The cause was thereupon referred for the purpose of ascertaining the amount of fines collected, etc. Upon the filing of the report the plaintiff moved for judgment for the amount found to be due by the referee. Defendant resisted the motion, etc. Judgment was rendered as set forth in the record. Defendant excepted and appealed. The defendant's counsel in their well considered brief thus state its contention: "This appeal involves the power of the Legislature of North Carolina to appropriate all or any part of its fines—as distinguished from penalties—arising from the violation of the ordinances of the city of Asheville, to said city," etc. The appellant also insists that each fine as collected by the city is properly the subject of a separate (505) action, and that notice should have been given of each claim before suit brought. That it appearing that each fine was less than $200, the Superior Court had no jurisdiction, etc. The plaintiff contends that the question presented upon this appeal has been expressly decided in this cause as reported in 128 N. C., 249; that the decision therein rendered is the "law of the case" and not open to further litigation. It is not contended that any such judgment has been rendered in the cause as will work an estoppel of record, or bring the case within the operation of the principles of *res judicata*. That a final judgment rendered upon a demurrer which is directed to and involves the merits of the controversy works an estoppel upon parties and privies is settled by several decisions of this Court. The principle is thus stated in 6 Enc. Pl. and Pr., 356: "When a demurrer goes to the merits of the action, judgment sustaining it is conclusive upon the parties and will bar another action for the same cause, but when it goes only to matters of form it does not have this effect." *Johnson v. Pate*, 90 N. C., 334; *Willoughby v. Stevens*, 132 N. C., 254. We are not prepared to hold that in this or a

similar case we may not, before final judgment, review our former decision upon a demurrer and, if found erroneous, correct our mistake. The limitations by which courts of appeal are bound by "the law of the case" are not clearly defined. Certainly, when no rights of property have become vested or change made in the status of the parties by reason of a ruling at some former stage of the litigation, a court should not be concluded from reviewing itself and correcting its errors. While we think this the correct view in any case, there would seem to be no doubt of our duty in a case involving the construction of the Constitution. No one can have a vested right in the *decision* of a constitutional question. We cannot very well see how the Supreme Court can, be-
(506) fore the case has gone to final judgment, be estopped by "the law of the case" to discharge its duty to declare the law. A very different question is presented when a final judgment has been rendered and the case has passed beyond its control. The principle upon which the matter in controversy becomes fixed does not grow out of the idea that the court is concluded, but that the parties are estopped to again litigate the question because it is *res judicata.* We are referred by counsel to *Hasting v. Foxworthy,* 45 Neb., 676, in which the foundations of the doctrine are traced and its limitations pointed out. We concur in the views expressed and the conclusions reached by the Court as stated in the opinion by *Irvine, J.:* "The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the questions upon this trial as well as upon the others and that it is within the power of the Court to reëxamine its former decisions and apply the law correctly. We think that ordinarily the Court is justified in refusing to reëxamine the questions of law once passed upon, and that it is only when it clearly appears that the former decision was erroneous that this should be done." If this record presented the conditions stated, we should find no difficulty in performing our duty to render such judgment as in our opinion is in accordance with the Constitution and laws of the State. We also concur in the opinion that when the question has been considered and decided the Court will not reverse its former decisions unless it clearly appears that it is erroneous. The considerations which guide and control the Court in this respect are obvious. While this Court has in four cases by unanimous opinions decided the very question now presented and debated, we recognize the fact that both plaintiff and defendant are public governmental agencies seeking to discharge their duty in
(507) respect to these funds and are prompted by no other consideration in asking a reconsideration of our former decisions. We are quite sure that the defendant, representing the interest of the city of Asheville, acting under the advice of learned counsel, has no other

purpose than to present in the strongest possible view the argument sustaining its contention that the funds in controversy should go into the treasury of the city of Asheville. The argument made before us is entitled to and has received the most careful consideration. After an examination of the opinions written in *Board of Education v. Henderson,* 126 N. C., 689; *School Directors v. Asheville,* 128 N. C., 249; *Bearden v. Fullam,* 129 N. C., 477, we are not prepared to say that the construction put upon Article IX, section 5, of the Constitution is not correct. In *Board of Education v. Greenville,* 132 N. C., 4, the sole question was the statute of limitations. It must be conceded that the language of Article IX, section 5, is not so clear as might be desired.

This Court in *Katzenstein v. R. R.,* 84 N. C., 688, first discussed the power of the Legislature to give to informers the entire penalty incurred for the violation of a statutory duty. *Mr. Justice Ashe* says: "There is a distinction between those penalties that accrue to the State and those that are given to the person aggrieved, or such as may sue for the same, and no doubt this distinction was in contemplation of the framers of the Constitution when they adopted that section." The learned justice concludes that it is within the power of the Legislature to give to the person aggrieved, or to the person who will sue for the same, the entire penalty incurred. This construction of the Constitution has been accepted and followed both by this Court and the Legislature since 1881. *Hodge v. R. R.,* 108 N. C., 24. *Mr. Justice Avery* in a concurring opinion expresses his dissent from the conclusion reached in *Katzenstein's case.* Certainly, much may be said to sustain his view. The question was again fully considered by the Court in *Sutton v. Phillips,* 116 N. C., 502, and the decision in *Katzenstein's case* (508) approved. *Faircloth, C. J.,* and *Avery, J.,* dissenting. The defendant does not question these decisions; on the contrary, it insists that they are correct and that the Legislature has the power to appropriate to a municipal corporation a portion, or all, of the fines collected, etc., in the same manner and to the same extent as penalties. The question has been fully considered by this Court and its conclusions uniformly adhered to.

We have examined the arguments and authorities upon which the decisions are based. Without intending to be critical, we think the question stated in defendant's brief is not strictly accurate. It is said: "This appeal involves the power of the Legislature to appropriate all or any part of fines—as distinguished from penalties—arising from the violations of ordinances of the city of Asheville, to the said city." For the reasons we will undertake to give, the question presented is, Has the Legislature the power to appropriate all or any of the fines imposed upon conviction of misdemeanors committed by violating the ordinances

of the city of Asheville? We think the argument to a very large extent hinges upon the different ways of stating the question. While there is much force in the defendant's contention, it is difficult to conclude that the authors of the Constitution intended that fines imposed in criminal prosecutions could be appropriated to private citizens or municipal corporations. The argument, if sound, leads to the conclusion that the Legislature may give to private prosecutors a portion or all of the fines imposed and collected as a punishment for offenses against the criminal law. It is settled that the Legislature may give to cities and towns the entire penalty incurred for the violation of ordinances to be recovered in a civil action, but when the State interposes and declares the violation of an ordinance a misdemeanor, the fine imposed
(509) for the criminal offense must go in the way directed by the Constitution. The town may, under its authority to make and enforce ordinances for its better government, enforce such ordinances by the imposition and collection of penalties. It has no power to impose fines, and although in many instances the word fine is used, it is but a penalty, to be recovered, as other penalties, by a civil action. Code, sec. 3804. Prior to the act of 1871, Code, sec. 3820, there was no other way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. *S. v. Parker,* 75 N. C., 249. In *Wilmington v. Davis* 63 N. C., 582, it was held that the special courts authorized to be created by the Legislature by section 14, Article IV, had no jurisdiction to try an action for the recovery of a penalty imposed for the violation of a town ordinance. The power of the mayor or other chief officer of a town to hear and determine a criminal action is derived from section 3818 of The Code, by which he is constituted an inferior court to be called a municipal court. He is made a magistrate and conservator of the peace, and within the corporate limits of any city or town given the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the State, or under the ordinances of the town. In imposing fines for misdemeanors, whether committed by violating an ordinance or any other criminal law, he has the same power and jurisdiction as, and concurrent with, a justice of the peace in such town. It is therefore not accurate to say that fines imposed by him are for the enforcement of a town ordinance or punishment for the violation thereof; they are so only because by the criminal law the violation of a town ordinance is made a misdemeanor. The warrant runs against the form of the statute and the peace and dignity of the State. *S. v. Taylor,* 133 N. C., 755. It is held that a justice of
(510) the peace has concurrent jurisdiction of a charge of violating a town ordinance, because it is a misdemeanor. *S. v. Merritt,* 83 N. C., 677. A party violating a town ordinance may be prosecuted by

the State for the misdemeanor and sued by the town for the penalty. *S. v. Taylor, supra.* We can see no more reason why it should be competent for the Legislature to give to the town all or a part of the fine imposed for a misdemeanor committed by violating a town ordinance, than for a misdemeanor committed by violating any other criminal law of the State. A fine imposed for an assault, or for retailing without license, or any other misdemeanor, committed within the corporate limits, cannot be distinguished, in respect to the power of the Legislature to appropriate or give it, or any part of it, to the town, from a like fine imposed for a misdemeanor committed by violating a town ordinance. Nor can we see why, if the fine or any part of it may be given to the town, it may not by the same power be given to the prosecutor, or to any private citizen. When the power is conceded, we find no limit to its exercise save the wisdom of the legislative department of the Government. If we found the power in the Constitution we should not hesitate to so declare; it is not our province to construe it out of the organic law because of any supposed apprehension on our part that it might be abused. When, however, the language of the Constitution or meaning thereof is doubtful, and a general purpose is indicated in respect to the matter in controversy, it is not only legitimate, but our duty, to test the strength of the argument by looking to its practical effects and ascertain how the general purpose may be affected by adopting the proposed conclusion.

Judge Ashe draws the distinction between "those penalties that accrue to the State and those that are given to the person aggrieved." This distinction is recognized in *Hodge v. R. R., supra.* We should be slow to conclude that it was intended that fines imposed for vio- (511) lation of the criminal laws which accrue to the State could be distributed among or appropriated to objects other than those named in the Constitution.

It is conceded that but for the word "of," between the words "and" and "all," no doubt could be entertained that "all fines" were given to the school fund. An analysis of the entire sentence indicates a purpose on the part of the draftsman to make a distinction between "penalties and forfeitures" and "fines" and to group them into separate classes—"the clear proceeds of all penalties and forfeitures, and of all fines," etc. Why insert the conjunction between "penalties" and "forfeitures," and again between these two and "fines," if they were included in one class? It is true that the word "of" leaves the entire sentence obscure and open to construction. It may be that, as suggested by *Judge Ashe,* "If it was intended to give the school fund all penalties, as well those that belong to the State as those that are given to the party aggrieved or common informer, then the statutes giving penalties in both cases would

be a 'dead letter.'" It is common custom to give either, all, or a part of penalties to the person aggrieved or any person who will sue for the same, whereas it would introduce a novelty into our law to distribute a fine imposed for the violation of the criminal law and bring many strange and dangerous innovations into our criminal jurisprudence. The able counsel for the defendant says that if this Court will define "clear proceeds" the difficulty will be cleared up. If we adopt the argument of counsel, we must hold that *fines* are in the same class as penalties, and, following *Katzenstein's case,* we would be forced to the conclusion that the disposition of both are entirely within the power of the Legislature, which nullifies the clearly expressed purpose of the people, that they shall go into the county school fund. If we stop short of this conclusion and limit the words "clear proceeds" to the power to dispose of only a part of the fine, we might well say that the power
(512) of the Legislature is exhausted by giving to the clerk or sheriff a reasonable commission for collecting the fines— to be deducted from the amount before paying it over to the treasurer of the school fund. The words "clear proceeds" could thus have full force and operation without giving the unlimited power claimed by the defendant. By reference to section 3739 of The Code, regulating the fees of the clerk, we find that he is given "5 per cent commission on all fines, penalties, amercements, and taxes paid to him by virtue of his office." We might well conclude that the 95 per cent of the fines constitutes the "clear proceeds," and that this, or such other reasonable commission as should be fixed, exhausted the power of the Legislature to appropriate the amount so collected and was in the contemplation of the draftsman in using the term "clear proceeds" as applied to fines.

The defendant's counsel strongly urges upon us the hardship visited upon cities and towns by the decisions made by this Court. They say that they have been deprived of an important source of revenue. This condition has resulted from the fact that they have been heretofore appropriating these fines, and we fully recognize the hardship imposed by requiring the payment. This Court, beginning in the *Henderson case,* held that no statute of limitations protected them; it now holds that they cannot be called upon to account for amounts collected beyond two years. *Board of Education v. Greenville, supra.* We presume that a large majority of the towns have acquiesced in the decisions and made settlement with the boards of education. However this may be, we must declare our conclusion as we reach it. While the fines collected for violations of the criminal laws in the city of Asheville will not in the future go into the general treasury of the city, they will contribute to the support of her splendid system of public schools, which reflect so much credit upon the wisdom and foresight of her citi-

zens. It is a wise policy to apply the fines imposed for the (513) commission of crimes to one of the most useful and valuable agencies for the prevention of crimes—the public schools—whereby the children of the State are educated to obey the law and strengthen the commonwealth.

The judgment of the Superior Court must be

Affirmed.

Cited: S. v. Maultsby, 139 N. C., 585; *S. v. Holloman, ib.,* 648; *S. v. R. R.,* 145 N. C., 553; *S. v. Oil Co.,* 154 N. C., 638.

NEWSOME v. TELEGRAPH COMPANY.

(Filed 21 March, 1905.)

Telegram—Damages—Evidence.

Where the plaintiff delivered to the defendant the following telegram: "Send by express four gallons of corn. Mint's Siding. Rush. Raft hands," and his name was changed by defendant in transmission, and the sendee did not send the whiskey, it was error to instruct the jury that the plaintiff could recover for expenses incurred in payment of his hands, and in sending to the telegraph and express offices, there being no evidence that the whiskey would have been sent if the error had not been made, nor that the defendant at the time of accepting the message had any notice of the purpose for which the whiskey was wanted, nor of the probable consequence of the failure to get it.

ACTION by T. J. Newsome against the Western Union Telegraph Company, heard by *Ferguson, J.,* and a jury, at May Term, 1904, of SAMPSON. From a judgment in favor of the plaintiff, the defendant appealed.

No counsel for plaintiff.

R. C. Strong and F. H. Busbee & Son for defendant.

CLARK, C. J. The plaintiff delivered to defendant for trans- (514) mission the following telegram: "Send by express four gallons of corn. Mint's Siding. Rush. Raft hands. T. J. Newsome." This message when delivered to sendee purported to be signed "T. J. Sessoms." The sendee, not knowing any such party, did not send the whiskey. This is an action for damages, the complaint alleging that the plaintiff had accumulated timber and rosin at his place of business

to be rafted to Wilmington, on the first full freshet (which was then up); that raft hands would not work without whiskey; that by reason of failure to get it the hands refused to work; that the freshet went down, and before it rose again rosin had depreciated in value to plaintiff's great loss; and, besides, the plaintiff, in anticipation of getting the whiskey, drew drafts on faith of above stores to be shipped, which stores not arriving in Wilmington on that freshet, caused said drafts to be protested, to damage of plaintiff's credit and business standing. These damages were disallowed by the court, doubtless because too remote and speculative, and the plaintiff is not appealing.

The defendant excepted and appeals because the court told the jury that plaintiff could recover whatever expense he incurred (in consequence of the error of defendant) in payment of his hands and his expense in sending to Clinton and Mint's Siding. This was error, for two reasons: first, it did not appear in the evidence that the whiskey would have been sent if the message when received by sendee had had the plaintiff's name properly signed thereto; nor does it appear that the defendant had any express notice of the purpose for which the whiskey was ordered and the probable consequences which would result from its negligence, and the face of the message did not itself put the defendant on notice of such facts. The words "four gallons corn" might possibly, as a local expression, have been understood by defendant's agent to mean that quantity of whiskey, but there was no notice to defendant of the specific purpose for which the whiskey was needed nor of (515) the probable consequences of failure to get it. The sendee, from the course of his dealings, might have understood the purpose for which the whiskey was to be used from the wording of the telegram, but there is no evidence that the defendant knew.

It is true, it is in evidence that after the failure of the whiskey to arrive the plaintiff went to the defendant's office and asked to have the telegram repeated or traced, tendering the money, and at the same time stated the purposes for which the whiskey was needed and his probable loss from its not being received. Failure of the defendant to do this as requested was negligence, and it would be liable for any direct damage from failure to repeat or trace the telegram, but there is no evidence as to the amount of such damages, if any, and, besides, it is not shown that the whiskey would have been sent if the telegram had been repeated.

Error.

Cited: S. c., 144 N. C., 178; *Barnhardt v. Drug Co.,* 180 N. C., 436, 437.

(516)

SCOTT v. LIFE ASSOCIATION.

(Filed 21 March, 1905.)

Appearance, Special and General—Judgment, Irregular and Erroneous—Res Judicata—Judgment by Default.

1. An appearance entered solely for the purpose of making a motion to vacate a judgment for irregularity involves the merits of the case and is a general appearance.

2. A special appearance cannot be entered except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and if the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character.

3. Where a party brought an action to vacate a judgment against him on the ground of fraud, and was unsuccessful, he is not estopped or precluded by that action from moving in the cause to vacate the judgment for irregularity.

4. An irregular judgment cannot be vacated in an independent action, but it must be done by a motion in the cause by a party thereto within a reasonable time, and the mover must show merits.

5. In order to constitute a *res judicata*, the question in the pending suit must have been involved in the issue as joined in the former suit, and not merely one which might have been litigated, although not so involved.

6. Where the plaintiff sued to recover the amount of certain fees, dues, and assessments, paid by him on a policy which the defendant had wrongfully caused to be canceled, and the defendant failed to answer the verified complaint, the plaintiff was entitled to a judgment by default.

7. A judgment for an excessive amount is erroneous, and not irregular, and can be corrected only by an appeal, in apt time.

8. Where the plaintiff was entitled to a judgment by default final, the fact that a judgment by default and inquiry was first entered and at a subsequent term the inquiry was executed, verdict rendered, and judgment entered in accordance with the verdict, will not invalidate the final judgment regularly rendered.

BROWN, J., dissents.

ACTION by S. H. Scott against Mutual Reserve Fund Life Association, heard by *Councill, J.*, at November Term, 1904, of CRAVEN, upon defendant's motion in the cause to set aside the final judgment rendered at May Term, 1902.

The plaintiff alleges that the defendant had wrongfully canceled his policy after he had paid thereon in fees, annual dues, and mortuary assessments the sum of $521.65, and to recover that sum he sued in this action. The defendant being a nonresident insurance company, process was served on the Insurance Commissioner, as provided by Laws 1899,

ch. 54. At February Term, 1902, there was a judgment by default and inquiry, defendant having failed to appear, and the record shows
(517) that at May Term, 1902, the inquiry was executed, and a verdict and judgment for the above amount and interest, $899.32, were entered. On or about 1 February, 1904, the defendant brought an action to set aside the judgment on the ground of fraud, and having failed to prosecute the action with success (136 N. C., 157), it moved in the Superior Court to set aside the judgment for irregularity, alleging that the verdict was rendered without any evidence whatever having been submitted to the jury. At the time of making its motion the defendant entered an appearance in the following terms: "The defendant, appearing for the purpose alone of making this motion, moves to set aside the judgment entered at May Term, 1902, as irregular, and to find the facts set forth in C. W. Camp's affidavit, or to pass upon said proposed findings of fact." The court refused to set aside the judgment upon the ground that the same matter had been adjudicated in the action to set aside the judgment for fraud. The defendant excepted and appealed.

W. W. Clark for plaintiff.

J. W. Hinsdale and Shepherd & Shepherd for defendant.

WALKER, J., after stating the facts: The case was argued before us as if the defendant had entered a special appearance, and the plaintiff's counsel insisted that, having done so, the defendant could not have the relief it seeks, nor could it appeal to this Court, citing *Clark v. Mfg. Co.*, 110 N. C., 111. The argument of both counsel was based upon a misconception of the true nature of the appearance entered by the defendant. In the first place, it does not on its face purport to be a special appearance. It is true, the defendant appeared solely for the purpose of moving to set aside the judgment; but as such a motion involves only the
(518) merits of the case and is not confined to the one objection that the court is without jurisdiction, it follows that an appearance entered solely for the purpose of making that motion is essentially a general appearance. The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., 502, 503. The question always is, what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. *Ibid.*, 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment

for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general. 2 Enc. of Pl. and Pr., 632. In *Ins. Co. v. Robbins,* 59 Neb., 170, the Court says: "The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of an action or proceeding, and, at the same time, seek a judgment in his favor on the ground that his adversary's allegations are false or that his proofs are insufficient. 'A special appearance,' says *Mitchell, J.,* in *Gilbert v. Hall,* 115 Ind., 549, 'may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the (519) complaint or petition constitutes a full appearance, and is hence a submission to the jurisdiction of the court.' Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." See, also, *Handy v. Ins. Co.,* 37 Ohio St., 366; *Pry v. R. R.,* 73 Mo., 123; *Cohen v. Trowbridge,* 6 Kan., 385; *Briggs v. Humphrey,* 83 Mass. (1 Allen), 371; *Crawford v. Foster,* 84 Fed., 939. "There are cases where the defendant may make a *quasi* appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all; but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not." *Nichols v. The People,* 165 Ill., 502; 2 Enc. Pl. and Pr., 625.

We must hold upon principle and authority that the defendant has made a full appearance in the case and will be bound in all respects by the orders and decrees of the court, even if not already bound by reason of the service of process. But the latter is in itself sufficient for that purpose. *Biggs v. Ins. Co.,* 128 N. C., 5; *Moore v. Ins. Co.,* 129 N. C., 31; *Ins. Co. v. Scott,* 136 N. C., 157; *Fisher v. Ins. Co., ib.,* 217.

It is too plain for any argument that the defendant is not precluded by anything said or done in the action to set aside the judgment for

(520) fraud, from now prosecuting this proceeding to set aside the judgment for irregularity. The court could not in that action consider the question now raised. A judgment cannot be vacated for irregularity in an independent action, but it must be done, if at all, by motion in the cause. This being so, nothing said in that case can conclude the defendant by way of estoppel, or as *res judicata,* or as the "law of the case," or in any other way that we can now conceive.

There was but one question before the court in that case, namely, whether the judgment was obtained by fraud. The only question involved in this proceeding is whether the judgment was irregular. In contemplation of the law, the two questions are quite diverse, and a decision of the one is not in any sense a decision of the other. A case directly in point is *Tyler v. Capehart,* 125 N. C., 64, in which the true rule of *res judicata* is clearly stated, and *Wagon Co. v. Byrd,* 119 N. C., 460, explained and limited to its peculiar facts.

The general result is this: In order to constitute a *res judicata* the question in the pending suit must have been involved in the issue as joined in the former suit, and not merely one which might have been litigated, although not so involved. *Williams v. Clouse,* 91 N. C., 322; *Turner v. Rosenthal,* 116 N. C., 437. But, however, we may state the rule, it is quite sure this case is not within it, because the question presented was not and could not have been litigated in the former suit. *Syme v. Trice,* 96 N. C., 243. "An irregular judgment can be set aside by a motion in the cause by a party thereto at any time, not by an independent action." *Ins. Co. v. Scott,* 136 N. C., 159; *Everett v. Reynolds,* 114 N. C., 366. Although it may be set aside at any time, that is, after the term, this does not mean within any indefinite period of time, but within a reasonable time, and, besides, the mover must show merits. *Williamson v. Hartman,* 92 N. C., 236; *Everett v. Reynolds, supra.*

As the court refused to find the facts upon the ground that, if they are correctly set forth in the affidavit of Camp, the motion should (521) be denied because by the judgment in the former suit the matter had been adjudicated, we must, for the purposes of this appeal, assume the facts to be as therein stated. While the court, as we have seen, refused the defendant's motion upon an erroneous ground, there is no reason why we should not sustain the ruling if it is in itself correct. We are not concerned so much with the reason for the ruling of the court as we are with the ruling itself. If it is right for any valid or sufficient reason, it must be affirmed. We think the judge was right in refusing the motion. The plaintiff sued to recover the amount of fees, annual dues, and mortuary assessments paid by him on a policy which the defendant had wrongfully and in clear violation of its contract of insur-

ance (as appears from the unanswered complaint) declared to be forfeited and had caused to be canceled. The total amount of the sums thus paid is distinctly stated in the complaint, and the money so received by the defendant is, in the view of the law, held by it to the plaintiff's use, as having been received upon a consideration which has failed by its own fault. Because the defendant has thus received the money, which *ex equo et bono* it ought to refund, the law implies a promise to pay back the specific sum—not any indefinite or unliquidated amount, but the same amount which was paid by the plaintiff to the defendant. This Court has repeatedly held that when an insurance company wrongfully cancels a policy, the holder is entitled to receive the amount of premiums or assessments and all fees and dues paid by him, with interest thereon from the date of payment. *Braswell v. Ins. Co.,* 75 N. C., 8; *Lovick v. Life Assn.,* 110 N. C., 93; *Burrus v. Ins. Co.,* 124 N. C., 9; *Strauss v. Life Assn.,* 126 N. C., 971. It is common learning that when the plaintiff has become entitled to receive from the defendant a fixed or liquidated sum of money upon a contract, either express or implied, he is entitled to judgment by default final upon failure of the (522) defendant to appear or answer, especially when the complaint, as in this case, is verified. The defendant by its default admitted the cause of action, and, nothing else appearing, the plaintiff was entitled to judgment for nominal damages at least, and to such substantial damages as he may have been able to prove. *Lee v. Knapp,* 90 N. C., 171; *Rogers v. Moore,* 86 N. C., 85. But "if the plaintiff's claim for damages is precise and fixed by an agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim." *Parker v. Smith,* 64 N. C., 291.

These principles are recognized and approved in *Cowles v. Cowles,* 121 N. C., 272. That decision affords a striking illustration of the doctrine and one very apposite to our case. The plaintiff, a mortgagee, had paid certain taxes for the defendant, the mortgagor. With reference to this payment, the present *Chief Justice,* who wrote the opinion, says: "If the sum demanded had been for unliquidated damages, or if on contract for an open account or other uncertain amount, the judgment should have been by default and inquiry. *Battle v. Baird,* 118 N. C., 854. But when, as here, the allegation is of a sum certain expended for the benefit of the defendant, and therefore upon an implied promise to repay, and the complaint is verified and no answer filed, the judgment is properly by default final. Code, sec. 385 (1). There was nothing for the jury to pass upon. Upon a judgment by default and inquiry, the legal liability is fixed by the default, and the inquiry is only to ascertain the amount. Here, if the facts appearing in the sworn complaint, and

not denied in an answer, were not sufficient in law to imply a promise to repay, there was an error of law in the court so holding, *i. e.*, it was an erroneous judgment, but there was no irregularity. The alle-
(523) gation in the complaint was of a sum as definite and fixed as if it had been evidenced by a bond or note. If upon the law the plaintiff was entitled to recover at all upon the facts stated in the verified complaint, there could be no question as to the amount, and no inquiry was required to ascertain it." There was a dissenting opinion in the case, but not upon this point, the dissenting justice conceding that if the defendant was under any legal obligation to pay the money the plaintiff was entitled to a judgment by default final. 121 N. C., 281.

Applying these principles to the case at bar, we find that the plaintiff sues for a fixed and certain sum of money which he is entitled to receive from the defendant. The court at first gave a judgment by default and inquiry, and at a subsequent term a judgment by default final. It certainly can make no difference that the latter judgment was not rendered in the first instance. If the court erred at the first term and gave an interlocutory judgment, it surely could correct the error and give a judgment by default final at the next term, for, upon the face of the record, the plaintiff was entitled to it. There was nothing that required proof, because, by reason of the default, the cause of action and the exact amount of the recovery were admitted. The former judgment by default and inquiry could not deprive the court of the right to enter the proper judgment afterwards. It was merely useless not in the way, as the maxim is *utile per inutile non vitiatur*. If the plaintiff recovers for assessments which, as the defendant alleges, he never paid, it will be because the defendant did not appear and contest his claim when it should have done so. The loss is to be imputed wholly to its own default, as the final judgment was regular, and the court below, after the term, cannot revise it, nor can this Court, except upon appeal duly taken.

It is suggested that this action was not brought to recover a specific sum contracted to be paid, as the suit is not on the policy. The
(524) Code, sec. 385, provides that judgment by default final may be entered on failure to answer when the plaintiff alleges a breach of a contract express or implied, to pay money, the amount of which is fixed by the terms of the contract or capable of being ascertained.

The defendant agreed to insure the plaintiff and to keep the insurance in force. It is alleged to have broken this contract, and the law implies therefrom a promise to pay back to the plaintiff the exact amount of the assessments he has paid on the policy. The amount is not only fixed necessarily by the implied contract, but also by the law. *Skinner v. Terry*, 107 N. C., 103. The value of the services rendered was not fixed

by the contract and no definite sum was alleged to be due; and the same may be said of *Battle v. Baird,* 118 N. C., 854, it appearing that the action was upon an official bond for unliquidated damages. *Stewart v. Bryan,* 121 N. C., 46, can be easily distinguished from our case, as the second cause of action was for a tort, and was not therefore within section 385 of The Code, and no final judgment was in fact entered thereon. The court held the judgment by default final upon the first cause of action to be right. The plaintiff in this action sued for $521.65 and interest. *Stewart v. Bryan, supra,* is authority for the position that the judgment of the court is presumed to be correct and for the correct amount. If the plaintiff has recovered more interest than he is entitled to, the judgment is not for that reason irregular, but simply erroneous, and should have been corrected by an appeal. If we should hold otherwise, we would overrule a long line of cases relating to void, irregular, and erroneous judgments. It is contrary to law to allow more interest than is due, but the judgment is not irregular, for the forms of legal procedure may be duly observed and yet the judgment itself be erroneous. In the leading case of *Skinner v. Moore,* 19 N. C., 138, the Court says that a judgment is not irregular because it is erro- (525) neous. "Error does not constitute irregularity, nor does it necessarily enter into it." It is further expressly decided in that case that a judgment for an excessive sum is erroneous and not irregular, and can be corrected only by an appeal. To the same effect are *Simmons v. Dowd,* 77 N. C., 155, and *Banking Co. v. Duke,* 121 N. C., 110. The defendant is not attacking the judgment upon the ground that the interest was improperly computed, but solely upon the ground that the plaintiff had forfeited the policy in 1892 by the non-payment of an assessment then due, that no assessment had since been made or paid, and that plaintiff was entitled only to nominal damages or, at most, to the amount of assessments paid prior ot 1892, and that it was irregular to render judgment for the assessments alleged to have been paid without legal proof of the payments.

The affidavit of Camp, the argument before us, and the brief of counsel show this to be the only question presented. By not appearing and filing an answer, the allegation of the plaintiff as to the payments, or, in other words, the cause of action, was admitted, and the amount being certain and fixed by the law, the intervention of a jury was not necessary, and the inquiry cannot be held to invalidate the final judgment regularly rendered, even if there was error in the amount, which does not appear, and the burden is on the defendant to make it appear. We must presume the amount is correct, until in the proper way it is shown to be wrong, that is, by an appeal taken in apt time.

Should it be conceded that, if the judgment is set aside, the plaintiff can, on motion, have a judgment entered by default final upon the verified complaint (and the concession would be a proper one to make, as it is not denied that the defendant willfully refused to appear and answer), we then ask, What advantage will be gained by setting aside the (526) judgment? The defendant is alleging that the plaintiff is not entitled to recover the assessments at all, as he never paid them, or, at most, that he is entitled to recover only a part of those he claims, and not that the interest was wrongly computed. If the judgment is set aside, another, perhaps for the same amount, will be entered, which would surely be an idle and unprofitable proceeding. *Everett v. Reynolds,* 114 N. C., 366. The law never does a vain thing. It cannot be successfully asserted, in view of direct decisions of this Court to the contrary, that plaintiff would be entitled only to a judgment by default and inquiry upon the allegations of his complaint, and not to a final judgment.

Having reached the conclusion that the final judgment by default was properly entered, it becomes unnecessary to consider the other questions presented.

No error.

HOKE, J., consurs in result.

BROWN, J., dissenting: I cannot concur in the opinion of the Court, for the following reasons:

1. A judgment final by default could not have been properly rendered in this case. The court below, recognizing this to be the law, did not render any such judgment, and the plaintiff did not ask for it there and did not contend for it here. Section 385 of The Code provides: "Judgment by default final may be had on failure of the defendant to answer, as follows: Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contracts or capable of being ascertained therefrom by computation." This complaint demands as damages for breach of the contract of insurance, not the sum of money fixed by the terms of the contract or capable of being ascertained therefrom by computation, but damages which must be proved *aliunde.*

(527) It has been decided by this Court that judgment by default final may be rendered for the specific sum contracted to be paid, when demanded in the complaint. *Rogers v. Moore,* 86 N. C., 85; *Wynne v. Prairie, ib.,* 73; *Alford v. McCormac,* 90 N. C., 151. The specific sum contracted for in this case is the amount of the policy,

which is payable upon death. This action is not brought to recover that sum. In *Skinner v. Terry,* 107 N. C., 103, it was held that where it appeared upon inspection of the record that the amount of the final judgment rendered on default of answer could not be ascertained by computation from the complaint, or be fixed by the terms of the contract sued on, such judgment was irregular and should have been set aside. In *Battle v. Baird,* 118 N. C., 854, it was held, in an action on an official bond on failure of the defendant to answer, that a judgment entered against him on default cannot be affirmed, since the action is not for a breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom, but must be by default and inquiry. In *Stewart v. Bryan,* 121 N. C., 46, it was held that judgment final by default could not be entered to recover a certain amount—$383, alleged to have been collected and misappropriated.

This Court has decided that an action similar to this is an action for a breach of contract and to recover substantial damages therefor. In *Strauss* against this same defendant ,126 N. C., 974, this Court reaffirmed the rule for measuring such damages first laid down in *Braswell v. Ins. Co.,* 75 N. C., 8; *Lovick v. Ins. Co.,* 110 N. C., 93, and *Burrus v. Ins. Co.,* 124 N. C., 9.

2. If this judgment had been rendered by the Superior Court, it would have been irregular, because there are no data in the complaint on which it can be based, and it could be set aside or corrected as an irregular judgment at any time. Assuming all the Court says to be true in law, yet a judgment final by default could not have been (528) rendered for over $521.65, because not demanded in the complaint; whereas the judgment rendered and now affirmed is for $889.83. Interest cannot be allowed in judgments by default final unless there are some data or references to instruments given in the complaint upon which interest can be computed without the aid of evidence. If evidence *aliunde* is required to prove the dates of the payments of the premiums and the amounts of each, interest could not be allowed in judgment by default final.

It is too plain for discussion that there are no specific facts or dates in the complaint from which the interest on $561.25 can be computed. There are no specific payments of premiums or dates thereof given in the complaint, nor are there any figures given which can be made to produce $889.83.

In *Skinner v. Terry, supra,* the decision is put upon the ground that the contract set out in the complaint does not warrant the judgment by default final, and the Court declares it should be set aside. It cannot be true that the defendant must appeal from a judgment final by default

to correct an error in it, apparent upon the record. He is not present and cannot appeal. He has the right to absent himself and rely upon the court not to render a judgment final by default not warranted by the complaint. How could this defendant appeal from a judgment final by default when no such judgment was rendered? There was nothing to appeal from. He apparently was content with the judgment by default and inquiry as rendered, but he had a right to expect that an inquiry would be executed regularly and in the legal and orderly course of judicial proceeding. As it was not so conducted, it should be set aside. If the court renders a judgment not warranted by the complaint, it is an irregular judgment. *Skinner v. Terry, supra.* It is elementary learning that an irregular judgment may be set aside or corrected
(529) at any time. Suppose the court renders a judgment by default final for $5,000 upon a complaint demanding $500; it need not be appealed from as simply an erroneous judgment; it will be set aside at any time as both an erroneous and an irregular judgment, because it is contrary to the due and orderly course of judicial procedure. Inasmuch as this Court refuses to set aside this irregular judgment, this defendant is completely cut off from the right to correct it, so as to make it tally with the complaint. This Court in effect admits that the inquiry was executed irregularly, without evidence, else the Court would not base its judgment upon a ground not contended for or thought of by counsel. How could such a judgment for $889 be rendered upon this complaint by default final? The complaint demands judgment for "$561.25 and interest," and does not demand interest even in the prayer from any date whatever. How can the interest be computed or allowed unless there is evidence offered as to the amount and date of each payment of premium? As the complaint gives no payments or dates, how can the required and necessary evidence be offered except upon an inquiry before a jury?

My view is that if the Superior Court had rendered a judgment by default final upon this complaint for $889, as this Court declares it should have done, such judgment could be corrected now as an irregular as well as an erroneous judgment, because not warranted by the complaint or anything in it. By the refusal to disturb the verdict rendered by the jury (although admittedly irregular and based on no evidence) this defendant is cut off entirely even from correcting this judgment. When the defendant applies to the Superior Court to correct, or reduce it to the only sum warranted by the complaint, he is met by a verdict of a jury for $889 in response to an issue submitted. Although this verdict is irregular, the judge below cannot look behind it. It is
(530) binding until set aside, which this Court refuses to do.

This Court does not even attempt to support the regularity of this verdict. For the purpose of this appeal, the affidavit of Camp must be taken to be true. He states that on the execution of the inquiry no evidence whatever was offered and no witness was sworn; that the plaintiff's attorney arose and made a statement to the jury and the verdict was rendered. This proceeding was irregular and utterly unwarranted by the due and orderly course of judicial procedure. But this Court gives effect and potency to such an unwarranted verdict by declaring that the Superior Court had the right to give judgment final by default, and should have done so, and therefore this Court will affirm the judgment rendered upon such verdict. The Court entirely ignores the patent fact that there is nothing in the complaint which warrants a judgment for $889 any more than for a million. So that the outcome of it all is that a judgment is finally affirmed against this defendant, based upon a verdict rendered upon no evidence, when there is no data whatever in the complaint from which the most accomplished mathematician could figure out such a result, or any other sum than $561.25. Unfortunately for the defendant, there is no way by which the judgment can be corrected in the manner other irregular judgments are frequently corrected, because this unwarranted verdict is legalized and stands in the way.

The Superior Court could not possibly have rendered judgment for such sum by inspecting the record. It could only be rendered upon a verdict, based on evidence, which was not done.

3. The plaintiff is bound by the judgment by default and inquiry and it cannot be disturbed on this appeal, and the inquiry should be properly executed anew. The plaintiff did not ask for judgment by default final. He asked only for judgment by default and in- (531) quiry, and the court granted it. The plaintiff did not appeal and could not, because he got what he asked for. He does not even now ask to have the judgment by default and inquiry set aside. The defendant was not present when it was rendered and did not answer, but if he had been he could not appeal, because only a judgment by default and inquiry was rendered. Both parties were satisfied with that judgment and neither one desired to appeal. Consequently, as it was within the jurisdiction of the court to render it, even if erroneous, it is binding on both and cannot now be disturbed. The plaintiff, on the hearing of this appeal, does not assign it as error. The majority of the Court assign it as error. They might at least point out the data in the complaint upon which a judgment for $889 could be now rendered by default final. It will not do to say that it was an erroneous judgment and the defendant should have appealed. No such judgment was ever rendered by the Superior Court, and how could it appeal? This judgment for $889 by

default final was not even asked for by the plaintiff, but was first conceived and rendered in this Court, from whose judgment the defendant cannot appeal. According to this Court, the plaintiff had a right, when the judgment by default and inquiry was rendered, to move for a judgment final. But he preferred the former, and for a very good reason. He knew the data in his complaint was insufficient to justify a judgment for more than $561.25 and he desired to offer evidence tending to prove the amount and date of each payment, as they are not given in the complaint, so he could claim interest on each. This could only be done by executing an inquiry before the jury. The plaintiff is bound by his own action, and it is just to say he does not seek to avoid it. He has defended the manner of executing the inquiry and rested his case on that. It is only the defendant who complains, and justly so, of the irregular and
(532) unwarranted manner in which that inquiry was executed, and that is the only assignment of error presented in this appeal. If the facts show that the inquiry was irregularly and unwarrantedly executed, this Court should set it aside and leave in force the judgment by default and inquiry asked for by plaintiff and from which neither party appealed. This is a court for the correction of errors complained of and assigned in the record. Where do we get the right to set aside a judgment which the Superior Court had power to render, when neither party asks for it, and both were content with it? Yet it is just what this Court practically has done, viz., of its own motion substituted a judgment by default final, from which the defendant cannot appeal, for a sum not warranted by the complaint, for a judgment by default and inquiry rendered nearly three years ago by the Superior Court upon motion of the plaintiff, and with which the defendant was content. All the defendant asks is that the course of the Court and the due and orderly procedure of the law be followed upon the execution of that judgment of inquiry. And the method of executing that inquiry is the only question brought before us by this appeal.

I am of opinion that the verdict rendered upon the inquiry of damages and the judgment rendered upon that verdict should be set aside, leaving the judgment by default and inquiry to stand. Then the plaintiff, if so advised, can either execute the inquiry anew and regularly, or else move in the Superior Court for judgment final by default upon the complaint.

Cited: Pace v. Raleigh, 140 N. C., 80; *Woodard v. Milling Co.,* 142 N. C., 102; *Allen v. R. R.,* 145 N. C., 41; *Warlick v. Reynolds,* 151 N. C., 610; *Currie v. Mining Co.,* 157 N. C., 217, 220; *Grant v. Grant,* 159 N. C., 531; *Miller v. Curl,* 162 N. C., 4; *School v. Peirce,* 163 N. C., 429, 430; *S. v. White,* 164 N. C., 410; *McDowell v. Justice,* 167

N. C., 494; *Hassell v. Steamboat Co.*, 168 N. C., 298; *Mutual Asso. v. Edwards, ib.*, 380; *Wooten v. Cunningham*, 171 N. C., 126; *Comrs. v. Scales, ib.*, 526; *Campbell v. Campbell*, 179 N. C., 416; *Bostwick v. R. R., ib.*, 488.

(533)

DUNN v. DUNN.

(Filed 21 March, 1905.)

Trust Fund—Statute of Limitations—Demand and Refusal.

1. Where a trustee did not keep a trust fund separate from his own funds after its receipt in 1860, he is not protected from liability because of the subsequent depreciation of Confederate money.

2. Where a fund was given to defendant in trust for the benefit of B, who was to receive the interest annually, and at the death of B the fund was given to his children, and B died in 1888 and his children sued defendant in 1902: *Held*, that the trustee held the fund upon implied trust for B's children; that one of the plaintiffs who made demand was barred by not suing within three years after refusal; and as to those who made no demand, ten years was a bar under The Code, sec. 158, which limitation began to run against those under no disability, upon the death of the life tenant B.

ACTION by J. A. Dunn and others against W. B. Dunn, heard by *Long, J.*, and a jury, at November Term, 1904, of WAKE.

Benjamin Dunn died in 1852, leaving a will containing the following clause: "I give to my son William B. Dunn $400, in trust, however, for the sole use and benefit of my son Benjamin C. Dunn, but not subject to his control or liable for his debts or contracts in any way whatever, but to receive the interest annually; and at the decease of the said Benjamin C., I give and bequeath said amount to his children, to share and share alike."

W. B. Dunn received this fund and lent it out and paid the interest to Benjamin C. until 1860, when the fund was paid back to him, and because of the coming on of the war he did not have an opportunity to lend it again to safe parties. He mixed said money with other trust funds and his own money in a pocketbook which he kept in a desk, and from this pocketbook he used money and put other (534) money in it from time to time, but always had more than $400 therein, but could not say that any of this identical fund was still in hand at the close of the war, when the money in the pocketbook all became worthless. The claim of Benjamin C. to the interest is not in controversy. He died in 1888, and this suit was begun in 1902 by his

children to recover the original fund. The defense was the loss of the fund in Confederate money, and the statute of limitations. From a judgment in favor of the plaintiffs, the defendant appealed.

Armistead Jones & Son for plaintiffs.
N. Y. Gulley for defendant.

CLARK, C. J. The jury having responded "No" to the issue, "Did the defendant keep the said $400 separate from his own funds after its receipt in 1869?" it is well settled that he was not protected from liability because of the subsequent depreciation of Confederate money. *Shipp v. Hettrick,* 63 N. C., 329; *Cummings v. Mebane, ibid,* 315.

But the court erred in directing the jury to answer "No" to the issue, "Are the claims of all the plaintiffs barred by the statute of limitations?" The sole express trust reposed in W. B. Dunn by the will was to hold the fund "for the sole use and benefit of Benjamin C. Dunn," to receive and pay over the interest to him annually. At the death of the life tenant, the express trust terminated. *Baker v. McAden,* 118 N. C., 744. The trustee then held the fund simply upon an implied trust to pay over to the plaintiffs, to whom, by the terms of the will, the title to the fund then passed. The trustee was charged with no duty save that imposed by the law to pay over when called on. The statute runs against an implied trust. *Parker v. Harden,* 121 N. C., 57; *Faggart v. Bost,* 122 N. C., 522; *Robertson v. Dunn,* 87 N. C., 195.

(535) In case of a demand and refusal, three years is a bar (*Robertson v. Dunn, supra*), and the court properly held that one of the plaintiffs, having made such demand and not having begun this action within three years from the failure of the defendant to pay, was barred. *House v. Arnold,* 122 N. C., 222; *Board of Education v. Board of Education,* 107 N. C., 367. But as to the other plaintiffs, who made no such demand, ten years was a bar under The Code, sec. 158, which limitation began to run as soon as the plaintiffs, who were under no disability, were at liberty to sue. *Eller v. Church,* 121 N. C., 272. The life tenant died, and the right to the fund accrued to the plaintiffs in 1888, but this action was not begun till 1902. In instructing the jury to respond that all the plaintiffs were not barred of recovery, there was

Error.

Cited: Lowder v. Hathcock, 150 N. C., 439; *Pritchard v. Williams,* 175 N. C., 331.

(536)

MILLSAPS v. ESTES.

(Filed 21 March, 1905.)

Arbitration by Infant—Judgment—Estoppel—Purchasers at Judicial Sale—Disaffirmance by Infant.

1. A submission to arbitration by an infant with the consent of his counsel of record, or by his guardian *ad litem* or next friend, is voidable, and an award and judgment based thereon can be set aside.

2. Where an action was brought by infants to have a life estate declared forfeited for waste, and for the cancellation of certain deeds, and an arbitration therein reverses the object and the purpose of the action, and converts it into a proceeding to validate the deeds and to prevent a forfeiture, and it is apparent that the next friend made no attempt to protect the rights of the infants, a court of equity will not enforce such a proceeding or allow a judgment obtained therein to operate as an estoppel upon the infants.

3. Purchasers at a judicial sale are not protected by the judgment, where it was apparent on the face of the record that the arbitration, award, and judgment were all by consent in a case in which the infant parties consenting thereto could not do so by themselves, by their next friend, or by their attorneys.

4. Where an infant disaffirms a transaction, equity will restore the property, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand or the property into which it has been converted can be reached by a proceeding *in rem*.

On petition of defendants to rehear.

A. M. Fry for petitioners.
Shepherd & Shepherd in opposition.

WALKER, J. This case was before us at Spring Term, 1904, when we ordered a new trial. It is reported 134 N. C., 486, where the facts are fully stated by *Justice Montgomery*. We are now asked to rehear the case, and to review and reverse the decision we then made. A brief recital of the leading facts will make plain our reason for not doing so. The plaintiffs brought a suit in 1888 against Estes and others and alleged in their complaint that their grandfather, John A. Millsaps, had devised to their father, W. R. Millsaps, the land in controversy for and during his natural life, with a restriction annexed to the gift that he should not sell and convey the same, and at his death to his legitimate children, the plaintiffs; and that their father sold and conveyed the land to the defendants in this suit, who entered while the life estate was still subsisting, and committed waste upon the land. Their prayer

was for a forfeiture of the life estate and for damages for the waste committed and for a cancellation of the deeds made by the life tenant. The material allegations were denied by the defendants.

Plaintiffs were all infants at the time the suit was commenced and when the judgment therein was rendered, and there was no ap-
(537) pointment of a next friend, upon written application and order, as required by the rule of the Court, to prosecute the suit in their behalf—Clark's Code (3 Ed.), p. 958—though the name of John Shuler was inserted in the summons by the clerk as such next friend. The evidence does not tend to show that he took any interest in the subsequent proceedings or any care of the interests of the infants. So far as appears, the latter had no actual knowledge of the institution of the action or of the proceedings therein. The evidence tends to show that the action was commenced at the instance of their father, whose conduct and relation to the cause indicates that he was unfriendly to their interests and was attempting by the suit to cure the defective title he had conveyed to the defendants.

The counsel of record consented to an arbitration, the submission requiring the arbitrators not to ascertain and determine what were the real rights of the plaintiffs, but simply to report the value of the land and how much had been paid to William Millsaps by those who purchased from him. It was further provided that the judgment should be entered for the difference between the value of the land and the sums so paid, or "for the balance thus found due to the plaintiffs." The arbitrators reported the value to be $1,550, the amount paid $1,194.60, leaving a balance due $355.40, to be paid as follows: G. D. Estes $225, W. R. Randall $45.40, and John Long $55. The other purchasers, J. A. and Mary M. Franks, were found to have paid their share in full, and no sum was reported as due by them. In accordance with the submission by consent of counsel, it was afterwards adjudged by the court that the award be approved and made a rule of court, and that the defendants respectively pay to the plaintiffs the several amounts thus found due by the report of the arbitrators; and the clerk, as commissioner, was appointed to make title to the purchasers upon payment of the sums so due. The several amounts were afterwards paid and title
(538) made by the commissioner accordingly. It further appears in the case that of the balance reported as due, namely, $355.40, the infants by their guardian received in round numbers one-half thereof, so that they have realized from their land, which is worth $1,550, the small sum of $175.

This action is brought to set aside that judgment and the award for the reasons stated in the former opinion, some of which were that the attorneys had no power or authority to consent to any such arbitration,

and the court had no power to enter a judgment by consent thereon, and further, that an arbitration by infants, or their next friend or attorneys even if properly appointed, is voidable if not void.

At the former hearing, this Court held that the arbitration and proceedings based thereon were void and could not be set up as an estoppel or as *res judicata* so as to conclude the infants. Counsel for the petitioners now argue that this was error, as the submission, the arbitration and the award, at most, were only voidable, and that the infants cannot avail themselves of the defect and disown the act of the attorneys and disaffirm the award, because a judgment of the court has supervened, and as some at least of the defendants purchased for value upon the faith of that judgment, without notice of any illegality, they are protected under the general principle applicable to persons who buy at judicial sales and who are strangers to the suit in which the sale was ordered.

We find that the authorities are not agreed as to whether an infant's submission to arbitration is void or merely voidable. Some courts, which are entitled to the greatest respect, have held that it is utterly void, while others of equal authority have held that it is only voidable. In this conflict of opinion, we are inclined to concur with those courts and the text-writers who maintain the proposition that such submissions are voidable merely, as we are unable to see why the case should be taken out of the general rule as to the contracts of infants, a submission being in itself a contract, or so far partaking of its (539) nature as to be substantially within the principle applicable to contracts. A submission to arbitration may be defined as the agreement by which parties refer disputed or doubtful matters pending between them to the final decision and award of another party, whether one person or more; the party to whom the reference is made is called an arbitrator; the arbitration is the investigation and determination of the matters of difference between the contending parties by the arbitrator so chosen, and the award is the decree or judgment of the arbitrator, and is generally conclusive in its effect. 2 A. & E. (2 Ed.), 539; Morse on Arbitration, 36. The basis of the arbitration and award is the submission. Watson, in his book on Arbitration, 59 Law Lib. (1848), p. 55, thus states the law upon the question now presented: "Every person capable of making a disposition, or a release of his right, may make a submission of that right to arbitration, and consequently will be bound by an award made in pursuance thereof. But persons who cannot bind themselves by contract, cannot submit to arbitration, as infants, *femes covert,* persons compelled by threats and imprisonment, persons professed in religion. It is quite clear that a submission by an infant is either void or voidable; and unless he ratifies when he attains his age, he is not bound by his submission to perform an award. In Rolle's

Abridgment it is laid down generally that an infant is not bound by his submission of a trespass committed either on his person or on his land. In another place, in the same book, it is said that such submission is only voidable. And this seems to be the only doubtful question respecting the submission, as far as regards the infant himself; for in some cases it has been held that a submission by an infant is entirely void; in others that it is only voidable. In a modern case, where a cause was referred by parol agreement, in which an infant (by his *prochein* (540) *amie*) was plaintiff, it was held to be quite clear that the infant was not bound by the award, but the court directed that he should have notice of the award, and, if he would not perform it, that the defendant should be at liberty to carry down the record to trial, by proviso," being one brought on by the defendant on notice to the plaintiff and taking its name from the words of the writ to the sheriff which required him to execute only one of the writs (or notices) of trial. 3 Blk., 357. So that it appears the arbitration was altogether ignored, and the defendant was left at liberty to proceed as if plaintiff had failed to bring down the record to the assizes. He also refers to a case in which the Court of King's Bench (by *Abbott, C. J.*), reversing the Court of Common Pleas, held that where infant plaintiffs appeared by next friend, their attorney or solicitor had no authority to consent for them or their next friend to a submission, and consequently that they were not bound by the award. *Biddell v. Dowse,* 13 E. C. L. (6 B. and C.), 164. In *Cavendish v. Wood,* 1 Ch. Cases, 279, or 22 Eng. Rep. (reprint), 800, *Lord Ch. Nottingham* refused to decree the performance of an award against an infant, who appeared by his guardian, which was based upon a submission by consent and order of the court, because it was inequitable on its face, and he added that, "He would never decree an award which should bind an infant." *Evans v. Cogan,* 2 P. Wms., 450. Morse thus refers to the subject: "The agreement of an infant to submit to arbitration is like any other contract into which he might enter. There is an old English case in which his undertaking is declared absolutely void. But the later and conclusive authorities hold it to be only voidable. The presumed incompetency of an infant to have a proper care for his own interest will be kept by the courts within reasonable bounds. Thus, where an infant's claim for damage for an assault and battery had been submitted and the amount (541) awarded had been paid him. In a subsequent suit brought by him for the same cause of action, it was held that the jury should take into consideration the sum paid; if they thought it sufficient compensation, they should give only nominal damages; if they thought it insufficient, they should make up the deficiency. Whether or not equity will decree an award to be binding upon an infant seems a matter of

doubt, depending much upon the merits of the case." Morse on Arbitration, p. 4. So, in 3 Cyc., 588, the power to submit in any case is said to exist only "where there is a capacity to contract, with a liability to pay," and the power to enter into the contract of submission to arbitration must needs be commensurate with such legal capacity of the parties to it. It must therefore be that, in the case of infants, as their contracts are only voidable, their agreements to arbitrate must, generally speaking, be voidable and not void. 2 A. & E. (2 Ed.), 616. And so it was expressly adjudged in *Britton v. Williams,* 20 Va. (6 Munf.), 453, the Court saying: "Although infants are bound by judgments had under the superintendence and protection of the court, yet where the case is referred to arbitrators, whereby they are deprived of that protection, a submission by infants, even by rule of court, ought not to be sanctioned. For, as awards are in the nature of judgments, and are to be final and conclusive, which cannot be where one party has a right to avoid them, it follows that a submission by infants, although with adults, cannot be obligatory on either party." The Court held that as there was no valid submission in the case, there could be no award; and consequently the judgment should be reversed as far back as the writ. The same doctrine was announced in *Baker v. Lovett,* 6 Mass., 78, where it was said that infants are supposed to be destitute of sufficient understanding to contract, and the law therefore protects their weakness and imbecility, so far as to allow them to avoid all their (542) contracts by which they may be injured, including agreements which involve a release of their rights, as the law presumes that they have not sufficient discretion to put a fair value upon them. For the same reason, if an infant submit his rights to arbitration, he will not be bound by the award, from a presumed incompetency to choose suitable arbitrators and a lack of sufficient judgment to properly care for his own interests, and he is thus protected until he attains his majority. It follows from what we have said, that as an infant cannot convey an irrevocable title to another, he cannot submit to an award which would give the latter such a title.

Nor has a guardian *ad litem* or next friend the power to submit for the infant, even though the submission be a rule of court. "He cannot change the tribunal or the principles of decision." Morse on Arbitration, 25; *Fort v. Battle,* 13 Sm. and M., 133; *Hannum v. Wallace,* 9 Humph., 129. But it can make no practical difference in this case whether the award and judgment are void or voidable, as the infants in their complaints have alleged that the award was made and the judgment was rendered in a suit which was collusive and fraudulent, and therefore that they are void. This would seem to be a sufficient disaffirmance of them, and, indeed, the language is quite positive and un-

equivocal in meaning. If they are to be set aside and disregarded, what difference can it make if it be done because they are void or voidable?

There is a more serious question to be considered and one the solution of which may be still more fatal to the award. The original suit was brought to have the life estate declared forfeited for waste, for damages for the waste committed, and for the cancellation of the deeds of the defendants. The arbitration reverses the object and the purpose of the suit and converts it into a proceeding to validate the deeds and thereby to save the life estate from forfeiture and to prevent
(543) the recovery of damages and to give the plaintiffs, in lieu of their just rights, which were too well astablished to be even the subject of any controversy, a sum of money so small in comparison with the real value of their land as to lead any one to exclaim, "They got the infants' land for nothing." *Collins v. Davis,* 132 N. C., 111; *Worthy v. Caddell,* 76 N. C., 82.

The agreement, if there was any with the next friend of the infants, was one-sided in its operation and unequal in its effect. It did not require any arbitration or even consideration of the plaintiff's rights, but only an appraisement of property and a statement of the payments made by the defendants—not to plaintiffs, but to their father—in order that the defendants might, by the payment of the balance, or the difference in the amounts, acquire a valid title to the plaintiffs' land. If we can properly call such a proceeding an arbitration, it is not such a one as a court of equity should enforce or allow to stand in the way of the plaintiff's recovery. Indeed, we doubt if the court had the necessary jurisdiction, even in equity, to proceed thus to dispose of an infant's land, although it may have had the consent of the parties. It unquestionably has a general jurisdiction over the estate of an infant, and may sell his property, if it deems it for his interest and advantage to do so (*Williams v. Harrington,* 33 N. C., 616), but not dispose of it in the manner adopted, or for the purposes intended in the former suit. *Troy v. Troy,* 45 N. C., 85. There must be some attempt at least, by the next friend to protect the rights of the infant. In this case it appears that one of the parties gets an interest in the land without paying anything whatever to the infants, and the others acquire their interests at a most inconsiderable sum. In the language of *Ruffin, J.,* speaking for the Court: "It would be a plain violation of right to leave the
(544) judgment standing, so as to operate as an estoppel upon these infants, when the Court can see that no real defense was ever made for them." *Larkins v. Bullard,* 88 N. C., 35.

The fact that judgment was entered upon the award according to the agreement in the submission does not under the circumstances of this

case impart validity to it. The judgment was by consent and is as open to attack as the submission and award.

Without discussing the matter more fully, we think there was evidence tending to establish the plaintiff's contention, which should have been considered by the jury upon each of the issues submitted.

The plea that they are purchasers for value and without notice cannot avail the defendants. It is freely admitted to be the general rule, as argued by the defendants' counsel, that innocent purchasers, or those who have purchased at a judicial sale without notice of any irregularity in the proceedings and judgment under which the sale was made, will be protected when it appears that the court had jurisdiction of the parties and of the subject-matter of the proceedings, and that the judgment on its face authorized the sale. This is but another way of stating the general principle that the judgment or decree of a court of having general jurisdiction over a subject-matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision. *Williams v. Harrington, supra.* Such a judgment will, therefore, sustain the title of a purchaser at a sale made under it, if he had no notice of the alleged defect in the proceedings. *Sutton v. Schonwald,* 86 N. C., 198; *England v. Garner,* 90 N. C., 197. But in our case the irregularities and defects are of such a nature and are so apparent upon the face of the record in the former suit that the defendants in that suit and those who now claim to hold under them must be pre- (545) sumed to have had notice of said defects. So far as the irregularity in appointing the next friend of the plaintiffs is concerned, it would seem that the observations of the Court in *Morris v. Gentry,* 89 N. C., at pp. 254, 255, are sufficient to overcome the defendants' plea of a want of notice as to it. We do not decide, though, how this is, as the arbitration, award, and judgment were all by consent in a case where it appeared in the record that the plaintiffs could not consent by themselves, by their next friend, or by the attorneys. There was a patent defect in the proceedings which should have been noticed by any one claiming under the judgment. In the cases cited by the defendants' counsel the defect did not appear on the face of the proceedings, but, as far as the record in those cases showed, the court had proceeded regularly in the exercise of its jurisdiction over the parties and the subject-matter, although it afterwards appeared that in fact it had not done so.

But while the plaintiffs may be able to avoid the judgment and recover their property, they must observe the maxim that he who asks equity must do equity. If they insist upon their disability and the defect in the proceedings for the purpose of invalidating the title of the defendants, they must, when properly called upon to do so, restore any money

they have received under the judgment of the court or, if the money has been invested in land or other property, they must surrender the latter. Neither an infant nor a married woman will be permitted to repudiate a transaction upon the ground of a want of capacity, or for other sufficient cause, and at the same time retain and enjoy any benefit derived from it. But the receipt of money or anything else of value by the persons under disability during the course of the transaction does (546) not take away the right of election to repudiate it. Equity will restore his or her property to the disaffirming party, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand or the property into which it has been converted can be reached by a proceeding *in rem. Scott v. Battle,* 58 N. C., 184; *Hodge v. Powell,* 96 N. C., 64; *Walker v. Brooks,* 99 N. C., 207; *Draper v. Allen,* 114 N. C., 50.

This brings us to the conclusion that there was no error in our former decision, though somewhat different reasons may have been given for that decision than those which are now assigned.

Petition dismissed.

HOKE, J., took no part in the decision of this case.

Cited: Settle v. Settle, 141 N. C., 573; *Yarborough v. Moore,* 151 N. C., 120; *Mangum v. Mangum, ib.,* 271; *McDonald v. Hoffman,* 153 N. C., 257; *Rawls v. Mayo,* 163 N. C., 180; *Cooke v. Cooke,* 164 N. C., 287.

CORBETT v. CLUTE.

(Filed 21 March, 1905.)

Cancellation of Mortgage—Illegal Consideration.

A note and mortgage will be canceled when it is shown that the sole consideration and inducement for signing the same was an agreement and promise on the part of the mortgagee to forbear and suppress a criminal prosecution for an alleged felony against the son of the mortgagor and the threat to prosecute unless they were executed.

ACTION by M. J. Corbett against Nancy Clute and others, heard by *Ferguson, J.,* and a jury, at February Term, 1904, of SAMPSON. This was an action to foreclose a mortgage. From a judgment for the defendants, the plaintiff appealed.

(547) *E. K. Bryan and Grady & Graham for plaintiff.*
J. D. Kerr and F. R. Cooper for defendant.

HOKE, J. The plaintiff declared on a note for $275 due 1 January, 1900, and a mortgage to secure the same on the land described in the complaint. The defendant admitted that she executed both the note and the mortgage, and by way of defense alleged that she was never indebted, herself, to the plaintiff in any sum, and that her signature to this instrument was procured by the plaintiff's agent, and at the time she signed the same the said agent said to her in substance that Theodore Clute, the son of the defendant, was indebted to the plaintiff in the sum of $275 and had obtained said amount in goods, wares, merchandise, and money by false pretense, and that if this defendant did not execute the said note and mortgage, the plaintiff would institute criminal proceedings against Theodore Clute and would send him to the penitentiary under said proceedings; that the defendant, being old, feeble, and inexperienced in business affairs, and greatly excited and alarmed by said false statements and threats, and being urgently pressed by said agent and attorneys, who refused to allow this defendant to investigate the matter stated to her, and without consulting counsel, signed said note and mortgage, as she was then made to believe, in order that she might save her son from criminal prosecution under the threats and charges, but having received no valuable consideration from the plaintiff. The defendant further answered that the sole and only consideration for the note and mortgage was the agreement and promise on the part of the plaintiff to forbear and suppress a criminal prosecution in the courts of this State for a felony, to wit, "false pretense," against her son, and the threat to prosecute her son for such felony unless she executed said note and mortgage, and the promise and agreement not to prosecute if she did execute the same was the sole and only inducement and consideration for signing and executing said note and mortgage, and she is advised and believes that said note and (548) mortgage are void, and prays that they be canceled.

The following issue was submitted to the jury upon the pleadings: "Did the plaintiff by his agent represent to the defendant, Nancy Clute, that her son, Theodore Clute, was guilty of an offense which would send him to the penitentiary, and did the plaintiff threaten to prosecute her said son for such offense if she did not sign the note and mortgage, and did she sign the note and mortgage to induce the plaintiff not to prosecute said son for such offense, and did the plaintiff agree not to prosecute her son in consideration of her signing said note and mortgage?" On this issue the plaintiff presented the note and mortgage and the defendant offered evidence tending to establish the allegations of the answer.

The court charged the jury that the burden was on the defense to satisfy them by the greater weight of the evidence before they could answer the issue "Yes." In other words, if the evidence failed to satisfy them that the plaintiff agreed not to prosecute her son on the defendant's signing the note and mortgage, it was their duty to answer the issue "No." If the defendant had satisfied them by the evidence that the plaintiff through his agents did threaten to prosecute the defendant's son for a penitentiary offense unless she executed a note and mortgage, and agreed that if she executed a note and mortgage he would not prosecute him, and she signed the note and mortgage to save her son from being prosecuted for a penitentiary offense, or an offense which she was made to believe from the representations of the plaintiff's agent was a penitentiary offense, it was their duty to answer the issue "Yes." Under the charge of the court the jury answered the issue "Yes."

(549) During the progress of the trial the plaintiff noted material exceptions as follows: At the close of the defendant's testimony the plaintiff moved for judgment, which was refused, and the plaintiff excepted. Plaintiff then rested, and moved for judgment on the entire testimony. This was refused, and plaintiff again excepted. Plaintiff then requested the court to charge the jury that if they believed the evidence they would answer the issue "No." This was refused, and plaintiff excepted. On the rendition of the verdict the plaintiff moved for judgment on the verdict, which was refused, and plaintiff again excepted.

All these exceptions were evidently made with the design of presenting the one question, whether upon the pleadings and entire testimony the defendant had made out a case sufficient to invalidate the plaintiff's note and mortgage. The plaintiff takes the position that the defendant's case should be made to turn on the question of duress, whether the papers presented against her were signed by her willingly, or whether she was so wrought upon by her fears aroused by the threats against her son that she was no longer a free agent in the execution of these papers. The plaintiff presented an issue addressed to this view of the defense—faulty, it is true, because it was evidential only, and not at all determinative, and the argument and authorities cited by counsel on this appeal are all addressed to this same phase of the defense. The position is forcibly presented, and we have grave doubts if the evidence is sufficient to support the allegations of duress.

We are not called on, however, to determine this question, because we do not think the defense can be so confined, nor that the cause was tried on this feature of the answer at all.

There is in the defendant's answer a complete defense stated, that the only consideration of the note and mortgage was the agreement and

promise on the part of the plaintiff to forbear and suppress (550) a criminal prosecution in the courts of this State for felony, to wit, a false pretense against her son, and the threat to prosecute her son for said felony, etc., and the promise and agreement not to prosecute was the sole and only consideration and inducement for the signing of the note and mortgage. The issue, while containing some matter by way of inducement, has this question presented in clear and unmistakable terms, and the answer decides it against the plaintiff. There was evidence, too, supporting this defense and sufficient to warrant the verdict.

The defendant herself testified (at the time the note and mortgage were executed) that "the plaintiff's agent told me that my son had committed a penitentiary offense, and, without satisfaction, they would put the law to him to the fullest extent." Mrs. Z. E. Matthews, a witness for the defendant, testified that she was present when the note and mortgage were executed, and heard the plaintiff's agent say to the defendant that "he had a letter in his pocket from his house to put the law to her son to the fullest extent, that he has mortgaged his property as much as seven or eight times, and that is a penitentiary offense, and, without satisfaction, his house would push the case to the fullest extent, but if my mother would let him have the rent money it would be all right with the house." Again, the same witness testified, "They said if mama (defendant) would let them have the rent money and back it up by the mortgage, they would not prosecute Theodore. The note was to represent these rents and the mortgage was to secure the note."

The charge of the court properly put the burden on the defendant of making her defense good, and under that charge the jury have found the facts as shown in the verdict. It will not be contended that the plaintiff is not bound by the statements of his agent. He is here now, asserting his claims under the note and mortgage obtained for him by this transaction, and if he claims the benefits he must accept the (551) responsibility. *Harris v. Delamar,* 38 N. C., 219; *Black v. Baylees,* 86 N. C., 527. And on the facts as established by the verdict the authorities are all against the validity of the plaintiff's claim. *Vanover v. Thompson,* 49 N. C., 485; *Garner v. Qualls, ibid.,* 223; *Lindsay v. Smith,* 78 N. C., 328. It has been suggested that these decisions are not controlling, because in this case no indictment had been found nor prosecution instituted. But there is no reason for any such distinction. Authority is equally against it.

It is against public policy that the enforcement of the criminal law should be obstructed or perverted by contracts made on such consideration in furtherance of personal and private interests, and this forbidden result can be accomplished as effectually by the suppression of inquiry before as after prosecution commenced. *Garner v. Qualls, supra,* holds

that "Where the obligee represented to the obligor in a bond that a relation of the latter had committed an indictable offense, and procured the bond in question to be executed by agreeing not to prosecute for such offense, it is void, whether any such offense had been committed or not." The facts of that case are remarkably like the present, and show that no prosecution had been instituted. They are stated thus: "It was proved that the plaintiff represented to Mrs. Qualls, the principal in the bond, that her son-in-law, one Fowler, had committed three several forgeries, and told her he would prosecute him for these offenses unless she gave him her bond for the amount Fowler owed him, and that if she would give him her bond he would not prosecute. She thereupon procured the other defendants to join in the obligation and delivered it to the plaintiff. There was no other evidence that Fowler had committed the offense imputed to him than the above declaration of
(552) the plaintiff." *Battle, J.*, in delivering the opinion says: "It is now well established, as a broad, conservative principle, that no executory contract, the consideration of which is *contra bonos mores* or against the public policy or the laws of the State, can be enforced in a court of justice. *Blythe v. Livingood,* 24 N. C., 20; *Ingram v. Ingram,* 49 N. C., 188. It is manifest that contracts founded upon agreements to compound felonies, or to stifle public prosecution of any kind, come within the range of this salutary principle."

The authorities are decisive against the claim of the plaintiff and the judgment must be

Affirmed.

Cited: Burton v. Belvin, 142 N. C., 153; *Typewriter Co. v. Hardware Co.,* 143 N. C., 101; *Beeson v. Smith,* 149 N. C., 145, 146; *Sprunt v. May,* 156 N. C., 392; *Bank v. Justice,* 157 N. C., 375.

IN RE YOUNG.

(Filed 21 March, 1905.)

Contempt—Bribery of Witness—Purging of Contempt—Findings of Fact.

1. Where a defendant in a criminal action tried to persuade a duly recognized State's witness to leave the State and not appear in court against him, and the trial judge in a proceeding "as for contempt" against defendant found that the object and purpose of defendant "was to defeat, impair, and prejudice rights and remedies of the State, and that his

conduct had such tendency," it was held that, under section 654 (subsec. 4 and 656 of The Code, a judgment of guilty "as for contempt" was authorized.

2. Where there is evidence to support the findings of fact by a trial judge, in a proceeding as for contempt, they cannot be reviewed on appeal.

3. The respondent in a proceeding as for contempt can purge himself only where the intention is the gravamen of the offense.

4. Chapter 87, Laws 1891, making it a misdemeanor for any person to intimidate or attempt to intimidate any juror or witness, is additional to, and not a repeal of, the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases.

THIS was a proceeding as for contempt, heard by *Moore, J.,* (553) at October Term, 1904, of NEW HANOVER. From the judgment rendered, respondent appealed.

Herbert McClammy for appellant.
Attorney-General R. D. Gilmer in opposition.

CLARK, C. J. This was a proceeding "as for contempt." The court found, among others, the following facts: "Paul W. Young was a defendant in a criminal action pending in the Superior Court, and Grace George was a witness duly recognized for her appearance to testify against said Young in said criminal action. On 21 September, 1904, the respondent tried to persuade the witness to leave the State and not appear in court against him, offering to take her in his buggy to another railroad station and to give her $10 to pay her way on the railroad to Norfolk, also to put up a $100 diamond ring to indemnify her for the apprehended forfeit of her $50 bond for appearance at court as a witness." The court further found that said Grace George refused to leave the State, and that the object and purpose of the respondent "was to defeat, impair, prejudice the rights and remedies of the State in said criminal action of *S. v. Paul W. Young,*" and that his conduct had such tendency. The court adjudged that the respondent was "guilty as for contempt of this court in the particulars set forth in the findings of fact," and that he pay a fine of $50 and the costs of the proceeding.

This proceeding is expressly authorized by section 654, subsection 3, of The Code, making punishable as for contempt all persons guilty of "unlawful interference with the proceedings in any action," and section 656, which embraces such acts as "tend to defeat, impair, impede, or prejudice" rights or remedies "in an action then pending." (554) The law governing proceedings as for contempt has been so recently and so fully considered in *In re Gorham,* 129 N. C., 481 and 492, that the citation of additional authority is unnecessary.

There being evidence to support the findings of fact by the judge below, they cannot be reviewed in this Court on appeal. There was abundant evidence to sustain his findings, and the punishment of the defendant was authorized by law. The respondent could not purge himself in a case of this kind. That is admissible only "where the intention is the gravamen of the offense." The intention here is not to be considered, for it is the acts of the respondent which constitute the contempt. *Gorham's case, supra,* at p. 493.

Chapter 87, Laws 1891, making it a misdemeanor for any person "by threats, menaces, or in any other manner to intimidate or attempt to intimidate" any person summoned or acting as a juror or witness from attending upon said court—would not embrace this case, which was not one of intimidation; and, besides, such statute is additional to, and not a repeal of, the inherent right of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses. Nor is such power of the court "as for contempt" restricted to interference by bribery or intimidation of jurors or witnesses in civil cases. There is nothing in the nature of things which should thus "sorten the arm of the law."

No error.

Cited: S. v. Hodge, 142 N. C., 670; *S. v. Moore,* 146 N. C., 654; *S. v. Thompson,* 140 N. C., 650; *In re Parker,* 177 N. C., 468.

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(555)

MARSHALL v. CORBETT.

(Filed 21 March, 1905.)

Abstracts of Grants—Evidence—Survey.

1. Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the State.

2. In order to aid the jury in locating the lines of a tract of land, it was competent to show by the chain-bearer at a survey made a year before the execution of the deed that lines were run and marked around the *locus in quo.*

ACTION by John B. Marshall against George W. Corbett, heard by *Ferguson, J.,* and a jury, at January Term, 1904, of PENDER.

The plaintiff brings his civil action pursuant to the provisions of chapter 6, Laws 1893, for the purpose of quieting title. He alleges that

he is the owner and in the possession of the *locus in quo;* that defendant claims title thereto adverse to him, etc. Defendant denies plaintiff's ownership and avers that he is the owner. For the purpose of showing title the plaintiff introduced a deed duly registered from W. A. Lamb to himself, bearing date 1 January, 1893. The land is described as "Beginning at a stake on the run of Colly, running S. 21 W. 73 poles to a stake in Moore's and Lamb's line, thence S. 57 E. 138 poles to a stake, thence N. 23 E. 21 poles to a lightwood stump in the edge of Colly Swamp, thence with Colly to the beginning." He next introduced a deed duly registered from George F. Walker to W. A. Lamb, bearing date 22 December, 1863, conveying six tracts of land. Several of the tracts are described as being covered by grants to Samuel Waters—dated during the years 1762 and 1764. Plaintiff next offered to introduce several abstracts of grants issued by the State to Samuel Waters during the years 1762-'64. The abstracts were in the (556) usual form—"Samuel Waters, 640, on Colly Creek" (with description and date), signed by Arthur Dobbs. They were duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, etc. Defendant objected. "The court being of opinion that said abstracts were not grants and not sufficient to take title out of the State, excluded the grants from the consideration of the jury." Plaintiff excepted. Plaintiff introduced one Barnhill, who testified that he owned land adjoining the land in controversy. That he was present when Mr. Colvin surveyed the land in controversy pursuant to the order of the court made in this cause. That he was also present when W. A. Lamb made a survey of the same land twelve months before he sold to Marshall. That no other survey was thereafter made until Mr. Colvin surveyed it, pursuant to the order of the court. Plaintiff then offered to show by the witness that he was a chain-bearer at the time Lamb made the survey and that the lines were run as claimed by the plaintiff. Defendant objected; sustained. Plaintiff excepted. The following issues were submitted to the jury, to which they responded as set out in the record:

"1. Has the plaintiff located his land; if so, where are the boundaries?" Answer: "No."

"2. Has the plaintiff had exclusive, adverse possession of the land conveyed by his deed for twenty-one years, counting the time from 23 September, 1863, or any part thereof; if so, what part?" Answer: .....

"3. Has the plaintiff had open, notorious, adverse, exclusive possession of the land claimed by him, or any part thereof, for thirty years, including the time W. A. Lamb had possession, before the commencement of suit; if so, what part?" Answer: "From A to B, from B to K, from K to L, from L to A." (557)

His Honor rendered judgment that plaintiff was the owner of the land included within the boundaries indicated by the jury in response to the third issue. Plaintiff excepted and appealed.

Stevens, Beasley & Weeks for plaintiff.
No counsel for defendant.

CONNOR, J., after stating the facts: We were not favored with a brief or argument in behalf of the defendant and are not quite sure we understand upon what ground his Honor excluded the abstracts of grants offered by the plaintiff. They appear to be in the usual form and duly certified. The only statement in the record is that in the opinion of the court that they were not grants and not sufficient to take title out of the State. The abstracts are in exactly the same form as the one which was held by this Court to be competent in *McLenan v. Chisholm,* 64 N. C., 323. *Pearson, C. J.,* says: "From the abstract it appears with the requisite certainty that Sampson Williams was the grantee, Governor Martin the grantor, and 300 acres of land therein described the subject of the grant, and that a grant was executed 24 May, 1773. This is settled." With a change of names, etc., the language is strictly appropriate to the case before us. *Nash, J.,* in *Clarke v. Diggs,* 28 N. C., 159, says that the Legislature by an act passed in 1748 made the abstracts entered in the office of Lord Granville, or exemplifications of them duly proven, evidence as if the originals were produced. "The paper offered in evidence is an abstract containing the courses and distances of the lines, and the date and is signed by the Governor of the Colony, and the Secretary of State has certified that it is a true copy of the record of the grant. We believe that the practice has been uniform to record abstracts, and though the act is not brought forward (558) in the Revised Statutes, we are of the opinion that the act merely recognized the rule of the common law, and by the latter the copy was evidence." *Candler v. Lunsford,* 20 N. C., 142. The plaintiff's exception must be sustained. It was not necessary for plaintiff to connect his title with that of Waters'. The plaintiff, if permitted to show title out of the State, was entitled to show, if he could, a chain of title connecting himself with the grantor, or if unable to do this, to build up title in himself by any of the ways pointed out in *Mobley v. Griffin,* 104 N. C., 112. After the rejection of the grants, plaintiff undertook to show title out of the State by showing thirty years possession or twenty years under color of title. For the latter purpose it was necessary that he locate the land within the boundaries of his deed. He encountered difficulty in this effort because his deed called for a line beginning at a stake on Colly Creek. Unless there was some call in the

deed for a natural object, or something equivalent thereto, he could not locate the land. *Archibald v. Davis,* 50 N. C., 322. There is, however, a call for a "lightwood stump on the run of Colly." If he could locate this stump to the satisfaction of the jury, there was no reason why, by reversing the calls, the jury may not have ascertained and located the lines back to the beginning and thence with the swamp to the stump. *Dobson v. Finley,* 53 N. C., 495. His Honor correctly so charged the jury. For the purpose of locating the stump and aiding the jury in locating the lines therefrom, the proposed testimony of Barnhill was competent, and, if accepted by the jury, very valuable. To show by the chain-bearer at a survey made a year before the execution of the deed what lines were run and marked around the *locus in quo* was most material. The plaintiff's several exceptions in this respect, from two to five inclusive, must be sustained. We have examined with care the entire record. There are quite a number of exceptions. As (559) the case goes back for a new trial, we deem it best not to discuss them, as they may not arise again. It may be that in the light of the finding of the jury the rejection of the grants did not injuriously affect the plaintiff; we cannot tell how this is. There must be a

New trial.

Cited: Ipock v. Gaskins, 161 N. C., 684.

BECTON v. DUNN.

(Filed 21 March, 1905.)

Action of Ejectment—Defense Bond—Power of Court—Irregular Judgment, How Vacated—Code, Secs. 274, 237.

1. In an action of ejectment, plaintiff filed a verified complaint at November Term, 1902, and at said term defendant filed a verified answer, raising material issues, and also a defense bond, with surety, in proper form and amount. At January Term, 1903, judgment by default final was taken, and at June Term, 1904, defendant moved, upon proper affidavit, to vacate said judgment: *Held,* the judgment was irregular, and it was error in the trial judge to decline to vacate it for want of power in that the defendant had "waited too long."

2. Section 274 of The Code, providing that a motion to set aside a judgment for "mistake, inadvertence, surprise, or excusable neglect," must be made within one year, has no application to an irregular judgment, that is, one contrary to the course and practice of the court.

3. A motion to set aside an irregular judgment need not be made within one year after rendition of same, but the trial judge may, in his discretion, vacate same upon a proper showing made within a reasonable time.

4. A failure to file a "justified" defense bond as required by sections 237, 390, and 567 of The Code, does not necessarily avoid the bond, but it is a defect which may be cured by waiver, and an exception to the filing of the bond entered by plaintiff on the back thereof, but no action taken by the court in reference to it, does not authorize the court to give judgment by default without notice to the defendant.

(560) ACTION by Amos F. Becton against Charles F. Dunn and others, heard by *Ferguson, J.*, at June Term, 1904, of LENOIR. The defendant Dunn made a motion to set aside a judgment by default final rendered at January (Special) Term, 1903. The motion was denied on the ground that the defendant had waited too long, to which ruling the defendant Dunn excepted and appealed.

Loftin & Varser for plaintiff.
No counsel for defendant.

HOKE, J. The summons in this action was issued in August, 1902, returnable to September Term, 1902, of the Superior Court of LENOIR. At November Term, 1902, the plaintiff filed his complaint, duly verified, stating that he was the owner of the land in controversy and the defendant was in wrongful possession of the same, wrongfully withholding it from the plaintiff, etc.

At the said November Term, 1902, pursuant to notice previously given, the presiding judge made an order appointing a receiver of the real estate, giving him the property in possession to hold the same as such receiver. The order provided that the same should be vacated if the defendant should file a justified bond in the sum of $200 "for purposes of receiver" in ten days. At said term the defendant filed a verified answer, denying the allegation of the complaint and setting up a further defense, meritorious if the same be established as alleged. At the same term bond was filed by the defendant with surety in the sum of $200, in the usual form for defendants' bonds in actions for realty. On the back of this bond were the entries, "Filed 3 December, 1902; signed Plato Collins, C. S. C.," and a further entry, "Plaintiff comes into court by his attorneys and excepts to the filing of this bond, 3 December, (561) 1902." So far as the record discloses, no notice was given the defendant that his bond was excepted to, and no action was taken in reference to the same by order requiring further security, or as to the surety justifying on the undertaking already filed. At January (Special) Term, 1903, judgment by default final was taken according to the prayer

of the complaint. On 4 September, 1903, the defendant caused notice to be served on the plaintiff that he would, at September Term following, move to set aside the judgment against him. At said term no entry of this motion appears, and no entry concerning the same appears on the record till June, 1904, when the defendant filed an affidavit alleging further merits, and at said term the motion was made and his Honor made the order as heretofore stated.

From this statement it will be observed that no motion was made in court by the defendant until June Term, 1904, more than one year after the rendition of the judgment. His Honor declines to set aside the judgment because the defendant had waited too long. As we construe the order, the relief was denied on the ground that the motion was made more than one year after the rendition of the judgment, and that the court then had no power to disturb it. This position of his Honor was no doubt on the idea that this was considered a proceeding to set aside a judgment for surprise or excusable neglect under section 274 of The Code, and that such motion was required to be made within one year from the rendition of the judgment. The plaintiff appellee evidently so regarded it, as the authorities cited by him are all decisions under that section. This section was enacted to afford a defendant relief where a judgment regular in form had been taken against him through his mistake, inadvertence, surprise, or excusable neglect; and if this judgment were of such character, that is, one taken according to (562) the course and practice of the court, the ruling of his Honor would be correct; but the judgment herein complained of is an irregular judgment, one contrary to the course and practice of the court, and can be set aside after one year on proper showing made.

The authorities are all to the effect that an irregular judgment may be set aside at a subsequent term, independent of section 274. *Wolfe v. Davis,* 74 N. C., 597. This is not done as a matter of absolute right in the party litigant, but rests in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time. 17 A. & E. (2 Ed.), 84. There is, however, no lack of power in the court to act after one year when the judgment is irregular, and the facts and circumstances justify and require it. There are numerous decisions in our own Court supporting the proposition as here stated. *Wolfe v. Davis, supra; Cowles v. Hayes,* 69 N. C., 406; authorities cited in Clark's Code (3 Ed.), pp. 321, 322, 323. It cannot be successfully maintained that this is not an irregular judgment. It is a judgment by default final in an action to recover land, and at the time the same was rendered the defend-

ant had an answer on file, properly verified, denying specifically the plaintiff's allegations, and setting up a further defense, meritorious if it can be established as alleged. More than this, the defendant had at the time, on file, a defense bond in proper amount and form, and no action of the court had been taken to strike out his answer nor to assail the validity of his bond. True, the bond had not been justified, and the plaintiff had caused to be entered on the back of it, "Plaintiff comes into court and by his attorney excepts to the filing of this bond, 3 December, 1902." But no action of the court had ever been taken in (563) reference to it, so far as the record discloses.

While the section of The Code relating to this question seems to require that said bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified (Clark's Code, secs. 237, 390, 560), a failure to do this does not necessarily avoid the bond. It is a defect which may be cured by waiver. *McMillan v. Baker,* 92 N. C., 110. The exception noted on the back of the bond by plaintiff's counsel does not point at all to the sufficiency of the sureties, certainly not in terms, and if it were otherwise, after a defense bond is received and filed, such objection, we think, on a fair interpretation of the statute, could only be made good by some action of the court on notice duly given.

In the order appointing a receiver, made at November Term, 1902, the judge had provided that if the defendant should file a justified bond for "purposes of receiver," the appointment of such receiver should be vacated; but this was a privilege granted to the defendant, which in its purpose and terms was confined to the question of receivership, and did not profess to pass on the undertaking as a general defense bond. Even when an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. *McMillan v. Baker,* 92 N. C., 111; *Cooper v. Warlick,* 109 N. C., 672.

The Court must not be understood as intimating that the plaintiff is required to go on and incur the expense of a trial when there is no bond, or only an insolvent bond given to protect him. The court has ample power to require a bond to be justified or a new bond to be given, (564) and, under certain circumstances, that the same should be enlarged. *Vaughan v. Vincent,* 88 N. C., 116. But this should be done by some action of the court, and usually after notice and some evidence offered; and when a motion to that effect is made and properly supported, it is the duty of the court to see that the plaintiff is protected by a justified and solvent bond. But when a bond has been received and

filed, and an answer also filed raising material issues, and no preliminary order of the court made in reference to either, the defendant is entitled to have the issues raised by his answer properly considered and disposed of, and it is irregular to give judgment by default final against him, ignoring his answer and all issues therein raised. *McMillan v. Baker, Cooper v. Warlick,* and *Wolfe v. Davis, supra.*

It is the opinion of the Court that there was error in the order of his Honor declining to set aside the judgment for lack of power; and that on the facts disclosed in this record and case on appeal the judgment by default final entered against the defendant at January (Special) Term, 1903, should be set aside.

Let this be certified to the end that such judgment be set aside and the cause proceeded with in accordance with this opinion and the course and practice of the court.

Error.

Cited: S. c., 142 N. C., 172; *Flowers v. King,* 145 N. C., 235; *Cowan v. Cunningham,* 146 N. C., 454; *Calmes v. Lambert,* 153 N. C., 253; *Miller v. Curl,* 162 N. C., 4; *Cox v. Boyden,* 167 N. C., 321; *Estes v. Rash,* 170 N. C., 342; *Lee v. McCracken, ib.,* 596; *Gill v. Porter,* 174 N. C., 570; *Jernigan v. Jernigan,* 178 N. C., 83; *Bostwick v. R. R.,* 179 N. C., 487; *Gough v. Bell,* 180 N. C., 270.

(565)

KNITTING MILLS v. GUARANTY COMPANY.

(Filed 21 March, 1905.)

Indemnity Bond—Final Agreement—Preliminary Negotiations.

1. Where the defendant gave a bond to secure the plaintiff against any loss "by any act of fraud or dishonesty" of plaintiff's employee, the defendant by such bond did not guarantee the payment of the employee's debts contracted with the plaintiff.

2. The legal effect of a final written instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake, unless the terms of the instrument are ambiguous and require explanation.

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

DEFENDANT'S APPEAL.

The plaintiff sues to recover the sum of $353.18 for goods sold and delivered to one Leopold Goorman, the payment of which it alleges was guaranteed by the defendant. The facts are that the defendant, on 9 March, 1898, by what is called in the case a temporary bond, "guaranteed the fidelity of Goorman in the sum of $1,000 in favor of the plaintiff from 2 March, 1898, for one year," subject to all the covenants and conditions set forth and expressed in the bond of the company to be issued and forwarded from the home office within fifteen days from said
(566) date. Goorman made a written application for the permanent bond, in which he represented that he was engaged as agent in the service of the plaintiff, and had been since 1 February, 1898, and agreed to indemnify the defendant against any loss it might sustain by reason of its guaranty of his fidelity "in his present or any other position in the service" of the plaintiff. The plaintiff in writing answered certain written questions sent to it by the defendant, and, among others, the following: "How long have you known the applicant, and how long has he been in your employ?" Ans. "Only recently, and we know very little of him." "What salary will he receive?" Ans. "None; he is to buy goods from us and for stipulated prices." "If his duties embrace the custody of cash, state the largest amount likely to be in his custody at any one time." Ans. "His obligations to us will probably average $500 to $600, not exceeding $1,000 at any time." In that writing it was recited that application for "bond of security" had been made for Goorman, who was in the plaintiff's service at Denver, Colorado, and at the end was the signature of the plaintiff, under the words "signature of employer." The paper containing the questions and answers was dated 15 March, 1898. The permanent bond is dated 7 March, and was forwarded to the plaintiff 17 March, 1898. It recites the fact that Goorman had been appointed agent in the service of the plaintiff, and describes the relation between them as that of employer and employee, and also recites that the plaintiff had made "a statement in writing relative to the duties and responsibilities of Goorman, and the checks to be used upon him as employee in said position." The defendant then agrees "in consideration of the premium and the foregoing statements of the said employer that, subject to the conditions precedent expressed in the bond, it will make good and reimburse to the plaintiff all and any pecu-
(567) niary loss it may sustain in the form of money, securities or other personal property in the possession of the employee (Goorman) or for the possession of which he is responsible, by any act of fraud or dishonesty on his part in connection with the duties of the office or posi-

tion" in said bond mentioned. The written statement of the plaintiff, dated 15 March, 1898, was enclosed to the defendant in a letter of the same date, in which the plaintiff stated that Goorman was not employed by them at all, but buying outright such goods as they shipped to him. It is further stated in the letter that the plaintiff never had any business dealings with him before and did not know him; that he is engaged in an agency and commission business in Denver and had applied to the plaintiff for a credit of $500 or $600, and offered to give a good bond to secure the same. The plaintiff, in this letter, then adds: "He is associated in business now with Mr. Lewis Pelton, Denver, Col., who has been representing us in that market for quite a little while."

The foregoing are the material facts taken from the report of the referee, to whom the case had been referred, and the exhibits. The referee reported the facts and his conclusions of law and found that the plaintiff is entitled to recover of the defendant the amount of the debt due by Goorman. The defendant excepted to the finding; the judge overruled the exception and affirmed the report, giving judgment for the amount of the debt and the costs against defendant, who again excepted and appealed.

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

WALKER, J., after stating the case: The referee found as a fact that when the permanent bond was delivered to the defendant it knew that Goorman was not an employee of the plaintiff, and he decided as matter of law that the plaintiff's written statement of 15 March (568) and the letter of the same date, in which it was enclosed to the defendant, should be considered in connection with the bond, as constituting the contract between the parties, and, when thus considered, those papers together imposed a liability upon the defendant to pay the "honest debt of Goorman," the act of Goorman in refusing to pay the debt to the plaintiff being an act of fraud or dishonesty within the meaning of the words of the bond. The court below seems to have concurred in this view of the referee. The conclusion is based upon the theory that, as the defendant knew how the plaintiff regarded the transaction, it would be fraudulent to permit the plaintiff to sell goods to Goorman with such an understanding of the contract, and the defendant is consequently estopped to deny its liability. Assuming, notwithstanding what is said in the concluding paragraph of the letter of 15 March, that there is some evidence to charge the defendant with knowledge of the plaintiff's construction of the contract, the fact remains that, afterwards, the plaintiff

received the permanent bond, which secured it only against loss by reason of the dishonesty of Goorman as its agent, and having had this bond in its possession several days, it shipped the goods to him. It dealt with the defendant at arm's length and is presumed to have been able to take care of itself in the transaction. When it received the bond its plain duty was to read it, and we must assume that it did. The language of the bond is too clear and explicit to mislead any one. It excludes the idea that the defendant was undertaking to guarantee the payment or collection of Goorman's debt, and we know of no principle of law which requires us to say that it does so, even when read in connection with the letter and statement. Why did not the defendant have as much
(569) right to rely upon its version of the contract, that it was merely guaranteeing the honesty of an agent, as did the plaintiff to act upon its view of the transaction, that defendant was guaranteeing the payment of the debt? The letter and statement of the plaintiff to the defendant, if we say the least of them, were not any more unequivocal in stating the plaintiff's understanding than the bond was in setting forth that of the defendant. Again we inquire, how was it any more censurable in the defendant to send the bond to the plaintiff after receiving the letter and statement, and to permit the latter to sell goods to Goorman, than it was in the plaintiff to receive and retain the bond without making the slightest objection to it, and then to sell the goods, when it well knew what were the contents of the bond? In this contention between the parties we are led to believe that the advantage is decidedly with the defendant. He is relying upon the last written memorial of the contract, which in law is taken to express all that the parties intended to put in it, and which merges in itself all prior or cotemporaneous declarations or agreements. The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or unless the terms of the instrument itself are ambiguous and require explanation. *Meekins v. Newberry,* 101 N. C., 17; *Bank v. McElwee,* 104 N. C., 305; *Taylor v. Hunt,* 118 N. C., 168; *Moffitt v. Maness,* 102 N. C., 457. *Dellinger v. Gillespie,* 118 N. C., 737, is much like our case in principle. It is there said that when the defendant received the contract he should have repudiated it at once, if it did not conform to the real agreement of the parties, and not have acted upon it with full knowledge of its contents. That, if he did not read it, it was his own fault, and
(570) the law will not relieve him from the consequences of his neglect,

and the case therefore must be considered and decided as though he had read it and knew and understood what was in it. The construction of a contract is to be determined, not by what either one of the parties may have understood, but by what they both agreed. *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249; *Lumber Co. v. Lumber Co., ante,* 431.

Here we have a solemn instrument embodying the final intention and agreement of the parties, without any allegation of mistake, and we are to construe the same according to the legal import of its terms, and upon such legal import there is no room for doubt as to what is the meaning of the writing. We must therefore decide according to the general rule of law that all preliminary negotiations and agreements are to be deemed merged in the final settled instrument of the parties when there is no reasonable showing of mistake. *Van Ness v. Mayor,* 4 Peters, 232; *Steamboat Co. v. Steamboat Co.,* 109 U. S., 672. It is not admissible to add to or engraft upon the contract, as thus ascertained by the law, any new stipulation, nor to contradict those which we find are plainly set forth in it, and the meaning of which is wholly free from any doubt. *Oelrichs v. Ford,* 23 How., 49; *Davis v. Glenn,* 76 N. C., 427. If the construction of the letter and statement, as insisted upon by the plaintiff's counsel, is the correct one, it is directly repugnant to the terms of the contract as finally written, and cannot, under the well-settled rule, be permitted to overthrow it, for that would be the inevitable result. The plaintiff must be held to have accepted the agreement as finally expressed in the bond, and must abide by it. This ruling renders it unnecessary to consider the other exceptions.

The court erred in giving judgment for the plaintiff upon the report of the referee for the amount of the account against Goorman.

The judgment should have been the other way, and will be so (571) entered.

Reversed.

PLAINTIFF'S APPEAL.

WALKER, J. This action was brought to recover the amount of accounts for goods sold and delivered to Leopold Goorman and to Lewis Pelton. The referee found in favor of the plaintiff as to the account of Goorman and against him as to the account of Pelton. We have disposed of the case, so far as it relates to the Goorman account, in the decision rendered in the defendant's appeal. We are now to consider the plaintiff's exception to the ruling in regard to the Pelton account. There is no substantial difference between the two cases. Whatever dif-

ference there may be is unfavorable to the plaintiff. The main question having been decided in the other appeal, it only remains to say, with reference to the Pelton account, that the referee found the defendant had no notice as to how the plaintiff construed the bond, and that the transaction between the plaintiff and Pelton was not within the scope of the contract of the defendant with the plaintiff. In all other respects the two appeals are substantially alike, and if the ruling in favor of the plaintiff in the other appeal was wrong, the ruling against him in this appeal must be right.

No error.

Cited: Mfg. Co. v. Assurance Co., 161 N. C., 96; *Patton v. Lumber Co.,* 179 N. C., 109.

(572)

WATTS v. GRIFFIN.

(Filed 21 March, 1905.)

Wills—Conditions in Restraint of Marriage (Total, Partial, Uncertain)—Curtesy, How Affected by Wife's Will.

1. A mother devised by the first item of her will a house and lot to four of her children "as a common home for themselves and with equal rights to the same until twenty-one years after the death" of herself and husband, and that then they and their heirs shall own the said house and lot in fee simple; and in a subsequent item she provided that if either of three of said children "marry a common woman," in such event he shall not have any interest in said house and lot: *Held,* that a deed executed by all of the devisees during the lifetime of husband of the testatrix conveyed a perfect title.

2. A condition annexed to a gift entirely restraining the donee from marriage is against public policy and void, and even if there be no positive prohibition, yet if the condition operates to occasion a probable prohibition, or is so rigid as to cause a virtual restraint, it is void.

3. But where the conditions in restraint are only partial and confined within reasonable limits and are certain in their terms, the law does not pronounce them void, if they do not unduly interfere with the donee's right of choosing whom and when he will marry.

4. A condition that if the devisee "shall marry a common woman" he shall not have any interest in a house and lot given to him in a previous item of the will, is void for uncertainty, and being a condition subsequent, the gift is absolute.

5. A husband has no interest whatever in the land of his wife acquired since 1868, where she dies testate as to such property.

CONTROVERSY without action by R. A. Watts, Sr., Andrew J. Flanner, Frank Watts, Eugene Watts, Florene Watts, and Samuel Watts against W. H. Griffin, heard by *Neal, J.*, at January Term, 1905, of WAYNE.

This is a controversy submitted without action under section 567 of The Code, upon the following statement of facts: The (573) plaintiffs have contracted to convey the land described in the will, hereinafter mentioned, to the defendant for $5,000, and have duly executed and tendered to him a deed for the same with full covenants of title, and demanded the payment of the purchase money. He refused to pay upon the ground that, by reason of the special provisions of the will of Fannie Watts, and of a mortgage deed and assignment made by her husband, R. A. Watts, Sr., the plaintiffs, who claim under said Fannie Watts, cannot convey a good and indefeasible and unencumbered title. The items of the will which it is necessary to set out are as follows:

"First. I give and devise to my beloved children, Frank Watts, Eugene Watts, Florene Watts, and Samuel Watts, the house and lot whereon I now live, to own in the following manner: that they shall own the said house and lot as a common home for themselves and with equal rights to and in the same until twenty-one years after the death of both their parents, then the said Frank Watts, Eugene Watts, Florene Watts, and Samuel Watts and their heirs shall own the said house and lot in fee simple. The room in the aforesaid house known as the Andrew J. Flanner room I reserve for the use of my son Andrew J. Flanner until twenty-one years after the death of both my husband and myself. During such time, my son Andrew shall have the personal use only of the said room. My will is that in the event that the house on said lot should be destroyed by fire, the insurance on the same shall be used to build another house on said lot.

"Tenth. Should my sons Frank, Eugene, and Samuel at any time marry common women, or if either of them marry a common woman, then in such event they shall not have interest in the house and lot devised in paragraph first of this will."

The testatrix provides in the will for the payment of the pre- (574) miums for insurance on the house and the taxes.

The plaintiffs, except R. A. Watts, Sr., the husband of the testatrix, are the persons named in the first and tenth items of the will. The testatrix had two other children and heirs, R. A. Watts, Jr., and Mrs. Mamie Hedrick, who are now living. The plaintiffs are all of full age and otherwise have full capacity to convey the land.

At the hearing the court below held that the plaintiffs had the right to convey the land in fee and that the same is free from all encumbrances, and adjudged accordingly that the plaintiffs recover $5,000

purchase money, and on payment of the same by the defendant that they deliver the deed to him. Defendant excepted and appealed.

W. C. Munroe and E. A. Humphrey for plaintiffs.
Aycock & Daniels for defendant.

WALKER, J., after stating the case: When this will was before the Court for construction at a former term (*Ex parte Watts,* 130 N. C., 237), the question involved in the litigation was quite different from that which is now presented for solution. Proceedings had been brought to sell the land or home place described in the will for partition among the four devisees, two of whom were at the time under age. It was held, and correctly, we now think, that the court could not order a sale, as that would defeat the intention of the testatrix to provide a common home for her four children during a period limited to twenty-one years after the death of herself and her husband, which intention should be enforced, it not being contrary to public policy nor for any other reason unlawful. The condition certainly was not unlawful as to the infants, for it imposed no greater restraint upon the alienation of the fee by them than
(575) did the law, as they could not convey during their minority. But the Court went further and held that the time during which the house and lot should be owned and used as a common home was not unreasonably long, and the condition was not therefore forbidden, and this was held to be the law without regard to the ages of the devisees. Counsel for the defendant now contend that, if the condition that the house and lot should be used as a common home for the time specified in the will is valid, and the land could not be sold in the proceeding for partition, as decided in *Ex parte Watts, supra,* it follows that the plaintiffs cannot sell it and convey a good title by deed, for there is nothing in this case to take it out of the rule laid down in *Ex parte Watts.*

This contention is based, we think, upon a misapprehension of the true scope of that decision. The Court expressly stated that it did not undertake to decide the question now presented in this case. *Justice Douglas,* who wrote the opinion, says: "We do not mean to say that the children or any of them are required to live in the house. Nor are we passing upon the effect of a joint deed executed by all the children after they become *sui juris.* Such a question is not before us in any shape." The reason for that decision was that there was not and could not be any such consent by the infants as would vest a good and indefeasible title in the purchaser at the sale. But we are dealing with a very different question, for it appears that all the interested parties, who now have full capacity to consent, have actually agreed to sell and convey the land

to the defendant. If we should find that the testatrix intended to put a restraint upon the alienation of the land, and has in fact done so, we might be forced to declare the condition to be void, but we should seek for some other intent more consistent with law, and if we can find one that will accord just as well with the words of the testatrix as the other, and not trench upon any principle of law or public policy, (576) we should adopt that one as the true intent. We think it is clear that the testatrix gave the house and lot to her children for the purpose of advancing their interests in life by providing them and each of them with a home in the event that one was needed, and she also intended in furtherance of this design that the land should not be conveyed or disposed of without the consent of all the devisees. Each one was at all times to have access to the house and lot for the purpose of using them as a home, and could not be deprived of this right, either directly or indirectly, nor be affected by the act of any of the others which would be calculated to interfere with or impair the full enjoyment of the right. In a few words, she did not intend that any of her children should become homeless. We need not inquire whether the condition was void, in so far as it incidentally imposed a restraint upon the right of alienation of each one of the children, so that no one of them could convey his or her interest without the consent of the others during the prescribed period of time, because we have no such case presented. It is quite sufficient for us to declare, as we do, that it was not intended by the testatrix, if all of her children should think it best for them to part with the homestead, so that each could buy a separate home for himself or herself, they should be prohibited from doing so. Such a construction might produce dissension and strife in the family, something that we can well see she neither contemplated nor desired. Giving to each one a veto power, it was left to all of them, if they could come to an agreement, to do with the property just as they pleased, and as they might think would promote their interests, their happiness and welfare evidently being the paramount intent of the donor.

The effect of the devise was to give the children a fee, subject (577) to the condition expressed in the gift. If it was intended that the gift of the land until twenty-one years after the death of the surviving parent should create a separate and distinct estate to be carved out of the fee, or what we may call a particular estate, with a remainder to the donees in fee at the expiration of that time, the two estates having met in the same persons and in the same right, would unite under the doctrine of merger and become one estate in fee.

Crudup v. Holding, 118 N. C., 222, which was cited by the defendant's counsel, is clearly distinguishable from our case. It was there decided

that the mother held the land in trust for her own use and the use of her children, who were infants, and could not sell it in violation of the terms of the will. There was no consent by all of the interested parties to sell, as in this case.

The defendant contends that the plaintiffs cannot convey a good title because of the condition annexed to the interests of the three sons in item ten of the will. As a general rule, the law will not recognize and enforce conditions in restraint of marriage. They are regarded as against public policy and therefore invalid. But where they are only partial and confined within reasonable limits, the law does not pronounce them void if they do not unduly interfere with the beneficiary's right of choosing whom and when he will marry. The rule is thus stated in Pritchard on Wills, secs. 156 and 157: "A condition annexed to a gift entirely restraining the donee from marriage is unreasonable, against public policy, and void, and the donee will take the gift free and discharged from the condition. And even if there be no positive prohibition, yet if the condition annexed to the gift is such as operates to occasion a probable prohibition, or is of so rigid a character, or so tied up to particular circumstances as to unreasonably impede the donee in the choice of marriage, and therefore occasion a virtual restraint, it is void. But restraints (578) designed for the protection of youth and inexperience against rash and improvident marriage, by postponing it until such time as is, or limiting it to such circumstances as are, presumably to the advantage of the person affected, are valid." But all such conditions, besides being reasonable, must be certain in their terms, so that, for example, when a beneficiary is forbidden to marry any member of a certain class, the court can determine who was intended to be embraced by the condition. "Perhaps no general rule can safely be laid down; but, independently of the question whether a condition involves anything illegal or impolitic, in order that it may be effectual the meaning of the testator must be reasonably clear and precise." Theobold on Wills, 452.

In this case we are not provided with any rule or definite criterion by which it can safely be decided to what particular persons the testator referred. The word "common" means, not excellent or distinguished in tone or quality; ordinary; commonplace; plebeian, hackneyed, coarse, low, unclean, or given to habits of lewdness. These are some of its accepted definitions, and we can easily see from them that its meaning has a very wide range and is capable of almost indefinite expansion. It certainly embraces a very large class of people of different types and characteristics, and, apart from any objection that perhaps may properly be urged against the condition as being too comprehensive by reason of the broad significance of the word which was used to describe the persons

intended, it has not the element of certainty which the law requires, as it refers to different classes of individuals without in any way indicating which one of those classes was meant. The condition is void for uncertainty, and being a condition subsequent, the gift is absolute. Theobold, *supra,* 450. It operates merely to divest and not to prevent the vesting of the interest so given, and is not, therefore, a condition precedent. 2 Jarman on Wills (5 Am. Ed.), 516); *Lloyd v. Branton,* (579) 3 Mer., 108.

The question raised as to the mortgage and assignment of R. A. Watts, Sr., was decided in *Ex parte Watts,* and we see nothing in this case to vary its facts from those upon which that decision was based, nor do we think we should change the opinion there expressed that he had no interest in the property. *Tiddy v. Graves,* 126 N. C., 620; *Hallyburton v. Slagle,* 132 N. C., 947.

Our conclusion is the court was right in adjudging that the plaintiffs can convey by their deed a good and perfect title to the premises.

No error.

Cited: Rea v. Rea, 156 N. C., 535; *In re Miller,* 159 N. C., 126; *Jackson v. Beard,* 162 N. C., 117; *Gard v. Mason,* 169 N. C., 508; *Bryan v. Harper,* 177 N. C., 311; *Sides v. Sides,* 178 N. C., 557; *Loftin v. English, ib.,* 607.

JONES v. COMMISSIONERS.

(Filed 28 March, 1905.)

"Authorize and Empower" Construed—Power of Legislature—Mandamus.

1. The terms "authorize and empower" used in an act conferring power upon a county, on the verge of bankruptcy, to issue bonds to fund its existing indebtedness incurred for necessary expenses, and providing the only feasible method by which the financial affairs of the county can be placed on a sound basis, will be construed to be mandatory.

2. The Legislature has power to pass an act compelling a county to issue bonds to fund its existing indebtedness incurred for necessary expenses.

3. *Mandamus* is the proper remedy against county commissioners who refuse to issue bonds, as required by an act of the Legislature.

CLARK, C. J., and WALKER, J., dissent.

PETITION of plaintiff to rehear former opinion, reported 135 (580) N. C., 218.

(589) *Charles E. Jones, Davidson, Bourne & Parker and Shepherd & Shepherd for petitioner.*

Gudger & McElroy and T. S. Rollins in opposition.

HOKE, J. This case has heretofore been decided by the Court in favor of the defendant, and an opinion to that effect has been reported in 135 N. C., 218. A like decision in a case substantially similar was (590) made in *Bank v. Comrs.*, 135 N. C., 230—*Justices Connor* and *Montgomery* dissenting in each case.

After full and careful consideration, the majority of the Court are now of opinion that the former decision was erroneous, and the law governing the case on the main questions presented is in accord with the dissenting opinions of *Mr. Justice Connor* filed in the two cases mentioned. The view of the Court which now prevails is so fully and clearly expressed in these dissenting opinions that we would be well content to adopt them as the opinion of the Court but as the more extended dissenting opinion is filed in *Bank v. Comrs.*, and our present decision is of momentous concern to the parties litigant, involving, as it does, too, a reversal of the former ruling of the Court, we have deemed it proper that we should make some further statement of the reasons which have led us to our present conclusion.

The first objection made by the defendant was to the jurisdiction of the court because, as contended by them, this is a money demand and the summons should have been returned to the court in term-time. This exception was determined against the defendant in the former opinion, and for the reasons therein stated this ruling should not be disturbed. Indeed, this question is really not before us on this petition, and is only referred to in order to show that the same has not been overlooked. The cause, then, is here for review on the second and third exceptions below stated:

Second. Is chapter 289, Laws 1903, mandatory? Third. Had the Legislature the power to pass it?

The terms of the first section of that act conferring power to issue bonds are "authorized and empowered," and in ordinary acceptation and in private transactions are usually permissive; but when these words are used in statutes they are frequently imperative, and where the statute is concerning public interests, or promotive of justice, or to secure (591) and maintain the individual rights of others, such words are well-nigh uniformly construed to be mandatory. This rule is stated by text-writers of approved excellence and is sanctioned by courts of the highest authority both in England and in the United States. Mr.

Black, in his Interpretation of Laws, p. 541, formulates the rule thus: "Where a statute provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty." And in commenting on the rule the author says: "The most frequent illustrations of the application of this rule are found in statutes authorizing the settlement of claims held by private persons against the State or its municipal corporations, and those making provision for the levy and collection of municipal taxes." He then cites several cases in which the term "may" and "authorized and empowered" and "authorized" are respectively held to be imperative, and then proceeds: "Even where the act provides that certain public officers, if deemed advisable, or if they believe the public good and the best interests of the city required it, may levy a certain tax, though these words are purely permissive in form, yet the act will be held to be peremptory whenever the public interests or individual rights call for the exercise of the power granted. And, in general, where the statute enacts that a public officer 'may' act in a certain way which is for the benefit of third persons, he must act in that way."

To the same effect is Throop on Public Officers, secs. 547 and 548, and Endlich on Interpretation of Statutes, sec. 311; Sutherland on Statutory Construction, p. 547. Adjudicated cases of like effect (592) can be found in *Supervisors v. U. S.*, 4 Wall., 435; *Galena v. Amy*, 5 Wall., 705; *Mayor of N. Y. v. Furze*, 3 Hill, 612; *People v. Flagg*, 46 N. Y., 401; *People v. Supervisors*, 51 N. Y., 401; *Brokaw v. Bloomington*, 130 Ill., 482; *S. Ex rel. v. King*, 136 Mo., 309; *Inhabitants of Veazy v. China*, 50 Me., 518; *Johnson v. Pate*, 95 N. C., 68.

We are not contending here that the Legislature cannot, in terms, confer discretionary power, nor that permissive terms, when used in statutes, are always mandatory regardless of their placing and the general purpose of the statutes in which they appear, nor are we assailing the principle that where such power is expressly conferred it is usually not permissible for courts to interfere and undertake to direct how such discretion should be exercised. We are seeking to arrive at the true meaning of the Legislature as expressed in this statute, by established and accepted canons of construction.

These very terms, "authorize" and "empower," are so frequently used in legislation of this character that they may be said to have attained a

technical or statutory signification, and where a long course of judicial decision has put a certain interpretation on such words, it is a fair inference and a true rule of construction that the Legislature, in using these words, intended them to have their established meaning.

Again, as said in one of the authorities cited, 51 N. Y., 401: "To determine this question (whether the terms 'authorized' and 'empower' are permissive or mandatory), not only the language of the act, but the circumstances surrounding its passage and the object had in view, must be considered." Here was a county on the verge of bankruptcy. As far back as 1887, and prior to that time, these debts for necessary
(593) expenses had begun to accumulate, and then amounted to $25,000. Issuing bonds to this amount under legislative sanction, the county officers have paid neither principal nor interest, with an exception so slight as not to be considered, and, in addition to this, debts of like character have been allowed to accumulate until there is $40,000 of indebtedness, additional to the bonds, accrued to 1 January, 1903, the period named in the act. The authorities of the county had failed to fulfill the purposes of its creation, and the Legislature enacted this statute to remedy the evil, as will be seen by a perusal of the entire act. It is a measure wisely conceived, carefully prepared, and presents the only feasible method by which this deplorable condition can be corrected, and the financial affairs of the county placed on a sound basis. Such being its beneficent purpose, the Court should be slow to construe the terms of the act discretionary, unless such construction is clearly required.

We do not understand that the general principle here declared is questioned, but some of our brethren are of opinion (and for their opinion we have the greatest consideration) that there are expressions in this act which forbid the application of the general rule, and require that the statute in question should be construed as discretionary. The language chiefly relied upon is that expressed in section 19, that "if the bonds authorized by this act are issued." . . . This expression, standing alone and unexplained, would not, of itself, be sufficient, we think, to prevent the application of the rule we are discussing. Many of the decisions upholding this rule were made on words much stronger than this expression would impart to the meaning of the act. But it is not unexplained. On the face of the act itself is found a full explanation of these words, entirely consistent with the decision of the Court on this question. It will be noted that the act provides in section 10 for
(594) the sale of the bonds, and in section 11 for their exchange with creditors holding claims, and in both sections it is directed that the bonds shall not be issued except at par value. It might turn out that

the bonds could not be sold at par under section 10. It might turn out that the creditor would not exchange them at par under section 11; and so the restriction in section 19 is explained by the restriction which the Legislature had itself put on the power to issue the bonds. This expression, no doubt, had reference to such restriction, and did not, and was not intended to weaken the imperative force of the words used in former sections of the act.

Again, it is contended that where the statute refers to the issuing of bonds it uses the words "authorize and empower," but where it provides for a board of audit, as it does in sections 7, 8, and 9, it uses the terms "authorize, empower, and direct." This difference, so far from supporting the construction contended for by the defendant, to our minds tends, rather, to confirm the decision on this point.

The act contains a complete and comprehensive plan for restoring order to the financial affairs of the county, and the issuing of bonds and the establishment of this board of audit are equal and dependent parts of the whole; one is as necessary to its successful operation as the other. The very fact that "authorize and empower" are used in one place, and "authorize, empower, and direct" at another, tends to the conclusion that, in the minds of the draftsman and legislators, the words had the same meaning and the same operative force and effect.

On the contrary, note how many of the requirements of the statute are couched in imperative terms: Section 4, in providing a form, says that the bonds "shall be signed by the chairman," and section 5, "the treasurer shall keep a separate account" . . . and section 6, "the Board of Commissioners of Madison County shall keep a separate account"; in section 8 "the board of audit are authorized, empowered, and directed to do their work"; section 15, "the treasurer of the (595) county shall pay the interest."

It is true that these words are usually in connection with the terms "bonds hereby authorized," but they serve to throw some light on the legislative intent, and to sustain the position that "authorize and empower," in the first three sections of the act, should receive their usual statutory acceptation. But this matter, we think, is conclusively set at rest by the language of section 11, and it is under this section that the plaintiff is now seeking to enforce his right. This section is as follows: "That if any creditor of the said county, whose debts or claims come within the meaning of this act, or any holder of any bond or bonds of said county, shall desire to exchange his bond or bonds and coupons, or other evidence or evidences of said indebtedness belonging to him, for one or more bonds hereby authorized, it shall be the duty of the said commissioners to pay off said creditor or creditors, and liquidate the said

indebtedness in the bonds authorized by this act, exchanging said bonds at their par value and canceling the evidences of indebtedness taken in lieu thereof."

The very reason of the rule of construction here adopted, given in many of the decisions, is that, where power is given in legislation of this character, a corresponding duty is imposed on the authorities to give the statute effect. The section here quoted, in express terms, imposes the duty which the creditor seeks to enforce. "Where the creditor desires to exchange his bonds or debt for bonds hereby authorized, and is willing to make the exchange at par, it shall be the duty of the commissioners to make the exchange."

On authority, and in consideration of the general purpose of the statute, and in view of its several provisions, we do not hesitate to declare that the act is mandatory in its force and effect, and was so intended by the Legislature.

(596) On the third question: Had the Legislature power to pass the act? The authorities are equally pronounced in favor of the plaintiff. We do not understand that the former opinion holds that the act is not within the legislative power. There is an intimation to that effect, however, and, as the present opinion will result in the enforcement of the statute, it is necessary to decide the question.

These counties are not, strictly speaking, municipal corporations at all in the ordinary acceptation of the term. They have many of the features of such corporations, but they are usually termed *quasi*-public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except where this power is restricted by constitutional provision. In *Hamilton v. Mighels,* 7 Ohio St., 109, it is said: "Counties are, at most, but local organizations, which, for purposes of civil administration, are invested with a few functions characteristic of corporate existence. They are local subdivisions of the State, created by the sovereign power of the State of its own sovereign will, without particular solicitation, consent, or concurrent action of the people who inhabit them." Again it is said: "A county organization is created, almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organizations, of the means of travel and transfer, and especially for the general administration of justice." "With scarcely an exception, all the powers and functions of the county organizations have a direct and exclusive reference to the general policy

of the State, and are in fact but a branch of the general administration of that policy." These statements are quoted with approval in 1 Dillon on Mun. Corp., sec. 23; Smith's Law on Mun. Corp., Vol. (597) I, sec. 10, and are sustained by a line of authorities unbroken, so far as we have been able to discover. *People v. Flagg,* 46 N. Y., 401; *Galveston v. Pomainski,* 62 Tex., 118; *Philadelphia v. Fox,* 64 Pa., 160; *Locomotive Co. v. Emigrant Co.,* 164 U. S., 559, 576. Nowhere has this doctrine been more consistently adhered to than by our own Supreme Court, *Mills v. Williams,* 33 N. C., 558; *Wallace v. Trustees,* 84 N. C., 164; *White v. Comrs.,* 90 N. C., 437; *Tate v. Comrs.,* 122 N. C., 812; *Mial v. Ellington,* 134 N. C., 131.

It will be borne in mind that we are speaking of the power of the Legislature in matters governmental. We are not asserting the right of the Legislature to compel a county to create a debt in aid of a private enterprise, nor for purposes of strictly local benefit and advantage. In *Park Comrs. v. Detroit,* 28 Mich., 222, it was held that the Legislature could not compel the city authorities to contract a large debt in purchasing a park, and in *People v. Batchelor,* 53 N. Y., 128, it was held that the Legislature had no power to compel a town to subscribe to a railroad owned and controlled by private stockholders and operated for their own advantage. These decisions were in relation to towns, in regard to which the power of the Legislature is usually more restricted, but as to counties also, they can, we think, be sustained by reason and authority.

This limitation of legislative power is not a debatable question in this State. It has been written into our organic law. In Art. VII, sec. 7, of the Constitution, it is provided that no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officer of the same, except for the necessary expenses thereof, unless by vote of a majority of the qualified voters therein. This section was (598) no doubt put in our Constitution because of the undefined and well-nigh unlimited power of the Legislature, which existed at the time of its adoption, and it has not been altered or repealed. It will be noted that debts for necessary expenses are expressly excepted from this article of the Constitution, and all the debts which are the subject-matter of the statute now in question are of this character. It is not sought here to force the county to *create* a debt of *any* kind. These debts had already been created, and were outstanding and drawing interest at 6 per cent when this statute was passed. The current rate of taxation is not sufficient to pay them in full, and the statute, as heretofore stated, presents a comprehensive, carefully prepared, and feasible plan to fund the debt at

a lower rate of interest, and restore the county finances to a satisfactory condition. As here stated, this power of the Legislature over counties is fully sustained in *Tate v. Comrs.*, 122 N. C., 812, and is nowhere more forcibly and tersely expressed. This was an action to compel the commissioners of Haywood County to put in force a legislative enactment requiring the county authorities to work their roads by taxation. And there was a judgment compelling the commissioners to put the law in operation. This authority is cited in the former opinion of the Court on the present case, and the distinction made between that and the case before us is that the making of roads was a governmental function; but we do not think the cases can be so distinguished. What are these debts to which this statute is addressed? They are all debts for necessary expenses. And what does this term import? They involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of the public peace, and administration of public justice—expenses to enable (599) the county to carry on the work for which it was organized and given a portion of the State's sovereignty. To say that the Legislature has no control in such matters would enable the county authorities, of their own will, to stay all governmental action in their locality, and entirely defeat the purposes for which they were created. This is one of the reasons, no doubt, why necessary expenses were excepted from the article of the Constitution just quoted. The exception was partly made because it would be impracticable to refer all of these current expenses to popular approval; but an equally important reason was that local authority should not be withdrawn from all legislative supervision and control.

It has been suggested that, while the Legislature might compel the laying of taxes, its power does not extend to the issuing of bonds, but we do not think this position sound, or that any such distinction exists. This method of adjusting debts which counties have lawfully created is not at all unusual. It was commended in *Johnson v. Comrs.*, 67 N. C., 101, and expressly sanctioned in *Jefferson County v. People,* 5 Neb., 136; *Comrs. v. City,* 45 Ala., 399; Cooley on Taxation (3 Ed.), Vol. II, pp. 1300, 1301.

Again, it is contended that, while the power to the extent claimed may exist in other jurisdictions, it cannot obtain here, where the officers and agents who carry on the county government are given a place in our Constitution and their existence thereby secured. As we apprehend this position, it is argued that the very fact that these officers are so placed manifests a purpose to give them exclusive or much larger power in the management and control of local affairs. Some expressions to this effect

have found their way into a few of our decisions, notably, *Brodnax v. Groom,* 64 N. C., 244, and *Cromartie v. Comrs.,* 87 N. C., 134. It will be noted that in these cases the Court was passing on the rights of the courts to interfere with the action of the commissioners, and (600) the question of legislative power was not at all before them, and any such effect from these intimations is expressly repudiated and condemned in *Tate v. Comrs., supra.* Even under our Constitution, as it originally existed, we do not think the position here contended for could be maintained. True, these offices were there created, and as the instrument then stood they could not be changed or destroyed; but what such officers, as agents of the State, could or could not be compelled to do was not stated in matters to which this discussion is addressed. However this may have formerly been, the position cannot be for one moment sustained under the Constitution as it now stands.

In 1875 the article in reference to counties was amended. For grave and weighty reasons, the people then added to their Constitution section 14 of Article VII, and it was there provided as follows:

"Section 14. The General Assembly shall have power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections 7, 9, and 13."

Section 7 is the one already quoted, and from its effect debts for necessary expenses are expressly excluded. Section 9 stipulates, in general terms, that taxation shall be uniform and *ad valorem.* Section 13 prohibits the payment of debts contracted in aid of the Confederate Government. Neither of these exceptions in any way affects the question now before us, and by the provisions of this amendment the power of the Legislature to supervise and control the action of county officers in governmental matters is fully restored, even if it had ever been withdrawn.

While the Court has every disposition to uphold the principle of local self-government, the history of this transaction, as shown in the record, is in itself almost a demonstration that it is not amiss, and at times altogether desirable, to have a supervising representative authority with power and disposition to intervene when local officers (601) have failed and refused to perform their official duties.

We declare our opinion to be that the court below had jurisdiction; second, that the act in question is mandatory; third, that the Legislature had power to pass the act; and fourth, that the remedy sought is the proper remedy.

Let this opinion be certified, to the end that the judgment of the Superior Court be affirmed and that process issue to enforce its provisions.

Petition allowed.

BROWN, J., concurring: I desire to express a few words of approval of the forcible opinion written by *Justice Hoke* on behalf of a majority of the Court upon the rehearing of this case. My attention was first drawn to its importance by the exhaustive and, to my mind, conclusive dissenting opinion of *Justice Connor* in *Bank v. Comrs.,* involving the same questions, 135 N. C., 230. After giving the case that careful thought which its importance demands, I fully concur in the reasoning and conclusions of the opinion of the Court.

I will briefly notice one matter not touched upon. By Laws 1903, ch. 289, secs. 7 and 8, a special board of audit was created with power to adjudicate and report the amount and status of the indebtedness of the county to be discharged and funded in accordance with the financial scheme set out in the act, with power to adjust the same on an equitable basis. The findings embodied in the report of the board were made conclusive on the county, and *prima facie* correct and competent in any court of justice in the State. This board duly advertised for creditors as required by the act, and duly passed upon, audited, and adjudicated the indebtedness of the county, and reported the same to the board of commissioners. The record discloses the fact that the board of
(602) commissioners met in session on 20 April and passed a resolution directing the issue of the bonds in manner and form as provided in the act. Notice was fully advertised, requiring all creditors to present their claims before the board of audit, which was evidently done. The board of commissioners adjourned and terminated their meeting of 20 April and met no more, so far as the record discloses, until the regular meeting on the first Monday in May. At this May meeting the board of commissioners attempted to revoke the order of 20 April, and directed that no bonds be issued under the act.

I am of opinion that, if the defendants had any discretionary power under the act, they exercised it once for all on 20 April, when they directed the issuance of the bonds. If the statute was dependent upon the contingency of their approval the commissioners of the county gave it force and vitality by their resolution of 20 April, and that they could not at their subsequent meeting lawfully revoke it.

When the board adjourned their special session *sine die* on 20 April, the rights of creditors at once attached under the act, and at their regular meeting in May the commissioners could not lawfully destroy those rights.

A very material enhancement in value was imparted to the bonds and script of the county by the action of the defendants on 20 April. This indebtedness is, doubtless, of a negotiable character in form, and that its purchase and sale were thereby greatly accelerated I do not doubt. It

is possible, nay, probable, some of it between 20 April and the May meeting found its way for value into the hands of innocent purchasers, who had a right to rely upon the stability of the solemn act of the commissioners. They cannot order a debt paid at one meeting, revoke it at the next meeting, reorder it paid at a succeeding meeting, and so on.

The board of commissioners, as the trustees and guardians of the county, cannot be permitted to play "fast and loose" with the (603) rights of creditors whose obligations are admitted to be just as well as the true interests of the citizens and taxpayers, who naturally desire to see the credit of their county maintained untarnished.

Municipalities are no more justified in neglecting their honorable obligations, when the means are at hand provided by law for their adjustment, than are private individuals, who contract honest debts and have the property with which to pay them. The General Assembly, evidently thinking so, has given the defendants ample means necessary to settle and adjust the indebtedness of their county. It has provided a wise and beneficent financial scheme whereby it can be done without great stress of taxation. It is the duty of the defendants to avail themselves of such means, and to carry out cheerfully and in good faith the will of the lawmaking power.

I am not at all alarmed at pessimistic predictions, or filled with fearful forebodings as to the consequences which may flow from this decision. It is but a proper recognition of the legitimate power of the General Assembly to compel counties to live up to their legal contracts, and to pay their honest and undisputed debts. It will have a very salutary effect upon the action of boards of commissioners and teach them to be economical and careful as to how they spend "other people's money." Besides, such legislation is carefully safeguarded by the Constitution of the State. Those wise provisions, which prevent hasty legislation upon such subjects and require a recorded vote, have been steadfastly upheld by this Court.

I am of opinion that the petition to rehear should be allowed, and that the writ of *mandamus* should issue as prayed for.

CLARK, C. J., dissenting: This case was decided in 135 N. C., (604) 218, and it is not shown that any authority or fact has been overlooked. Clark's Code (3 Ed.), p. 945, and numerous cases there cited. As this is the first instance in the books in which it has ever been held that the courts can compel a county to issue bonds upon a statute which merely "authorizes" it to issue them, it is well to scrutinize an innovation which must inevitably lead to startling results in the future.

It is the province of the courts to direct payment of indebtedness, either by issuing execution or by a *mandamus* to levy a tax, when the Legislature has authorized a tax or the indebtedness, which the municipality has created. But no court has issued an order that the debt of a county shall be funded. When the statute authorizes a debt, the expression "may levy a tax" has been construed "shall," because the enforcement of payment is a judicial function, and the courts will order the debtor to do what he may do to effect payment. This is the purport, without exception, of every case cited by the Court in which "may" has been construed "shall." But issuing bonds is not payment. It is an act which can only be made effectual by mutual agreement between the creditor and the debtor, and is in fact an agreement not to pay for a specified time. The Court can no more order bonds to be issued than it can compel the creditor to accept them. Neither is it in the scope of judicial power, in the absence of an agreement between the parties. Nor is it a legislative function to order a municipality to issue bonds, thereby deferring payment, any more than it is to command immediate payment.

A brief consideration will show that the Legislature in this act has done no more than "empower and authorize" the county to issue bonds—that is, if the county and the creditors should so agree, otherwise the issuing of bonds would be a vain thing. In section 1 the board
(605) of commissioners are "authorized and empowered"—not directed —to issue bonds. Section 8 "authorizes, empowers, and directs" them to audit, ascertain, and adjust the amount of the floating debt, thus showing that the General Assembly knew when it could add the word "direct" and when it could not. Section 19 places the legislative intention beyond the possibility of doubt by providing: "If the bonds hereby authorized by this act are issued." What is the meaning of this expression if the act were a direct and imperative order that the county should issue the bonds?

That the General Assembly knew and intended a difference between the permissive authority to issue bonds and the imperative "shall" is shown by the use of the latter word, in sections 10 and 11, in providing that the bonds "shall not be issued except at par value"—thus restricting the permission, which is given in section 1, to issue bonds. Also, in section 4, in providing a form, it says the bonds "shall be signed by the chairman"; section 5, "the treasurer shall keep a separate account"; section 6, the "commissioners shall keep an account"; section 15, "the treasurer shall pay the interest"—all these, coupled with the words "bonds hereby authorized," thus meaning clearly what is expressly said in section 19, "if the bonds hereby authorized are issued."

The General Assembly thus knew the difference between "authorizes and empowers" and the words "shall" and "direct," and used each in its appropriate place. It could only "authorize" the debtor to issue the bonds, and did so. It could restrict that authority by imperative requirements as to the methods of doing so and other details, and, as to those matters, used the words "shall" and "direct."

For certain purposes counties and other municipal corporations are governmental, and in those respects being a branch of the State Government, can be changed or abolished by legislation, and can- (606) not be sued except by legislative permission. *McIlhenny v. Wilmington,* 127 N. C., 149, and cases cited. But as regards indebtedness incurred, they are business corporations, not governmental, else they could not be sued. Hence the Legislature can neither release the indebtedness nor defer nor order payment—the latter being a judicial function. It belongs neither to the Legislature nor to the judiciary to order bonds to be issued, since neither could order any other debtor to issue bonds. As to indebtedness, the jurisdiction is the same as over other debtors, neither more nor less. The Legislature may "authorize and empower" municipalities to issue bonds, and, as we have seen, that is all it has done in this case. It would be a sad and deplorable result if the General Assembly should attempt to order and command in matters affecting a local indebtedness which it cannot command the people of any locality to create. Not having such power, it cannot order the people of any locality to change the form of its indebtedness, nor defer its payment to a future day by directing the issue of bonds. It may "empower" them to create an indebtedness, provided (in proper cases) there is a vote of the people to that end. It may authorize the issuing of bonds; it may restrict such permission by imperative provisions as to details and circumstances under which authorization may be used. The courts alone can direct payment. Even the courts cannot order issuance of bonds, for that would be to forbid payment for the duration of the bonds, and might fix a different rate of interest, both in violation of the contract between the parties. When the statute provides "the county commissioners 'may' issue license to sell liquor" the Court has always held that this was discretionary with the commissioners. Even if the word "shall" is used there is a discretion, which the courts will not control by *mandamus. Barnes v. Comrs.,* 135 N. C., 27. Yet that is a governmental matter, as to which the Legislature could sub- (607) stitute "shall." As to municipal indebtedness, the Legislature can neither order payment (which is a judicial power) nor direct the issuance of bonds, which is a matter of agreement between every debtor and

his creditor. The time when to be paid, the rate of interest, and the like are parts of the contract and cannot be changed, against the will of either party, by legislative enactment.

The only two cases in the books in which any court has issued a *mandamus* to a municipality to issue bonds are *Comrs. v. People,* 5 Neb., 127, in which the statute provides that said "commissioners are hereby authorized and *required*" to issue said bonds, and *President v. Board,* 45 Ala., 399, in which also the statute "hereby *requires*" that the municipality shall issue the bonds. Neither is authority for such action by the court when the statute, as in this case, neither "requires" nor "directs," but merely "authorizes and empowers" the county commissioners to issue bonds, and the last-named case is severely criticized by Judge Cooley in his work on Taxation, vol. 2, p. 1312 (3 Ed.), citing many apposite cases (p. 1307, note) that the State cannot make a contract for a municipality.

The Constitution, Art. VII, sec. 7, provides that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." It is true that here there is a debt already contracted, but it is not yet due, and there is certainly no contract that the county shall pay interest thereon for thirty years, a sum largely more than the principal, at a rate not agreed to by the debtor, who is debarred by the issue of bonds from paying the principal at an earlier date. Is it possible that the courts can force
(608) any debtor to make a new contract, issuing bonds for a debt not yet due or for script not reduced to judgment, without a vote of the people authorizing such contract? The issue of bonds is a solemn contract. The time and rate of interest are both matters to be agreed upon. The State cannot make a contract for the county, and the expression "authorize and empower" should not be held to effect such end.

Nowhere in the Constitution appears any authority to require or order a county or city to issue bonds. But Article V, section 6, restricts taxation levied by county commissioners so that it shall not exceed double the State tax "unless with the special approval of the General Assembly." Here is the source and authority of the numerous acts passed by each Legislature since, "authorizing and empowering"—never in any instance directing or requiring—the issue of bonds by counties and the levy of taxes to pay them. The measure must come from the will of the county, the General Assembly giving its approval. Thus speaks the Constitution, recognizing the right of the people of each locality to speak for themselves. So far as the past contract is concerned, the debt already

created by the county, with such approval, the courts can enforce its collection. But neither the General Assembly nor the Court can invade the principle of self-government by ordering the county to create a new debt by issuing bonds, to which the county has not given its assent.

Nothing is better settled than that when the courts have construed the meaning of certain words or a phrase, then if the Legislature shall thereafter use those words, it is conclusively presumed that the intention of the Legislature must be taken to be in the import of the words previously judicially construed—otherwise it would have used other words, of course. Since the phrase "authorized and empowered" was construed by this Court to be permissive and not mandatory (*Jones v. Commissioners,* 135 N. C., 218) the General Assembly of 1905 has met. If (609) it had been the intention of that body to make the statute mandatory, it would have amended the statute by adding appropriate words to express such intent. On the contrary, the General Assembly (Laws 1905, ch. 132) passed another act upon the same subject, entitled "An act to authorize the Board of Commissioners of Madison County to issue bonds," etc., and in section 1 thereof it is again provided that said board are hereby "authorized and empowered"—not required nor directed—to issue said bonds. The General Assembly knowing the Court had construed those words to be permissive and not mandatory, and as conferring only the "special approval of the General Assembly" (Constitution, Art. V, sec. 6), thus expressed its will that the statute should be permissive only. It thus also added the weight of its legislative construction to that of the Court as to the meaning of the act of 1903. It is fair to conclude, from the omission to add mandatory words, that if they were inserted by the draftsman, they were stricken out, or at least that the bill could not have been enacted in a mandatory form. That the General Assembly acted intelligently, and with full knowledge that the statute was not mandatory, is shown by the fact that the same Legislature (1905) passed two other statutes in regard to Madison County, which it saw fit to make mandatory, and used appropriate words to express such intent. In chapter 240 it provided for levying a tax to build an iron bridge in Madison County. In section 1 of said act the board of county commissioners are "authorized, empowered and *directed*" to build such bridge and "*shall* levy a tax," etc. Again, by chapter 262, it is provided that said county of Madison "shall levy a special road tax . . . to be specially applied on the public roads of the county in the (610) purchase of blasting and bridge material." These two acts, requiring the building of public bridges and roads and the levy of taxes for that purpose, were governmental and have been held to be, therefore, matters within the scope of the legislative authority to *command* to be

done. *Tate v. Comrs.*, 122 N. C., 812, cited in *Jones v. Comrs.*, 135 N. C., at pp. 223, 224, where the distinction is drawn.

It is different, however, as to issuing thirty-year bonds, whatever the previous consideration, for that is not imposing a governmental duty and directing the levy of taxes to discharge it, but it would be a legislative requirement that the county make a contract, without its consent, and which yet would be subject to enforcement in the courts.

The General Assembly of 1903 (chapter 289) understood clearly this fundamental distinction between imposing a governmental duty and requiring the county, as a financial agency of its people, to make a contract, and therefore said chapter 289, Laws 1903, merely "authorizes and empowers" the county commissioners to issue new bonds for the former bonds which will not be due till 1907. And the General Assembly of 1905, knowing that this Court had held those words to be permissive and not mandatory, enacted a new statute upon the same subject, using the same words, and, presumably, only because it had the guarantee of a decision of this Court that the words could not be construed except as permissive authority.

WALKER, J., dissenting: When this case was before us at a former term, my conclusion, after a most careful investigation of the questions involved and a special consideration of the statute under which the plaintiff claims the right to a *mandamus*, was that the Legislature did not intend by that act to compel the commissioners to issue the bonds, but only to invest them with the power and authority to do so, if (611) in the exercise of their judgment and discretion they thought it best for the public interests. A further consideration of the case leads me to think that the conclusion then reached by me was correct. If it were not for the great respect entertained by me for the opinion of my brethren, I would say that the act admits of no other construction. Let it be conceded, for the sake of argument, and it may be a perfectly correct proposition, that the Legislature has the undoubted power to compel the commissioners to issue bonds for the purposes mentioned in the statute, and let it be further granted that where power is given to public officers in language directory, permissive or enabling, the courts will construe it to be in effect peremptory, whenever the public interest or individual rights call for the exercise of the power, and we are still far from proving that the act under consideration is mandatory in its terms. The first of the two propositions I will not discuss, as I do not deem it at all necessary for a decision of this case. When the act is correctly interpreted, we are able to decide the case before having reached that question in the proper order of discussion. It is only necessary to in-

quire whether the Legislature has the power to command, when we find that it has undertaken to exercise that power. As to the second proposition, it is a general rule that words in form permissive will be construed as mandatory when they are used to confer power or authority, the exercise of which is important for the protection of public or private rights, or for the advancement of justice. This is the general rule, but it does not mean that the words are to be so construed if a contrary intention appears, nor does it abrogate, or even impair, the force of the rule of construction that the entire statute must be considered in ascertaining the intent, and that the intent, as thus expressed in the context, must control in determining the meaning of the act. *Justice Story* says for the Court in *Minor v. Bank,* 1 Peters (U. S.), 46-64: "The argument of the defendants is that 'may' in this section means 'must'; and reliance is placed upon a well-known rule in the construction (612) of public statutes, where the word 'may' is often construed as imperative. Without question, such a construction is proper in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that proposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions." Here is a clear declaration by a Court of the highest authority that the principle contended for has its limitations, and has never become crystalized into a hard and fast rule to be applied inexorably, notwithstanding it may defeat the real intention of the Legislature. In my former (concurring) opinion, I reviewed the provisions of the act for the purpose of showing that the Legislature, by the use of the words "are hereby authorized and empowered to issue coupon bonds," intended that they should have their admitted primary and ordinary meaning, leaving the whole matter to the judgment and discretion of the commissioners, and there is good reason for this construction, as the Legislature did not wish to interfere with the administration of local affairs, and as there is nothing in the case which tends to show that it was thought the commissioners would not exercise their judgment and discretion honestly and in accordance with their true convictions as to the best interests and requirements of their county, and that coercive measures were, therefore, necessary to compel them to act in a particular way. If the Legislature did not think so at the time, and, as far as appears, it had no reason so to think, the mere fact that the county was burdened with a large indebtedness would be no more reason for compelling the commissioners to issue bonds (613)

than for authorizing them to exercise their discretion in doing so. To the county commissioners, says this Court in *Brodnax v. Groom,* 64 N. C., 244, and *Cromartie v. Comrs.,* 87 N. C., 134, is confided "the trust of regulating all county affairs." It is not to be supposed that the Legislature, if it has a supervising and controlling power, will interfere with the local administration, unless there has been a willful refusal to act on the part of the commissioners. Such antagonism would be unnecessary and, as *Chief Justice Pearson* says in *Brodnax v. Groom,* such exercise of power would be well-nigh despotic. The commissioners, having special knowledge of the facts and being perfectly familiar with the condition of county affairs, are presumed to be more competent to judge correctly as to the expediency of issuing bonds than the Legislature, at least so apparently thought this Court in *Brodnax v. Groom,* and we should not infer that the Legislature intended gratuitously to force them to act. While it is manifestly right and proper that the local authorities should have the power to refund the bonded indebtedness of the county, the usual method of satisfying such debts is by taxation, and this was known or should have been known by the creditors when they bought the bonds. They are not, therefore, entitled as of right to have new bonds issued and exchanged for those now held by them any more than a creditor has the right to compel his debtor, who is an individual, to renew his note or other evidence of indebtedness. It is a mere matter of favor, to be granted or not as the debtor may determine. In the case of a county it should not be compelled to do so, unless an extreme case is presented for the exercise of the paramount and controlling power of the Legislature, and we should not presume that the Legislature intended to exert its power in such a way unless that intention clearly ap-
(614) pears. The issue of these bonds will virtually prevent the county from paying its indebtedness for many years, even though it may be abundantly able to do so long before their maturity. This, to be sure, will benefit the bondholders, but may prove very detrimental to the county, and surely her people should at least be consulted before any such action is taken.

But I think that the statute, on its face, shows that the Legislature did not intend to act so inconsiderately in this matter, and to force an issue of bonds regardless of the wishes of the people of the county or of the local authorities. It uses words implying permission to issue the bonds, and not words of command. The suggestion is made that after the commissioners are thus authorized to issue the bonds, all other duties necessary to be performed for the purpose of executing its order are enjoined in peremptory words, and this shows that the duty to issue the bonds was intended to be mandatory. To my mind, this is a most cogent reason for

construing the words of the act as merely conferring a discretionary power. If the board has a discretion, and orders the bonds to be issued, all other duties to be performed, such as auditing, preparing the bonds, keeping an account, paying interest, etc., would be ministerial and absolutely required in the execution of the order of the board, and, therefore, mandatory in their nature. When the Legislature intended to confer a discretionary power, it used language fit for that purpose, but when it directed the performance of duties which were necessarily mandatory, because the order of the board could not otherwise be made effectual, it changed the form of expression so as to adapt it to the nature of the duties thus required. It was careful to fit the language to the nature of the authority given or the duty enjoined, so that its intention might not be misunderstood. The act means no more than this, that if the board shall decide to issue the bonds, then the other officers shall perform the duties specified. If those duties had been made dis- (615) cretionary instead of compulsory, the decision of the board could be nullified by a refusal to perform them. I think I am sustained in the views so far expressed in *Staples v. Bridgeport,* 75 Conn., 509, in which a question similar to the one in this case is discussed.

That the authority to issue the bonds was merely permissive is further conclusively shown by the use in section 19 of the words "if the bonds authorized by this act are issued." This implies without doubt that the commissioners might not see fit, in the exercise of their discretion, to issue them. It seems to me that it can mean nothing else. It is suggested that these words refer to the inability of the commissioners to sell or exchange the bonds under the provisions of sections 10 and 11 of the act. But by force of the very words employed, the reference is to the authority to issue, and not to the sale or exchange of the bonds. If the latter had been intended, how easy it would have been to have said so. The language in such a case would have been "if the bonds authorized cannot be sold or exchanged." Again, the act provides (section 10) that the bonds, "when issued," shall be placed in the hands of the treasurer of the county to be sold, so that, by the terms of the act, it cannot be determined whether the bonds will bring their par value or not until they are issued, and the same may be said in regard to the exchange of the bonds. It is clearly contemplated that the issue of the bonds shall precede any attempt to sell them, as they must be placed in the hands of the treasurer for the purpose of being sold. Until he has tried the market it cannot be known what the result will be. It may be further said, in this connection, that the treasurer is not only directed to sell the bonds, but the commissioners are required by the act (section 10) to apply the

proceeds of sale to the payment, not only of the old bonds (if they cannot be exchanged for new ones, but to the discharge of all debts
(616) contracted for necessary expenses prior to January, 1903, which is a very large part of the total indebtedness, so that the bonds would have to be issued for the latter purpose anyhow, and the reasoning of the Court, so far as it applies to a possible failure to exchange the bonds or to sell them at par, must lose its force. All this but shows the clear intention of the Legislature by the use of the words in section 19, "if the bonds authorized by this act are issued," to imply that the commissioners, for some reason satisfactory to themselves, might decide not to issue the bonds.

It is argued that the commissioners having, at the meeting on 20 April, ordered the bonds to be issued, could not revoke that order by the resolution passed in May. If this be a correct proposition, it is strange indeed that the decision is not rested upon that ground, as it would effectually dispose of the case without an elaborate discussion of the other and more serious questions. But it is not correct in law. In *Staples v. Bridgeport, supra,* the precise question was raised and decided contrary to the present contention. It was there held that, although the local authorities had voted to issue bonds, it could rescind its action before substantially anything was done or any bonds issued under its vote. If it had appeared in this case, and it does not, that any one has acted to his prejudice upon the vote of the commissioners to issue the bonds, we could only hold that it was his folly so to act when the whole matter was *in fieri* and subject to be revoked. The whole argument presupposes that the order of the commissioners was revocable and, if it was, those who may have relied upon it, knowing of its revocable character, surely cannot complain if the commissioners afterwards exercised their undoubted right to rescind their resolution. They acted with their eyes open, and if they have suffered any loss it is the result of their own folly.

(617) Believing that the terms of the act are not mandatory and were not intended to be, I must dissent from the conclusion of the Court.

Cited: Comrs. v. Stafford, 138 N. C., 455; *Glenn v. Comrs.,* 139 N. C., 421; *Wharton v. Greensboro,* 146 N. C., 359; *Comrs. v. Webb,* 148 N. C., 123; *Burgin v. Smith,* 151 N. C., 566, 567, 569; *Trustee v. Webb.,* 155 N. C., 383; *Battle v. Rocky Mount,* 156 N. C., 333; *Murphey v. Webb, ib.,* 406; *Comrs. v. Comrs.,* 157 N. C., 519; *Withers v. Comrs.,* 163 N. C., 345; *Southern Assembly v. Palmer,* 166 N. C., 80; *Keith v. Lockhart,* 171 N. C., 456; *Waddill v. Masten,* 172 N. C., 585; *Comrs. v. Spitzer,*

173 N. C., 148; *Comrs. v. State Treasurer,* 174 N. C., 155, 165; *Woodall v. Highway Comrs.,* 176 N. C., 385; *Wagstaff v. Highway Comrs.,* 177 N. C., 357; *In re Utilities Co.,* 179 N. C., 162.

RODWELL v. ROWLAND.

(Filed 28 March, 1905.)

Clerk of Superior Court—Vacancy—Tenure of Appointee—Elections—Dicta—Stare Decisis.

1. Under Article IV, section 29, of the State Constitution, which provides that in case of a vacancy in the office of the clerk of the Superior Court the judge shall appoint to fill the vacancy "until an election can be regularly held," the appointee of the judge holds only until the next election at which members of the General Assembly are chosen, and an election held at the general election in November, 1904, to fill a vacancy occurring in September, 1904, is legal, without any special legislation; Article IV, section 16, of the Constitution, which provides that a clerk shall be elected "at the time and in the manner prescribed by law for the election of members of the General Assembly," being self-executing. (*Deloatch v. Rogers,* 86 N. C., 357, overruled.)

2. The reasoning, illustrations, and references contained in the opinion of a court are not authority or precedent; but only the points arising in the particular case and which are decided by the court.

The maxim *stare decisis* discussed.

BROWN, J., dissenting.

ACTION of State on relation of James R. Rodwell against Oliver L. Rowland, heard by *Webb, J.,* at chambers, by consent, on 22 December, 1904, upon a case agreed.

This is an action in the nature of a *quo warranto* to try the title to the office of clerk of the Superior Court of WARREN, and was heard by *Webb, J.,* holding the courts of the Second Judicial District, upon a case agreed, which is in substance as follows: (618)

In November, 1902, W. A. White was elected clerk for four years from 1 December, 1902. He qualified and held the office until September, 1904, when he resigned. The judge of that district then appointed the defendant to the office, in terms providing that he should "fill the unexpired term of W. A. White." The defendant accepted the appointment and qualified by taking the oath and giving an official bond for the term ending the first Monday of December, 1906, at which time

White's term would have expired if he had remained in office. "At the general election held in the county of Warren on 8 November, 1904, for members of the General Assembly, for State, county, and township officers, for members of Congress, and for electors for President and Vice President of the United States, a clerk of the Superior Court for the county of Warren was voted for, and James R. Rodwell, the relator herein, a citizen and resident of said county, received a majority of the votes cast for such officer, and upon a canvass of the votes cast at such election the board of county canvassers of said county did judicially determine and proclaim that the said Rodwell, the relator herein, had received a majority of the votes cast for such office and was elected as such clerk of the Superior Court of Warren. The said Oliver L. Rowland did not participate in or consent to the election of a clerk of the Superior Court for the county of Warren, but contended that no election for clerk of the Superior Court of said county could be held in the year 1904 according to law; and pursuant to such contention, said Rowland, through his attorney, appeared before said canvassing board and objected to the counting of any votes cast for any one for clerk of the Superior Court for said county."

On the first Monday of December, 1904, both relator and defendant tendered their official bonds to the board of commissioners of the
(619) county, who accepted the relator's, and rejected the defendant's solely upon the ground that he was no longer entitled to hold said office, and not because the bond was in any respect insufficient. Relator thereupon duly qualified as clerk of the Superior Court "and was declared by said board as inducted into the office." Relator duly demanded the possession of the office, but defendant refused to surrender the same, and still claims said office and is exercising its duties and functions. Relator, having first obtained leave from the Attorney-General, brought this suit to recover the said office. All questions of accounting for fees and emoluments, if relator is adjudged to be entitled to the office, are reserved in the case agreed for future determination. At the hearing the judge gave judgment for defendant. Relator excepted and appealed.

W. A. Montgomery and Pittman & Kerr for plaintiff.
B. G. Green, Hawkins & Bickett and Tasker Polk for defendant.

WALKER, J., after stating the facts: The question presented in this case is whether the relator was duly chosen to the office of clerk of the Superior Court at the general election held in November, 1904. The defendant contends that he was not, for two reasons: First, because there was no vacancy in the office to be filled at that election, and, second, be-

cause if there was such a vacancy, the Legislature had not made any provision whatever for filling it. The first of these reasons is based necessarily upon the assumption that when *Judge Peebles* appointed the defendant, Oliver L. Rowland, to fill the vacancy caused by the resignation of the former clerk, W. A. White, the appointment, under the provisions of the Constitution, was for the unexpired term of White, and not merely until some one could be chosen at the next general election to fill the vacancy. The second of the above-stated reasons presup- (620) poses that if, by the terms of the Constitution, the defendant held by virtue of the appointment of *Judge Peebles* only until his successor could be chosen at the next general election, the provision of the Constitution is not self-executing, and no election could be held, although plainly required by the supreme law, without some affirmative action by the Legislature.

In order to test the correctness of the defendant's contention and the validity of his reasons therefor, we are called upon to perform the delicate and often difficult duty of construing the Constitution, for whatever is therein ordained, as we may construe it, becomes the supreme law of the State. The relator of course contends that the vacancy created by the resignation of W. A. White was required to be filled at the general election in 1904, and if there has been no special legislation adequate for the purpose of executing the will of the people, as thus expressed in their Constitution, that instrument itself provides sufficiently for such an election, especially when considered in connection with the general election laws of the State, and is therefore self-executing. We will now examine these several and conflicting views and determine which of them is the correct one.

The Constitution provides in Article IV as follows: Section 16: A clerk of the Superior Court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the General Assembly. Section 17: Clerks of the Superior Courts shall hold their offices for four years. Section 24: Sheriffs, coroners, and constables shall be elected by popular vote and shall hold their offices for two years, and "in case of a vacancy existing for any cause in any of the offices created by this section the commissioners for the county may appoint to such office for the unexpired term." Section 28: When the office of justice of the peace (621) shall become vacant otherwise than by expiration of the term, and in case of a failure by the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term. Section 29: In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by the ex-

piration of the term, and in case of a failure by the people to elect, the judge of the Superior Court for the county shall appoint to fill the vacancy until an election can be regularly held.

These extracts from the Constitution will suffice to show what has been ordained with respect to offices, the vacancies in which are not filled by appointment of the Governor. The appointees to vacancies in offices, which are so filled by appointment of the Governor, hold their places by the express provisions of section 25 until the next regular election for members of the General Assembly, when elections are required to be held to fill such offices. Indeed, it is suggested that this provision of section 25 Article IV extends to all offices created by that article, when the term of the appointee to a vacancy is not otherwise expressly and definitely fixed, if the words "unless otherwise provided for" are understood as referring only to the method of appointment, and not as excepting vacancies not filled by the appointment of the Governor from the operation of that section, and the words "appointees" in the next line as embracing, not only those who have received their appointment from the Governor, but also those whose appointments may have emanated from some other source designated in that article. We express no opinion as to the meaning of that section, preferring not to rest our decision upon its construction, as we think the case can well be decided without any reference to it, although if the construction which has been suggested were adopted the case would necessarily be decided against the re-
(622) spondent, as we would then have a direct and unequivocal command that the election to fill a vacancy in the office of clerk shall be held at the next regular election for members of the General Assembly after the vacancy occurred. We have referred to that section only for the purpose of emphasizing the leading idea of the Constitution of 1868, as amended by the Convention in 1875, that appointees to elective offices should not hold their places any longer than is required for the people again to exercise their right of choosing such officers at the polls, and that they should be permitted to do so at the earliest opportunity that can be afforded for that purpose. This intent pervades the entire instrument, and when, as we shall presently see, the appointee is permitted to hold for the unexpired term, the intention to do so is expressed in plain and unmistakable language, and is confined to those offices the incumbents of which hold for only two years, during which time, under our system of elections, there is no provision for a regular election, and no election can intervene between the occurrence of the vacancy and the next regular election for a full term. We were told by counsel who argued for the relator that there was more reason for preserving the elective feature in filling a vacancy in the office of clerk since than before 1868,

as the clerk, prior thereto, had little or no jurisdiction of any kind and no judicial functions save in the probate of deeds, being merely the hand of the court for registering its orders and decrees and safely keeping its papers and records, while by the Constitution of 1868 he has been invested with very many and important powers and quite an extensive jurisdiction, so to speak, having immediate charge of those particular matters which bring him frenquently in close touch with the people, and which affect vitally their most valued interests; that his powers are not simply ministerial, but, within the broad limits of his jurisdiction, he possesses some judicial functions of a very serious nature, (623) and in the exercise of which the citizen is as much concerned as if his office were of a higher dignity. All of this is very true, and should have its proper weight with us in giving our construction to the Constitution. It may also be added to what is thus suggested, that "when the duration of the term of office which is filled by popular election is in doubt or uncertain, the interpretation is to be followed which limits it to the shortest time, and returns to the people at the earliest period the power and authority to refill it." *Opinion of the Judges,* 114 N. C., at p. 929.

These general observations will perhaps enable us the better to interpret the meaning intended to be conveyed by the sections of the Constitution which we have quoted. Our first inquiry must be, What is meant by the words in section 29, "the judge shall appoint to fill the vacancy until an election can be regularly held"? It must be borne in mind that this is not a provision for choosing an incumbent for the full term, who would, of course, hold until the expiration of that term, but to supply a vacancy by appointment until the people can have an opportunity in the regular way of choosing some one to fill that vacancy. If it was contemplated that the appointee of the judge should hold for the unexpired term, and therefore until the regular election for the full term, it was all-sufficient to provide simply that the judge should appoint to fill the vacancy, for this would have clearly and fully impressed that idea without the use of any words of restriction or limitation. The vacancy, nothing else being said, would comprise all of the time between the appointment and the expiration of the term. But the framers of the Constitution evidently intended that the words "until an election can be regularly held" should apply to an election to be held short of the time when the full term would expire, and to an election which could be held regularly, or, what is the same thing, according to rule or to the manner prescribed by law, whether that law be found in the Con- (624) stitution or the general statutes relating to elections. It then comes to this: Was there, at the time this election for clerk was held, any

rule or law by which it could be conducted, or, in other words, was there any machinery provided by which an election could be regularly held? We think there was. The Constitution, Art. IV, sec. 16, ordains that a clerk of the Superior Court shall be elected by the qualified voters of the county "at the time and in the manner prescribed by law for election of members of the General Assembly." Here is a plain and adequate method provided for the election of clerks, and indeed the only method. When, therefore, it was ordained that vacancies should be filled by appointment of the judge until an election could be regularly held, it meant necessarily an election held and conducted as pointed out by the Constitution, that is, one held at the time and in the manner prescribed for the election of members of the General Assembly, and that election would, of course, be the next election for such members. Does not such an election fulfill all of the requirements of the Constitution, and is not the procedure thus provided sufficient for the purpose of obtaining a free and full expression of the popular will at the ballot-box? What more was required to be done in order to accomplish that purpose? The Legislature in providing for filling vacancies in some of the executive and in the judicial offices of the State has done no more than has the Constitution in the case of clerks of the Superior courts. It merely provides, as the Constitution does, that the person to fill any such vacancy shall be elected at the same time and in the same manner as members of the General Assembly, that is, at the next general election, as members of the General Assembly are elected every two years. The provision, therefore, is no broader in its scope than that of the Constitution relating to the same matter. Laws 1901, ch. 89, sec. 4
(625) (Election Law). If the Legislature had made provision for an election to fill a vacancy in the office of clerk, it could have done no more than to require that a clerk should be chosen in like manner and under the same rules and regulations as members of the General Assembly at a general election—which, as we have said, is all that it has done in the case of other vacancies. The provision of the Constitution is, therefore, sufficient for the intended purpose, and self-executing, and whenever there is a vacancy in the office of clerk it may be filled at any general election next occurring at which members of the General Assembly are chosen. It is true that Laws 1901, ch. 89, sec. 4, requires that a vacancy in any State, executive, or judicial office must occur more than thirty days before the next election in order that it may be filled at that time, and if we concede that the provision should by analogy apply to vacancies in the office of clerk, it so happens that in this case the office was vacated more than thirty days prior to the general election of 1904.

There are other considerations which lead us to the conclusion that the constitutional provision refers to the next election at which members

of the General Assembly are by law required to be chosen, but it is unnecessary to discuss them here. It will be observed, though, when we read the Constitution, that in every instance where the term of office is only for two years, and there can be no general election before the expiration of the term, it is provided that the appointee to fill a vacancy shall hold for the unexpired term. This is true notably in the case of sheriffs, coroners, constables, and justices of the peace. Const., Art. IV, secs. 24 and 28. But when such an election will by law intervene between the occurrence of the vacancy and the expiration of the term of the next election for the full term, it is provided expressly in the cases of justices of the Supreme Court, judges of the Superior Courts, and solicitors, that the vacancies shall be filled by appointment of the (626) Governor, the appointees to hold until the next regular election for members of the General Assembly, when said vacancy shall be filled by election. (Article IV, sections 21, 23, and 25.) And in respect to vacancies in offices of the State Executive Department, which offices are held for four years, it is provided that if the office of Governor shall become vacant the Lieutenant Governor, who is elected by the people, as the successor to the Governor, shall fill that office; but in case any other office in that department becomes vacant, such as the office of Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General, the Governor shall appoint to the vacancy, and the appointee shall hold—at least if the vacancy was caused by death or resignation and not merely by disability of the former incumbent—until the vacancy can be filled at the first general election, the person chosen at said election to hold "for the remainder of the unexpired term." Const., Art. III, secs. 12 and 13.

As the office of a clerk is four years, and a general election may be held under the law after a vacancy has occurred and before the expiration of the term, we do not see how we can escape the conclusion that it was intended by the words in section 29 of Article IV of the Constitution, namely, "the judge shall appoint to fill the vacancy until an election can be regularly held," that the vacancy should be filled at the next election at which members of the General Assembly are chosen.

The counsel for the respondent contend that *Cloud v. Wilson,* 72 N. C., 155, is an authority against the conclusion we have reached. We do not concur in this view. The language there under consideration was different from that we are now construing. It would be useless to review that case at any length to ascertain if what is there said conflicts with our understanding of the true meaning of the clause of the Constitution which was then construed. It is sufficient to say that the Court in *Cloud v. Wilson* laid great stress upon the fact that judges of the Superior Court had been divided into classes by the Constitu- (627)

tion, and that a decision in favor of the respondent might produce great confusion in that classification; and, besides, the decision is based in part upon what we conceive now to have been an erroneous assumption, namely, that if a judge should be chosen to fill a vacancy at the next election he would hold for a full term, and not merely for the unexpired term, and consequently the classification made by the Constitution would be disturbed. We believe the great weight of authority is to the effect that a person so elected will hold only for the unexpired term, and this view of the law we deem to be more consonant with reason than the other. *Opinion of the Judges,* 114 N. C., 925.

It is not our purpose to overrule *Cloud v. Wilson, supra,* for the decision of the case at bar, when rested upon the principles and reasons stated herein, does not require it. We do not agree with all that is therein said by the Court, and it remains to be stated that the Convention of 1875 seems to have thought that the Court had not construed the Constitution according to its spirit and the intention of its framers, for it amended the section then under consideration so as to require all vacancies in the office of judge of the Superior Court to be filled, first, by appointment of the Governor, and, afterwards, at the next election by the people for the unexpired term. This is in accordance with the true principle of our Government, that the people should have the power and the right to determine how and by whom they shall be governed; and this includes the right not only to select their officers originally, but to do so as soon as it can conveniently be done, when any of the offices become vacant, and it can be done regularly, that is, with due regard for the forms of the law and the requisite procedure; and we should not be too strict and technical in our interpretation of the Constitution, lest (628) we thereby unduly deprive them of this natural and fundamental right, but, on the contrary, we should be liberal in our construction, with the view of preserving that right to the people unimpaired and undiminished, except in so far as the exigencies of the case may require a temporary filling of the vacancy by appointment.

We have not adverted to the fact that section 28, relating to a vacancy in the office of justice of the peace, and section 29, relating to a vacancy in the office of clerk, are identical in language, except that in the former instance the vacancy is filled "for the unexpired term," while in the latter it is filled "until an election can be regularly held." This change in phraseology was not accidental, but it was intended, we think, that the concluding words of the two sections should have different meanings, and for the very reasons we have already given, that in the case of the justice an election would not be held, whereas in that of the clerk one would be held, before the expiration of the term.

We are not without strong authority to sustain our conclusion. In *S. v. Johns,* 3 Oregon, 533, the provision of the Constitution which the Court construed was that the Governor should fill the vacancy by appointment, which should expire when a successor shall have been elected. It was contended that the appointee held until the next regular election for the full term, but the Court decided that the vacancy should be filled at the next general election. In a well-considered and able opinion the Court, among other things, says: "It is not reasonable to presume that, where the people have reserved to themselves the appointment of an officer, they would confer on the Executive the filling of a vacancy in the office which would extend the time of the appointee beyond a general election and deprive the whole people of a county from electing their own local officer when they could fill it as con- (629) veniently as they appointed the original incumbent. It is a political axiom that when an office becomes vacant the power that made the office can fill it again. If the people have surrendered that power, it should be by express and unequivocal words. The words are: 'The Governor may fill the vacancy until a successor is elected.' Vacancy in an office means the want of an incumbent at the time. It has no reference to duration of time, and the appointment of a person to fill a vacancy *pro tempore* does not invest him with a full term unless the law so expressly provides. Vacancy in an office is one thing, and term is another." So in *S. v. Conrades,* 45 Mo., in construing words substantially similar to those used in our Constitution, the Court says: "The act of 1864 was a limitation on this power of appointment and abridged its exercise to the next regular election. It is insisted now that in passing this law the Legislature meant that the executive appointee should continue to hold his office till the next regular election of county judges, and that the act had exclusive reference to that election. But this construction, we think, is founded in misconception and is not maintable. It was the obvious intention to give the people an opportunity to elect this officer at the earliest practicable moment, without incurring the expense of a special election. When applied to elections, the terms 'regular' and 'general' have been used interchangeably and synonymously. The word 'regular' is used in reference to the general election occurring throughout the State." Construing a clause of the Constitution which provided that the appointment by the Governor to fill a vacancy should be until the next election, the Court in *Weeks v. Gamble,* 13 Fla., 9, said it is plain that the election contemplated is the next election after the vacancy, and not the election which is to be held to fill a new term. It is an election to fill the balance of the unexpired term, and not an election to fill the full term, which takes place, without reference to the vacancy, under a law having nothing to do with the (630)

subject of vacancies. The power to fill the unexpired term is a part of the original power of the people to select. It is therein declared that a construction which would postpone the election to fill the vacancy beyond the time appointed by law for holding the next general election would be inconsistent with the true spirit and intent of the Constitution and opposed to the fundamental and vital principles of republican government. To the same effect are *Taggart v. State,* 49 Ind., 42; *S. v. Lansing,* 46 Neb., 514; *Rice v. Stevens,* 25 Kan., 302; *S. v. Orvis,* 20 Wis., 248; *Op. of Judges,* 25 Fla., 426; *People v. Mott,* 3 Cal., 502; *S. v. Cowles,* 13 N. Y., 350; *S. v. Thayer,* 31 Neb., 82, and *S. v. Mechem,* 31 Kan., 435, in which the Court says: "It is the general policy of the Constitution that the people elect the officers. The theory of our law is that officers shall be elected whenever it can conveniently be done, and that appointments to office will be tolerated only in exceptional cases." It is further said to have been decided in *Rice v. Stevens, supra,* that "the appointee by the board of county commissioners to fill a vacancy caused by the resignation of a county clerk would hold his office under the appointment only until the next general election," and the same rule was applied to the case then under consideration, as the language to be construed was the same.

In the people resides the right of selecting their officers, and the appointing power should not be permitted to extend in its operations beyond the particular exigencies and requirements of the case. Appointment is a temporary expedient devised to keep the office filled until the people have the first opportunity to exercise the right to fill it, which must needs be at the next general election, and this right should not be abridged by any construction which postpones its exercise to the (631) election for the next term.

We have already shown that an appointee to a vacancy does not hold for a full term, and it hardly requires argument or the citation of authority to show that section 17 of Article IV of the Constitution, so far as it fixes the duration of a full term, has no bearing upon the question of filling a vacancy, but is quite foreign thereto. *Haggarty v. Arnold,* 13 Kansas, 367. The decision of this case, as to the time of filling a vacancy, must turn upon the construction of those sections of the Constitution relating strictly to vacancies. If an election at which members of the General Assembly were chosen, and the machinery of which was all-sufficient for a fair and free expression of the popular choice, was not one regularly held within the meaning and intent of the Constitution, we cannot imagine what more was required to make it so. The leading idea in the use of the words "until an election can be regularly held" was to give the people the chance to fill the vacancy just as soon as an election should occur, which would be held and conducted

according to the requirement of section 16, namely, "at the time and in the manner prescribed by law for the election of members of the General Assembly." Any other construction would be strained and unreasonable and deprive the people unnecessarily of the constitutional right to choose their officers. Suppose the Legislature had omitted to provide for filling vacancies in the offices of the Judicial Department, could it be said that the people had no power to elect and that the appointees must hold over, although the Constitution positively requires that such vacancies shall be filled at the next regular election for members of the General Assembly? We think not; and yet there is no substantial difference between the supposed case and the one now under consideration. The Constitution in both cases prescribes the method of filling offices by election, and there is no sound reason why the same method should not apply to filling vacancies. Mechem on Public Office and Officers, (632) sec. 183.

We will next consider the contention that there has been no legislation providing for an election to fill a vacancy in the office of clerk. This question has received some attention in what we have already said. It certainly is not absolutely necessary that there should be any special legislation upon the subject, if the Constitution furnishes sufficient machinery in itself or in connection with the general election laws to secure a fair election. The failure of the Legislature to act in obedience to the Constitution in the particular case, if it be requisite that it should act, cannot be permitted to defeat the right of the people to elect their officers, provided the machinery is otherwise sufficient for the purpose of affording them that right. The principle herein asserted that the Constitution is self-executing and that its provisions, if not in themselves sufficient for the purpose of holding an election at which the people may choose their clerk (and we have shown that they are), may be supplemented by such parts of the general election law as are applicable to the election of clerks at regular or stated intervals or of members of the General Assembly, and that an electio nheld in substantial accordance with such law will be valid, is fully sustained in an able opinion by *Judge Brewer* (now a justice of the Supreme Court of the United States) in *S. v. Thoman,* 10 Kansas, 191. Referring to the same subject, Judge Cooley says: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley Const. Lim. (7 Ed.), 121. The rule supplied in our case is that furnished by the law for the election of members of the General Assembly. A learned and exhaustive discussion of this question will be found in *S. v. Burbridge,* 24 Fla., 112, where it is held that, whenever a

(633) power is given by law, everything necessary to the effectual execution of the power is given by implication, and therefore the failure of a statute to declare the mode of proceeding at an election ordered by it does not defeat its purpose; and further, that it is the duty of a court to sustain an election authorized by law if it has been so conducted, according to the general law, as to give a free and fair expression to the popular will, and so that the actual result thereof is clearly ascertained. Likewise, in *Wells v. Taylor,* 5 Mont., 202, it was held that where the law authorizes an election, even though it be a special one, but provides no method of holding it, the election is good if conducted according to the general law on the subject, whether any reference be made to the general law or not. And this is the general doctrine, says Judge McCrary in his work on Elections (3 Ed.), sec. 161. To the same effect is *People v. Dutcher,* 56 Ill., 144.

It was contended before us that legislation is required in order to give notice to the voters that a vacancy will be filled at the election. The great weight of authority is directly opposed to this contention. "It has, therefore, been frequently held," says Judge Cooley, "that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given; and such election cannot be defeated by showing that but a small portion of the electors were actually aware of the vacancy or cast their votes to fill it. But this would not be the case if either the time or the place was not fixed by law, so that notice became essential for that purpose." Cooley, *supra,* 909. This proposition seems to be well supported by the cases. *S. v Orvis,* 20 Wis., 248; *People v. Hartwell,* 12 Mich., 508; *S. v. Cowles, supra;*
(634) *S. v. Shirving,* 19 Neb., 497; *S. v. Thayer, supra.*

We believe nearly if not quite all of the courts hold that when notice is required by the law, if there has been actual notice of the vacancy and the people have had a fair opportunity to vote, all of which may be indicated by the vote cast, the election will be valid, though formal notice was not given, and even though many refrained from voting because of a difference of opinion as to the true construction of the Constitution in regard to the existence of a vacancy or the time of filling it. Actual knowledge and an opportunity to vote take the place of notice, or are equivalent to it. Mechem, *supra,* sec. 174; *Adsit v. Secy. of State,* 84 Mich., 420. The right to hold an election is derived from the law, and not from the notice. McCrary, *supra,* sec. 145. The cases upon this question of notice refer, of course, to statutes

requiring notice to be given or proclamation to be made of the election, and it is said that this notice is in addition to that which the law itself gives by implication when it directs that the election shall be held at a certain time and place. We are not aware of any provision of our law requiring notice to be given of elections held at the regular time in the regular manner.

It does not appear from the case agreed, nor has it been suggested, that the voters of Warren County did not know of the vacancy in the office of clerk, which occurred about two months before the election. It can hardly be supposed that such a change was made in the office of clerk without becoming known almost immediately to the people of the county. There is no presumption against the validity of the election. The presumption, if there is any at all, is the other way. If notice of the vacancy and of the election to fill it was required, we must presume that it was given, in the absence of proof to the contrary. Mechem, *supra,* sec. 219. The burden rests upon him who assails the validity of the election, and contests the right of (635) him who holds a certificate of election upon the ground of irregularity or of the omission of something directory which should have been done. Mechem, *supra,* sec. 220. The presumption of validity is strengthened by the requirement of our law that the local board of elections shall judicially determine and declare the result, which was done in this case. Indeed, we do not understand it to be contended that the people had no actual notice that a clerk would be voted for at the election. The whole argument here was addressed to the sole question whether there was any authority conferred by the Constitution or by the statute to hold an election for clerk, and it was not claimed or even suggested that there was any irregularity in the mode of procedure, or that the people did not in fact have a fair opportunity, if they desired, to cast their ballot for some person to fill the vacancy, if there was one.

We must not be understood to mean, by what we have said in this opinion, that there is any inherent reserved power in the people to hold an election to fill an office. It is freely admitted that authority to hold it must be found somewhere, either in the Constitution or in the statute. McCrary, *supra,* sec. 170. We merely hold that there was such authority to elect a clerk at the general election in 1904.

Our attention has been called to *Deloatch v. Rogers,* 86 N. C., 357. It seems that the question we are now deciding was involved in that case, and that the Court assumed, upon a state of facts somewhat like those we have in this case, that there was no vacancy to be supplied by a popular election. The matter does not seem to have been contested at all, nor was there the slightest discussion of it nor any citation of authority.

It was simply taken for granted that an appointed clerk held to the end of the term, the main question being whether certain ballots were vitiated under the provision of the statute by reason of the fact that there
(636) was on them the name of a person as a candidate for the office of clerk, and the opinion was directed almost solely to the consideration and decision of that question. It is desirable, of course, that there should be a stable and uniform construction of the organic law, but we cannot hold ourselves to be bound by that case to the extent of its laying down a rule to be followed without any inquiry into its correctness. We accept it as an authority but must give it only the weight to which, under the circumstances, it is entitled. In construing the Constitution it is of the utmost importance that we ascertain the true intent of the people who by their delegates ordained it, and no interpretation of it can be said to be settled until it is settled right and in accordance with that intent. If, by inadvertence, we have departed from the real meaning of that instrument, we should return to it at the earliest moment, for, unlike a statute, which is clearly changed if wrongly construed the Constitution is intended to be permanent, and is not so easily amended as to conform to the true will of the people. We must decline to follow *Deloatch v. Rogers,* though we do so with the greatest reluctance. But it must be done, in order to save to the people the full enjoyment of the elective franchise with which we think they never intended to part. There is no vested right to be injuriously affected by this decision of the Court, and no one not a party to this action is likely to be prejudiced by it in any way. We do not mean to say that the rule *stare decisis* should not apply to constitutional questions at all. It should perhaps have its proper weight in the decision of those questions as well as others. "The maxim *stare decisis* has greater or less force according to the nature of the question decided; and there are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. These are questions where the decisions did not constitute a business
(637) rule and where a change would invalidate no business transaction conducted upon the faith of the first adjudication. As an illustration, take a case involving personal liberty: A party restrained of his liberty claims to be discharged under some constitutional provision; the court erroneously decided against him; the same question arises again. To change such a decision would destroy no rights acquired in the past, if it would only give better protection to rights in the future. The maxim in such a case would be entitled to very little weight, and mere regard for stability ought not to be allowed to prevent a more per-

fect administration of justice." Wells on *Res Adjudicata and Stare Decisis,* pp. 556, 557, citing *Kneeland v. Milwaukee,* 15 Wis., 691.

It is suggested that in *Cloud v. Wilson, supra,* the *Chief Justice* extended the principle of that case to clerks of the Superior Courts. It is clear that this could not be done. The authorities are all agreed upon this question, and those we will cite emanate from the highest source. "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, and opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And therefore this Court (and other courts organized under the common law) has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." *Carroll v. Carroll,* 16 How. (U. S.), 287. *Chief Justice Marshall,* for the Court, says: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those (638) expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent; other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Va.,* 5 Wheat., 39. "More is needful to constitute a precedent than merely that a principle or doctrine is announced within the appropriate limits of a cause. It is a fundamental law that a precedent must be a conclusion, a decision in a cause, and not a process of reasoning, an illustration, or analogy. The reasoning, illustrations, and references contained in the opinion of a court are not authority, not precedent; but only the points arising in the particular case and which are decided by the Court." Wells, *supra,* pp. 530, 531. These citations will suffice to show that we are no more bound by a mere statement made in *Cloud v. Wilson,* not necessary to the decision of the case, than if it had not been made at all. It is also argued that the language interpreted in *Cloud v. Wilson* is identical in meaning with that we are now construing, and for this reason the decision is binding upon us as coming within the maxim, *stare decisis.* We have already said that the language of the two sections is not the same in meaning. The difference may be thus

illustrated: In *Cloud v. Wilson* the Court held that the words "regular election" meant a general election as distinguished from a special election, and referred to the next general election of judges. If it had been ordained in the Constitution that vacancies should be filled, first by appointment, and then by a special election to be called by the Governor, this would certainly not have changed the decision in *Cloud v. Wilson,*
as the words were construed to refer to the next general election
(639) of judges and would not include a special election; but will any
one contend that the words, "until an election can be regularly held," would not refer to such special election? Indeed, in some of the cases it is held that like words, unless restrained by some other language of the Constitution, would authorize the calling of a special election, if the Legislature so provided. The adjective "regular" qualifying the word "election" may well refer to an election held at regular periods for the same office, but the adverb "regularly" qualifies the word "held" and refers not so much to the time as to the manner of holding the election, that is, according to the prescribed method *or rule,* which in our case is given in section 16. It would be strange indeed if the convention had provided for the filling by election of vacancies in all offices, the terms of which were fixed at four years, and left the important office of clerk of the Superior Court to be filled by appointment for the unexpired term. Such an intention should be most plainly and unmistakably expressed before we adopt it as the true one, for there would be no reason in making such an exception to the general rule. That such was not the intention is clearly manifested by the use of plain and explicit words in sections 24 and 28 when reference is made to an appointment for an unexpired term. The difference in the language employed in the case of judges and in that of clerks, and the language used when an appointment for the whole of the unexpired term was intended, led the members of the Convention of 1875, no doubt, to take the same view of the matter that we do. They did not amend section 29, because they thought it plain enough as it stood and free from all doubt as to its meaning.

We are told that the judges of the Superior Court have in practice adopted a construction different from that we have placed upon the Constitution, and appointed to vacancies for the unexpired term. There is
nothing in this record that tends to show such to be the case, but,
(640) if it be true, while we have the greatest respect for their opinions,
we should not permit such a construction to control us unless it meets with our approval. We must take the responsibility of deciding the question for ourselves, as it has been imposed upon us by the very instruments we are construing. It is our supreme duty to decide correctly, without giving undue weight to extraneous views and opinions,

however much they may be entitled to our respect. We are not aware of the reasons which influenced them, nor do we know to what extent the matter had been considered, and without this knowledge it would not always be safe to follow them, and especially should we not do so when we have no doubt as to the true meaning of the Constitution.

Our conclusion is that the defendant is not entitled to the office of clerk, but that the relator was duly chosen to that office at the election of 1904, and is entitled to exercise its functions and to receive and enjoy its fees and emoluments. The mere fact that the defendant was appointed for the unexpired term can make no difference in the result, The judge could not thus lengthen his term as fixed by the law. *Opinion of the Judges,* 114 N. C., 927.

There was error in the judgment of the court below. Its judgment should have been for the relator instead of for the respondent.

Reversed.

BROWN, J., dissenting: I regret that I am compelled to differ with my able and learned brethren in the conclusion arrived at in this case. Were it not for a firm conviction that this question has been settled in this State for thirty years past, I should yield my judgment to theirs. I am convinced that this question has been put at rest for the past thirty years in this State: 1st, by the settled judicial decisions of this Court, composed of some of the ablest lawyers that have ever adorned its judicial history; 2d, by acquiescence in this judicial construc- (641) tion and its adoption by the Constitutional Convention of 1875, and by legislative construction of the Constitution ever since; 3d, by the uniform pactice of the Superior Court judges for thirty years in filling vacancies in the office of clerk of that court.

1. Ever since the decision of *Cloud v. Wilson,* 72 N. C., 155, decided in 1875, the words "until the next regular election," and those other words of similar purport, "until an election can be regularly held," have been taken by the legislative and judicial departments of the State Government to mean "until the next regular election for the office in which a vacancy has occurred." That decision was made by a Court of exceptional ability, and the opinion was written by *Chief Justice Pearson,* one of the greatest judges this or any other State has produced. Among lawyers his is *"clarum et venerabile nomen."* It is true, *Judge Reade* dissented, but it was not as to the meaning of these words, but as to the application of them to a particular judicial election. If I were not deeply sensible of the eminent ability, profound research, and painstaking care of my esteemed brother who speaks for the Court in this case, I should say he had wholly failed to consider the scope and significance of both of the opinions in *Cloud v. Wilson,* and had not noted their

very words, since he say that this Court does not overrule the principles decided and pronounced in that case. It is unnecessary for me to quote from the conclusive argument of the great *Chief Justice*, but I note the language of *Judge Reade* for the purpose of showing that he is not only in accord with *Chief Justice Pearson* as to the meaning of the words under discussion, but makes it clearer even than the opinion of the Court: "It is also a useful inquiry: For how long a time would the people be *likely* to part with this important elective power? As they (642) parted with it temporarily to suit their convenience, they would resume it as soon as convenient. The next inquiry is: Is such *convenient* time indicated in the Constitution? It is the 'stated, established, usual period' when the people meet together for the *first* time after the vacancy occurs, to vote for judges of the Superior courts. Then it is as convenient to fill a vacancy resulting from accident as from the expiration of a term." Even a cursory reading of the opinions in that case, I am sure, will convince the profession that the construction of the Constitution therein promulgated is overruled by the opinion in this case. Therefore, I am unwilling to give it my concurrence. I believe in the stability of judicial decisions, and when acquiesced in for a long time they should not be lightly set aside. *Misera est servitus ubi jus vagum aut incertum.* "It is the function of a judge," says Lord Coke, "not to make, but declare the law according to the golden wetewand of the law, and not by the crooked cord of discretion." If the rule of *stare decisis* is of any value, it should be adhered to, and not set aside except for a very cogent and compelling reason, for *"Omnis innovatio plus novitate perturbat quam utilitate prodest."*

The vacancy in the office of Clerk of the Superior Court of WARREN occurred prior to the general election in 1904, at which election such clerks were not regularly elected. They were regularly elected in 1902 for four years. The next election when clerks will be regularly elected occurs in November, 1906. *Judge Peebles* commissioned the defendant until that time, and in my opinion he acted according to the well-settled construction of the Constitution and according to the unvarying precedents in this State since 1875.

The adjective "regular" is used to qualify election so as to distinguish it from other kinds of elections. "Regular elections," says *Judge Reade,* "for an officer to fill an office are those by which the office was (643) originally and continuously filled according to stated and set rules at periodical times." *Cloud v. Wilson, supra. Judge Pearson* expressly declares in his opinion that the words "regular election" mean the next regular election for the office in which the vacancy occurs. He says: "We think this construction the true one in respect of justices

of the Supreme Court, clerks of the Superior Court, and solicitors." He further declares that this is the construction adopted by the General Assembly. It is not to be supposed that the framers of the Constitution used words needlessly, and without regard to their natural and recognized significance. Why use the words "can be regularly elected?" Why not say "until the next election," or "until an election can be held for members of the General Assembly?" While the Constitution declares that clerks shall be elected at the time and in the manner prescribed by law for the election of members of the General Assembly, it fails to state that the vacancies shall be filled at *any election* for members of the General Assembly. It is not my purpose, however, to attempt to strengthen the arguments of such consummate judicial writers as *Pearson* and *Reade*. My only purpose is to show, if I can, how completely and fully the contentions of the defendant in this case are supported by both the opinions in *Cloud v. Wilson*.

It is true that this rule of construction has not been adopted and followed in a number of states; but it must be remembered that in the great Northwest, where cases are as plentiful as crops, precedents can be found for almost any legal proposition. Yet the decision in *Cloud v. Wilson* has been indorsed in several other respectable jurisdictions. In *Lynch v. Budd*, 34 L. R. A., 46, the Supreme Court of California defines the meaning of the words "next regular election," and says that it means the next election provided for filling the particular office vacant, not the next general election. In *Matthews v. Shawnee County Commissioners*, 34 Kansas, 606, the Court says: "The words 'regular election' do not mean necessarily general election. . . . They simply (644) mean the regular election prescribed by law for the election of the particular officer to be elected." To the same effect are the following cases: *McGee v. Gardner*, 3 S. D., 554; *Sawyer v. Haydon*, 1 Nev., 75; *Watson v. Cobb*, 2 Kansas, 32; *Love v. Mathewson*, 47 Cal., 442. In the California case first cited the case of *Cloud v. Wilson* is cited with approval.

The construction adopted in *Cloud v. Wilson* was expressly recognized in 1882 as applying to vacancies in the office of clerk of the Superior Court in *Deloatch v. Rogers*, 86 N. C., 358 and 731, by a Court composed of such eminent judges as *Smith, Ashe,* and *Ruffin*. It is not likely that so careful a judge as *Chief Justice Smith* could have been inadvertent to the language he used. A portion of his opinion, on page 731, shows unmistakably that the Court over which he presided recognized the rule of constitutional construction laid down in *Cloud v. Wilson* as being applicable to clerks of the Superior Court, and that such rule was not changed by the convention of 1875. Not long before the general election

for members of the General Assembly and other officers in November, 1880, Thomas D. Boone was appointed clerk of the Superior Court of NORTHAMPTON to fill a vacancy for the unexpired term, just as this defendant has been appointed. Boone was voted for at said election. The ballots were declared worthless paper, as there was no vacancy, showing clearly that the question of vacancy or no vacancy was considered by the Court. The Court says: "But as the decision sustains the ruling of the court in the rejection of all the ballots that have the name of the person voted for to fill the office of clerk, *when there was no vacancy to be supplied,* the oversight does not affect the conclusion reached and the proper determination of the appeal." (P. 731.) In *Norfleet v. Staton,* 73 N. C., 546, while the case turned upon the power of a *de facto* judge to
(645) appoint a clerk, *Judge Reade* says: "By reason of the failure of the person elected to qualify there was a vacancy in the office of Superior Court clerk for the term of four years. The Constitution provides that the judge of the Superior Court shall fill such vacancy." This was written at the term following the decision in *Cloud v. Wilson.* In *Peebles v. Boone,* 116 N. C., 58, this Court recognizes the fact that an unexpired term of a clerk, who resigned 7 December, 1883, extended to 1 December, 1886, and that a judge of the Superior Court properly filled the vacancy for the unexpired term. I cite this case to show how generally the construction of the Constitution laid down in *Cloud v. Wilson* has been recognized and accepted by this Court as applicable to vacancies in the office of clerk of the Superior Court. The *Opinion of the Judges,* 114 N. C., 925, is not a precedent, as there was no case before the Court to be adjudicated. It was the opinion of three very able lawyers, given at the request of the Governor of the State, written by the eminent lawyer who presided over this Court at that time. But I am willing to give it all the force of a precedent, for there is not a line in it that controverts any contention of the defendant in this case. The only question decided was whether a judge, who had been elected by the people to fill a vacancy, was elected for the unexpired term of his predecessor or for a full term of eight years. The judges do say that the word "vacancy" means, *ex vi termini,* an unexpired term, and this agrees with the defendant's contention in this case as to the meaning of the words of the Constitution.

2. The authority of the decision has been recognized and its construction acquiesced in by a constitutional convention and the legislative department of the State Government. The Constitutional Convention of 1875 met within six months after the decision in *Cloud v. Wilson*
(646) was handed down. The able lawyers of that body took the case of *Cloud v. Wilson* under a careful consideration. They studied the full scope and effect of the opinions. This is manifest from the con-

curring opinion of *Judge Avery* (who was a prominent member of that convention) in *Ewart v. Jones,* 116 N. C., 575. In consequence of the opinions in *Cloud v. Wilson* the Convention amended the Constitution of 1868 in respect to judges of the Superior Court and of all other appointees of the Governor; but the Convention allowed the section in regard to clerks of the Superior Court to remain unchanged, section 35, Article IV, of the Constitution of 1868 being brought forward and being now section 29, Article IV, Constitution of 1875. Not only are the two phrases "until the next regular election" and "until an election can be regularly held" of similar purport and meaning, but this Court in *Cloud v. Wilson* expressly and in unmistakable terms declared that the construction of the phrase therein given applied to vacancies in the office of the clerk of the Superior Courts. "We think this construction the true one," says *Chief Justice Pearson,* "in respect to justices of the Supreme Court, judges of the Superior Courts, clerks of the Superior Courts, and solicitors." It is idle to conjecture for a moment that such thorough lawyers as R. T. Bennett, chairman of the committee on judicial department, Shepherd, Manning, Avery, Jarvis, and other eminent lawyers and men, who were members of the Convention of 1875, should have overlooked the plain language of the *Chief Justice* extending the construction laid down by him to the article of the Constitution relating to clerks of the Superior Courts. With those unmistakable words before them, why then did they not make the same changes in that section as in the sections relating to judges and other appointees of the Governor? There can be but one logical answer to that question. They ratified such construction, and desired that clerks of the court should be elected only once every four years, and that the appointee of the judge (647) should hold for the unexpired term. If the Convention had any other view, it would have amended that section as it did the others, and thereby relieve the matter of any possible doubt. As counsel for the defendant say in their very able brief: "The Convention had the opinion of the Court before it; weighed it and deliberated upon it, and its failure or refusal to make any change in the Constitution in regard to the office of clerks of the Superior Court is equivalent to a declaration by the Convention that in regard to that office it would abide by the decision of the Court. It was more than acquiescence, it was direct ratification." So, I think that now the decision is entitled to more weight in its reference to the office of clerk than it was before the Convention. The construction announced was adopted by the Convention in reference to that office, and practically becomes thereby a part of the organic law of the State. The phrases "regular election" and "regularly elected" have been judicially defined and such definition recognized and acted upon by the Con-

vention, and so long as the phrase is retained in our organic law we cannot escape the legal import as declared by this Court. We are compelled to infer that wherever in the Constitution or a statute of this State either phrase was thereafter employed, it was used with full knowledge of and acquiescence in this judicial definition and interpretation.

The legislative view: "When the scales are so evenly balanced, we deem it our duty to settle the preponderance by casting the legislative view, which is of peculiar weight in this case, into the scale where it belongs." *Opinion of the Judges, supra.* Every General Assembly that has met since 1875 has construed the Constitution in its relation to the office of clerk of the Superior Court in accordance with the con-
(648) tention of the defendant in this case. Until after the amendment of the Constitution in 1875 there could not be held an election to fill a vacancy in the office of Superior Court judge, but after the Constitution of 1875 was adopted the General Assembly made provision for holding elections to fill vacancies for unexpired terms in judicial offices. Laws 1876-'77, ch. 275, sec. 275. It is a most significant fact that neither the General Assembly of 1876-'77 nor any subsequent one has made any provision whatever for holding an election to fill a vacancy in the office of clerk of the Superior Court. The act of 1876-'77 is incorporated in The Code of 1883, sec. 2736, and it names the offices for which elections must be held to fill vacancies for unexpired terms. The office of clerk of the Superior Court is conspicuous by its absence from the section. It is nowhere named in it. Why provide for elections to fill unexpired terms in other offices and entirely ignore the office of clerk of Superior Court? Because *Cloud v. Wilson* declared the unexpired term is to be filled by the judge. That decision was recognized and indorsed by the General Assembly which enacted The Code, and the identical case is cited at the end of the section.

The Election Law of 1901, ch. 89, sec. 4, is practically identical with section 2736 of The Code, but in reference to the office of clerk it leaves no doubt of the legislative view of the proper constitutional construction, for in section 1 it practically prohibits an election for clerk in 1904. It provides that on the first Tuesday after the first Monday in November, 1902, and every *four* years thereafter, an election shall be held in each county for clerk of the Superior Court, and at such times an election shall be held in the several judicial districts for solicitors. On the same page of the act provision is made for an election to fill vacancies in the office of solicitor by election, but none whatever to fill vacancies in office of clerk of the Superior Court by election. Why was this? Evi-
dently, because the General Assembly continued to give its ap-
(649) proval to the construction of the Constitution laid down in *Cloud*

v. Wilson and acted on and acquiesced in for thirty years past. Certainly, the Constitution is no more self-executing in providing the machinery for a clerk's election than as to any other offices named in it. In view of this legislative history, the conclusion is irresistible that the several General Assemblies which have convened since the adoption of the Constitution of 1875 have construed the language of the Constitution to mean that in the case of a vacancy in the office of clerk of the Superior Court, the judge has a right to appoint and his appointee shall hold until the next regular election for clerks of the Superior Court as provided for in the Constitution, which election will occur in 1906.

3. The construction by the judges of the Superior Court.

These judges, ever since 1875 and prior thereto, have uniformly appointed clerks of the Superior Court for unexpired terms, and such appointments have been recognized as legal throughout the entire State. In the past thirty years there must have been a great many of such appointments, and never, until this case, has the right of the judge to appoint for the unexpired term been questioned. I think it highly probable that the four members of this Court who served on the Superior Court bench made such appointments, and their appointees served for the unexpired term without challenge to their authority. This fact is entitled to weighty consideration, as it is hardly to be supposed that all the Superior Court judges would have habitually misconstrued the law or usurped authority which was not conferred upon them.

4. Independent of the constitutional question, there was no legal election.

Elections can be held only as directed by law. No election is (650) valid, no matter how great the desire for it or how many participants, unless the requisite machinery is provided by law. *Monroe v. Wells,* 83 Md., 506.

The Constitution is no more self-executing in the case of vacancies in the clerk's office than as to other vacancies. Stress is laid by the Court upon section 16, Article IV: "A clerk of the Superior Court, etc., shall be elected, etc., at the time and in the manner prescribed by law for the election of members of the General Assembly." This must be construed with reference to section 17, which provides that clerks shall hold office for four years, otherwise it would be lawful to elect a clerk every two years, when members of the General Assembly are elected. There is, then, taking the two sections together, no constitutional warrant whatever for holding an election for clerk at more frequent intervals than every fourth year. I have already shown that the act of 1901 expressly provides for holding such election in 1902 and 1906 only.

In *Van Amringe v. Taylor,* 108 N. C., 198, *Merrimon, C. J.,* says: "The ascertainment of the popular will or desire of the electors under the mere semblance of an election, unauthorized by law, is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, and authority of government to the expression of the popular will. An election without the sanction of law expresses simply the voice of disorder, confusion, revolution, however honestly expressed."

In *Comrs. v. Baxter,* 35 Pa., 263, it is said that "majorities go for nothing at an irregular election; they are not even regarded as
(651) majorities, for orderly citizens have the right to stay away from such elections."

In *Sawyer v. Haydon,* 1 Nev., 75, the Court says: "We think no court or judge has gone so far as to hold that the people might hold an election, or vote for any particular officer at a general election, unless special provision was made for electing such officer for the particular term for which he was seeking to be elected, either in the Constitution or in some statutory enactment."

It is not sufficient that an election be authorized or warranted by the Constitution, but the time and manner of its being held must be specifically provided, and there must be affirmative legislation providing the necessary machinery for holding the same. The only election for clerk of the Superior Court mentioned in or authorized by the Constitution is the regular election every four years, and then it must be held in the manner and at the time prescribed for the election of members of the General Assembly. That is the plain meaning of the Constitution. The attempted election in Warren County in 1904 was a nullity. Nowhere, in Constitution or in statute, is there any provision made for voting for a clerk of the Superior Court in case of a vacancy. There is ample provision made for holding elections to fill vacancies in the offices of Secretary of State, Treasurer, Auditor, Superintendent of Public Instruction, Attorney-General, Solicitor, Justice of the Supreme Court, Judge of the Superior Court, or any other State officer. But not one word do we find about elections to fill vacancies in the office of clerk of the Superior Court. *Expressio unius, exclusio alterius.*

For these reasons, I am of opinion that the judgment of the Superior Court should be affirmed.

Cited: Salisbury v. Croom, 167 N. C., 227; *Hill v. Skinner,* 169 N. C., 409; *Comrs. v. Malone,* 179 N. C., 608.

(652)

CASH REGISTER COMPANY v. TOWNSEND.

(Filed 28 March, 1905.)

Fraud, Elements of—Deceit—Cancellation of Contract—Pleadings.

1. Where, in an action to recover balance due upon a contract for the purchase of a cash register, the defendant admits the execution of the contract and the delivery of the machine and the amount due, but asks to have the contract canceled, alleging, as the ground therefor, that its execution was induced by false representations of plaintiff's agent, the plaintiff was entitled to judgment on the pleadings, in that the answer failed to allege that such representations were known by the agent to be false, or, not knowing them to be true, he made them with a fraudulent intent or with reckless or wanton disregard of the truth.

2. The material elements of fraud are (1) misrepresentation or concealment, (2) an intention to deceive, or negligence in uttering a falsehood with intent to influence the act of others, and (3) the success of the deceit in influencing the act of the other party.

3. Expressions of commendation or of opinion, or extravagant statements as to value, or prospects, or the like, are not regarded as fraudulent in law.

4. A statement by plaintiff's agent to defendant, that the use of a cash register would save the expense of a bookkeeper, is not a misrepresentation of a subsisting fact, but nothing more than "dealer's talk" puffing his wares.

Action by National Cash Register Company against B. W. Townsend, trading as Townsend Grocery Company, heard by *Ward, J.*, and a jury, at December Term, 1904, of ROBESON.

This was a civil action brought by plaintiff against defendant, in which plaintiff seeks to recover of defendant the sum of $480, balance due under a contract for the purchase of a cash register sold and delivered by plaintiff to defendant. (653)

The plaintiff alleged the execution of the contract, the delivery of the machine thereunder, and the amount due. The defendant admitted the delivery of the machine and at the trial admitted the execution of the contract, but denied the indebtedness, alleging that he was induced to purchase the machine by the fraudulent representation of one Stronach, the plaintiff's agent, and prays that the contract be rescinded.

The court submitted the following issues:

1. "What is the balance due under the contract mentioned in the pleadings?" Ans.: "$480."

2. "Was the defendant induced to purchase the cash register by the false representations of the agent of plaintiff, as set forth in the answer?" Ans.: "Yes."

3. "Did the defendant offer to surrender the said cash register to the plaintiff upon discovery of said false representation?" Ans.: "No."

4. "What is the actual market value of the said cash register?" Ans.: "350."

From a judgment for the plaintiff for $325 and costs, he appealed.

McLean, McLean & McCormick for plaintiff.
McIntyre & Lawrence for defendant.

BROWN, J., after stating the facts: It is unnecessary to consider the fifty-three exceptions in the record. The plaintiff requested the court to charge that upon the whole evidence the plaintiff is entitled to recover of the defendant the sum of $480. We are of opinion that such instruction should have been given, or rather that at the close of the evidence, with the admissions of the parties, such should have been the judgment of the court. It is admitted that the defendant purchased the cash register at the price of $505, and that he paid $25 on it; that the same was delivered to him, and there is no claim made of any defect in the mechani-
(654) cal construction of the machine. The defendant signed a written contract securing the purchase of the machine and stipulating the dates of payment. The defendant sets up an equitable defense, that the execution of the contract was induced by the false and fraudulent representations and deceit of the plaintiff's agent who sold him the machine, and asks for a rescission and cancellation of the contract. The burden of proof is therefore upon the defendant to establish such allegations by a preponderance of the evidence, and failing to do so, the plaintiff is entitled to judgment for the balance due upon the contract price.

The allegations relating to deceit and fraud in the answer charge that the agent of the plaintiff stated to the defendant that the use of the cash register would save the expense of a bookkeeper; that the books could be kept upon the machine, and that it would not take half the time to keep the defendant's books as was required without a machine, and that it would save half of one clerk's time and that the machine could be operated by a person of ordinary intelligence. We note that the answer fails to allege that such representations were not only false, but were known by the agent to be false, or, not knowing them to be true, he made them with a wrongful and fraudulent intent, or with reckless or wanton disregard of the truth. For such omission the court might well have rendered judgment upon the pleadings. But as the case was tried before the jury, we have considered it as if such necessary averments were in the answer.

The material elements of fraud as laid down by the text-writers are, first, misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with intent to influence the actions of others; and third, the success of the deceit in influencing the action of the other party. To constitute legal fraud, which will warrant the rescission of a contract, there must be a false representation (655) of a material fact. There are cases in the books where courts of equity have afforded relief from the consequences of innocent misrepresentation. Contracts induced thereby have, in some instances and under peculiar circumstances, been set aside; but in all cases the misrepresentation was of a material and subsisting fact. No particular rule can be laid down as to what false representation will constitute fraud, as this must necessarily depend upon the facts of each case, the relative situation of the parties and their means of information. But all the authorities are to the effect that where the false representation is an expression of commendation, or is simply a matter of opinion, the courts will not interfere to correct errors of judgment. *Walsh v. Hall,* 66 N. C., 236. The law will not give relief unless the misrepresentation be of a subsisting fact. *Hill v. Gettys,* 135 N. C., 375.

What has been called "promisory representation," looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud. Benjamin on Sales (7 Ed.), 483 *et seq.; Godron v. Parmele,* 2 Allen (Mass.), 212; *Long v. Woodman,* 58 Me., 52, and cases cited.

Clark on Contracts states in substance that commendatory expressions or exaggerated statements as to value or prospects, or the like, as where a seller puffs up the value and quality of his goods or holds out flattering prospects of gain, are not regarded as fraudulent in law. (Pages 332-334.) It is the duty of the purchaser to investigate the value of such expressions of commendation. He cannot safely rely upon them. If he does, he cannot treat it as fraud, either for the purpose of maintaining an action of deceit or for the purpose of rescinding a contract at law or in equity. *Saunders v. Hatterman,* 24 N. C., 32; 14 A. & E. (2 Ed.), 34, and cases cited. (656)

Kerr on Fraud and Mistake, at page 83, says: "A misrepresentation to be material should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for nothing, though it may not be true, for a man is not justified in placing reliance on it."

Again, "A man who relies on such affirmation made by a person whose interest might so readily prompt him to invest the property with exaggerated value does so at his peril, and must take the consequences of his own imprudence."

The evidence relied on by the defendant is as deficient in proving the necessary elements of legal fraud as the answer is in alleging them. It tends to prove that Stronach, the plaintiff's agent, approached the defendant for the purpose of selling him a cash register; that he stated to the defendant that if he would use the cash register credit system he could do the same business he was doing with one clerk less, or do away with a bookkeeper; that the defendant said if that was true he would take one; that defendant's brother had a cash register which looked like the one plaintiff sold defendant; that the next morning the defendant sent his bookkeeper to see his brother's machine and report upon it; that when he came back and reported, the defendant signed the contract and bought the machine. According to the defendant's own evidence, the machine worked all right, and it was only a question of the time it took the defendant's clerks to operate it. The defendant testified that he did not know that the machine had an adding attachment. He said: "The only objection I had to it was it took a little more time. I asked my brother, who had a cash register, about his, and he reported that the cash (657) register is a good thing." The defendant further testified: "Neither I nor my clerks have ever had any experience with a machine of this kind. I knew nothing about one. Stronach told me that the trouble with the machine was that I had not sufficiently tried it. We used the cash register only one week. It took us about twice as long." The defendant's bookkeeper testified: "The machine was perfect from a mechanical standpoint. I cannot say that it would take me twice as long with the machine as it would with the books. The more familiar I became with it, the faster I could work it. The more it was used, the better it would work. We did not use it over two weeks. I had never had any previous experience with cash registers." Another witness for the defendant said: "The cash part was all right. The credit part did not work well. If we had tried it longer, it might have worked better."

This evidence does not disclose any misrepresentation of a subsisting fact. The language of the agent at best was nothing more than "dealer's talk," commending his wares, and possibly exaggerating what the machine could do. There is no evidence of a fraudulent misrepresentation, or that the defendant acted entirely upon such representation; and there is no evidence that the agent knew such statements to be false when he made them. The evidence shows that the defendant undertook to investi-

gate the truth and value of the agent's representations on his own account when he sent his bookkeeper to examine and inquire into the value of his brother's machine, and did not sign the contract until his bookkeeper reported. There is no evidence to show that the value of this machine as a labor-saving device was peculiarly within the knowledge of the agent; that it was not known to other persons to whom the purchaser might have applied for information; that the agent did anything to prevent investigation on his part. Such evidence is regarded by some judges as material in cases of this kind. *Conly v. Coffin,* 115 (658) N. C., 566. "When the purchaser undertakes to make an investigation of his own, and the seller does nothing to prevent this investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations." *Jennings v. Broughton,* 5 De Gex M. and G., 126; *Developement Co., v. Silva,* 125 U. S., 259.

The evidence fails to show that the defendant has given the machine a fair trial. On the contrary, his own witnesses testified that the more they used it, the more expert they became. It is common knowledge and everyday experience that the wonderful products of mechanical skill, which in their operations almost approach human intelligence, require practice in order that the best results may be produced. It is possible that if the defendant and his clerks persevere in their efforts to master this machine, he may agree with his brother, that "the cash register is a good thing." But if it turns out that he has sustained loss, not from any mechanical defect in the machine, he must attribute it to his own negligence and indiscretion. He did not exercise that diligence in making inquiry which the law expects of a reasonable and careful person. *Vigilantibus et non dormientibus jura subveniunt.*

New trial.

Cited: May v. Loomis, 140 N. C., 357; *Frey v. Lumber Co.,* 144 N. C., 762; *Williamson v. Holt,* 147 N. C., 520, 524; *Whitehurst v. Ins., Co.,* 149 N. C., 276; *County v. Construction Co.,* 152 N. C., 30; *Audit Co. v. Taylor, ib.,* 273; *Machine Co. v. Feezer, ib.,* 519, 520; *Unitype Co. v. Ashcraft,* 155 N. C., 66; *Robertson v. Halton,* 156 N. C., 220; *Bank v. Brown,* 160 N. C., 25; *Fields v. Brown, ib.,* 299; *Vaughan v. Exum,* 161 N. C., 415; *Machine Co. v. Bullock, ib.,* 17; *Pate v. Blades,* 163 N. C., 272; *Oltman v. Williams,* 167 N. C., 314; *Pritchard v. Dailey,* 168 N. C., 332; *Kime v. Riddle,* 174 N. C., 444; *Hollingsworth v. Supreme Council,* 175 N. C., 635; *Rice v. Ins. Co.,* 177 N. C., 131; *Bourne v. Farrar,* 180 N. C., 137.

(659)

KORNEGAY v. MILLER.

(Filed 28 March, 1905.)

Contingent Remainders, Assignments of—Consideration—Possibilities, Assignments of.

1. In the absence of fraud or imposition, an assignment of a contingent remainder (the person who is to take being certain) for a nominal consideration vests an equitable title in the assignee from the time of the assignment, and instantly upon the acquisition of the property the assignor holds it in trust for the assignee, *whose title requires no act on his part to perfect it.*

2. The principles heretofore announced by this Court in respect to assignments of mere possibilities, especially expectant interests in the estates of parents, are strictly adhered to. Such assignments are not promotive of either the moral, social, or material welfare of the people, and should be anxiously and jealously watched by the courts.

HOKE, J., dissents.

ACTION by A. U. Kornegay against C. B. Miller, heard by *Neal, J.*, at January Term, 1905, of WAYNE.

James F. Kornegay at the time of his death was seized in fee of a tract of land in the city of Goldsboro, containing about fifteen acres, of which the land described in the complaint is a portion. Said Kornegay died on 13 August, 1883, having executed his last will and testament appointing his son W. F. Kornegay executor thereof, which was duly proven and the executor therein qualified. The testator left surviving, his children, the said W. F. Kornegay, John J. Kornegay and the plaintiff A. U. Kornegay, and his widow, Fannie E. Kornegay. Item VII of said will is in the following words: "I give to my wife Fannie, during her life and no longer, the dwelling and lot where I now reside, embracing the yard and garden and all buildings adjoining the same on the east side of the stock lane, together with one-half of the lucerne lot on the west side of said lane." By item XI of his will he gave the
(660) residue of his estate, together with the land devised to his wife for life, to his son, the said W. F. Kornegay, to hold in trust for his other two sons, to be divided equally between them. He authorized the said trustee to rent out the said real estate or to sell such portion or all of it as in his judgment he might deem best and to invest the proceeds for the benefit of his said two sons. By item XIII he appointed the said W. F. Kornegay guardian to the said Albert U. Kornegay, directing that he manage his portion of the estate and settle with him when he should attain his majority. By item XIV he directed that if either of his said sons, John J. or Albert U., should die without offspring, the

portion of his estate given to the one so dying should pass to the survivor, and if both should die without offspring, the income arising from both their portions should be paid to his wife, Fannie E. Kornegay, during her life or widowhood, and then said property to pass to his son, W. F. Kornegay. That said W. F. Kornegay died on 31 October, 1894, without issue and leaving the said John J. and Albert U. Kornegay his only heirs at law; that by his last will and testament he gave his estate, after the payment of his debts, to his widow, Mrs. Annie L. Kornegay, during her life or widowhood, and upon her death or at her marriage he gave his said estate to his brothers, John J. and Albert U. Kornegay, and Annie D. Slocumb, to be divided equally between them. After the death of the said W. F. Kornegay the said John J. Kornegay died intestate and unmarried, leaving the plaintiff his only heir at law. Thereafter, on 9 January, 1905, the said Annie D. Slocumb executed and delivered to the plaintiff a deed conveying for the consideration of $1 all of her right, title, and interest, present, contingent, and prospective, in and to all the property of every character devised by the last will and testament of the said James F. Kornegay, and all of the right, title, and interest which may have passed or may hereafter pass to her (661) under the last will and testament of W. F. Kornegay. That thereafter the said Annie L. Kornegay intermarried with Charles Dewey. That Fannie E. Kornegay, wife of James F. Kornegay, is now living. Plaintiff A. U. Kornegay arrived at full age on 17 September, 1892, and on 9 January, 1905, contracted in writing to convey to the defendant, for the consideration of $1,200, a portion of the land devised by the said James F. Kornegay as hereinbefore set forth, a description of which is set forth in the complaint; pursuant to the terms of said contract the plaintiff executed and tendered to the defendant a deed in fee with full covenants of warranty for the said land, duly executed by the plaintiff A. U. Kornegay, and by the said Fannie E., widow of the said James F. Kornegay, and damanded payment of the consideration agreed upon, which has been refused. The defendant avers that he is ready, willing, and able to perform his part of the said agreement, if upon the foregoing facts the deed tendered to him conveys an indefeasible title in fee to said land. His Honor being of opinion that the deed tendered conveyed to the defendant a good and indefeasible title to said land, rendered judgment for the plaintiff, to which defendant excepted and appealed.

Aycock & Daniels for plaintiff.
A. C. Davis for defendant.

CONNOR, J., after stating the facts. The construction of this will was before this Court in *Kornegay v. Morris,* 122 N. C., 199. The facts, in

the light of which we are now called upon to construe the will and pass upon the plaintiff's title, differ from those set out in that case, in that Fannie E. Kornegay was then made a party defendant, and (662) adopted the answer of the defendant Morris, which alleged that the plaintiff in that case could not convey a clear and indefeasible title, and it was so held. In this case the said Fannie E. Kornegay joins in the execution of the deed. In the opinion filed by *Mr. Justice Furches,* after considering the several contingencies provided for in the will, he says: "But if Albert dies without leaving issue, the widow Fannie E. is to have the 'income' from the estate left John and Albert, until her death or marriage. This gives her a contingent estate in this property. Her estate is also contingent, depending upon the death of Albert without leaving issue. This contingency may never happen, and she may never receive any benefit from this estate. But if Albert should die without leaving issue, before she dies or marries, she may then enforce the collection of the rents arising therefrom upon or against the lot itself, as this income would be a lien on the property itself." The two questions, therefore, presented for our decision in this case are whether the contingent interest of Fannie E. Kornegay can be assigned or conveyed by her deed and whether Mrs. Annie Slocumb has parted with the contingent interest which she took under the will of W. F. Kornegay. In *Watson v. Smith,* 110 N. C., at p. 6, *Shepherd, J.,* speaking of the effect of a deed conveying a contingent interest, says: "Taking the limitation to be either a contingent remainder or an executory devise, we are of the opinion that the interest of John W. Watson and others was at least a 'possibility coupled with an interest,' and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity," citing *Watson v. Dodd,* 68 N. C., 528, in which case *Pearson, C. J.,* says that assignments of such contingent interest will be upheld in a court of equity, and that if the estate should afterward vest, the court would compel the assignor to make title, (663) in the absence of fraud or imposition. *Gray v. Hawkins,* 133 N. C., page 1.

The only doubt which we have had in disposing of the case is in regard to the effect of the deed executed by Mrs. Slocumb to the plaintiff. It would seem that when the will of James F. Kornegay was before the Court in *Kornegay v. Morris, supra,* no notice was taken of the fact that W. F. Kornegay executed a will devising his entire estate to his wife during her life or widowhood, remainder to his two brothers and Mrs. Slocumb. The case is discussed and disposed of upon the theory that the interest of W. F. Kornegay descended to his heirs at law. We find no difficulty in holding that Mrs. Fannie E. Kornegay, by joining with the

plaintiff in the deed tendered the defendant containing appropriate words to release her contingent interest in the income, as well as all title to the land with warranty, parts with her interest, the consideration being the full value of the land. Her deed operates either by way of an assignment, valid and enforcible in equity, or by way of estoppel. *Foster v. Hackett,* 112 N. C., 546; *Wright v. Brown,* 116 N. C., 26.

It is well settled that such contingent interest as W. F. Kornegay took under the will of his father passed under his will. Code, sec. 2140; Fearne on Rem., sec. 752; Underhill on Wills, sec. 50; *Fortescue v. Satterthwaite,* 23 N. C., 566. His widow having married, the interest of her husband passed under his will to the plaintiff, his brother James J. and Mrs. Slocumb. James J. having died without issue, his interest passed to the plaintiff. Hence, if the plaintiff died without issue, the title, subject to a charge to the extent of the income during the life or widowhood of Mrs. Fannie E. Kornegay, will pass to his heirs at law and Mrs. Slocumb. Mrs. Slocumb, therefore, upon the death of the plaintiff without issue, would take under the will of W. F. Kornegay a one-third undivided interest, subject to the rights of Mrs. Fannie E. Kornegay. (664)

It must be conceded that some obscurity rests upon the effect of an assignment of such interest by reason of expressions used by the judges. Such interests have been spoken of as *possibilities* and classed with bare expectancies, as that of a child to inherit from the parent, etc. Again, the validity of such an assignment has been sustained as an executory contract to convey, passing no present interest or estate, but a mere right in equity, to be enforced by suit when the contingency upon which the estate vests occurs. Such assignments are sometimes sustained upon the doctrine of estoppel, especially when the deed contains a warranty of title. It has also been held that an assignment of such interest, while not passing any present legal title or estate, does pass the equitable title of the assignor, which is perfected by converting the assignor into a trustee for the benefit of the assignee when the estate vests. This Court in *Fortescue v. Satterthwaite,* 23 N. C., 566, by *Daniel, J.,* said: "It is true, as stated in the argument, that a possibility cannot be transferred at law. But by a *possibility* we mean such an interest or the chance of succession which an heir apparent has in his ancestor's estate. . . . But executory devises are not considered as mere *possibilities,* but as *certain interests and estates.*" After citing *Gurnell v. Wood,* Willes, 211, and *Jones v. Roe,* 3 T. R., 93, in which may be found an interesting review of the cases, the learned judge says: "In the last case the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be

assigned, says Atherly, p. 555, both in real and personal estate, and by any mode of conveyance by which they might be transferred, had they been vested remainders." It is true that the deed in that case was sustained upon other grounds, but the language used shows the opinion held by the learned and eminent judge who wrote for *Ruffin, Gaston,* and himself.

(665) In *Bodenhamer v. Welch,* 89 N. C., 78, *Ashe, J.,* discusses the question with his usual clearness and learning, stating the distinction between a "mere possibility" and "a possibility coupled with an interest," which latter, he says, "may of course be sold, assigned, transmitted, or devised; such a possibility occurs in executory devises, contingent remainders, springing or executory uses." He cites a number of authorities to sustain the proposition that such interests or estates may be assigned. In that case it was held that such an interest passed to the assignee in bankruptcy, and when sold by him vested in the purchaser. *Judge Ashe* notices the language of *Pearson, C. J.,* in *Watson v. Dodd* 68 N. C., 528, and says: "There can be no doubt, then, that the contingent interest of the bankrupt may be assigned, and whether assignable at law or in equity, whatever interest the bankrupt had vested in his assignee." In *Watson v. Dodd, supra,* the question before the Court was whether the interest of a contingent remainderman could, before the contingency happened upon which the estate was to vest, be subjected to sale for the payment of debts. That was the only question decided. *Pearson, C. J.,* says, *arguendo:* "If one entitled to a contingent interest of the kind we are treating of, assigned it and received therefor a valuable consideration, and there was no fraud or imposition, and the estate afterwards vested, a court of equity would compel the assignor to make title or else would hold the estate as a security for the consideration paid, according to circumstances, under its jurisdiction of specific performance of executory contracts." This language is noted by *Shepherd, J.,* in *Watson v. Smith,* 110 N. C., 6. He says: "It is possible he (*Pearson, C. J.*) had in mind the assignment of a mere possibility, such as the expectancy of an heir at law, as in *McDonald v. McDonald,* 58 N. C., 211. In *Bodenhamer v. Welch,* 89 N. C., 78, it is held that such an interest may be assigned (we suppose that an equitable assign-
(666) ment is meant), and we are of the same opinion; but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue; and this is all that is necessary, according to the stipulations in the case agreed, to entitle the plaintiff to the relief he asks. The plaintiff, the life tenant, has by the assignment acquired an equitable right to the interest of

the remainderman." We have quoted the language of the learned justice for the twofold purpose of showing that the decision is based upon the agreed facts in that case and that by the assignment the plaintiff acquired an equitable right to the interest of the remainderman and not a mere right in equity to file a bill for specific performance. In *Watson v. Dodd, supra,* it is said that the assignment will be sustained as an executory contract if based upon a "valuable consideration." In *Wright v. Brown, supra,* it is said the consideration necessary to sustain the assignment must be "sufficient." In other cases the Court uses the term "a fair consideration."

If the deed of Mrs. Slocumb operates only as an executory contract, and all that is acquired is a right to sue for specific performance, we should hesitate to declare that the defendant acquires a "good and indefeasible title" to the land. It is evident that he is paying the plaintiff full value for the lot. If his title in respect to the interest of Mrs. Slocumb is dependent upon the view which a judge or jury may take, at some uncertain time in the future, of the adequacy of the consideration paid her by the plaintiff, when probably, by reason of the growth of the city or the placing of valuable improvements on the property, it has enhanced in value, and the parties to the transaction are dead, we should not compel him to pay his money and take the risk of the result of a lawsuit. Before the defendant is required to complete the purchase and pay the money he should have something more than the mere right to sue for specific performance of an executory contract. The basic principle upon which said assignments are sustained should be (667) settled—certainly so far as the question of consideration is concerned. Of course, if any "fraud or imposition" be practiced upon the remainderman, the deed or assignment would be set aside as in case of and under the same equitable principles as other deeds.

An examination of the authorities and text-books develops an effort of the judicial mind to escape from the uncertainty which has oppressed the subject and bring the law into harmony with the well-recognized principle enlarging the power to assign things in action in the same manner and with the same certainty as things in possession. The general subject underwent an exhaustive examination in *Holroyd v. Marshall,* 10 H. L. Cas., 209. Mr. Bispham, in his very able work on Equity (6 Ed.), 236, says: "The true ground upon which this and similar decisions are to be placed appears to be, that a court of equity enforces such assignments on the ground that the assignee is entitled to have specific performance of the contract to assign, as soon as the property comes into existence, in the hand of the assignor. But it must not be understood by this remark that the assignor's right is merely in the nature of a right to the

specific performance of executory contracts, or is to be measured by the limitations by which that equitable remedy is controlled. The assignee's right is something more. It is a present *title,* not existent at law, but thoroughly recognized in equity; and to that title equity stands ready to give full effect the instant the property comes into being. It is true that neither in equity nor at law can a contract to transfer property, not then in existence, operate as an immediate and complete alienation, for the simple reason that there is nothing which can be immediately transferred. But instantly upon the acquisition of the thing, the assignor holds it in trust for the assignee, *whose title requires no act on his part to perfect it.* The assignee, therefore, has an equitable
(668) title *from the time of the assignment."* The principle thus stated by Mr. Bispham has been and is now uniformly applied to mortgages of after-acquired property. Certainly, it would seem equally applicable when the subject-matter of the assignment is a contingent remainder—the person who is to take being certain. By the statute of wills such interests are made devisable, and by act of Parliament and the Legislatures of several States made the subject of a conveyance at law. Hopkins Real Prop., 305. While there is no statute in this State upon the subject, the Legislature at its session of 1903 provided for the sale of such interests by the courts for the purpose of reinvestment. In the deed executed by Mrs. Slocumb with her husband, the interest which she had and with which she parts is described by reference to the two wills under which she acquired it. She expressly disposes of such interest as she now has or may hereafter have in the property. This form of conveyance prevents the operation of an estoppel. *Wellborn v. Finley,* 52 N. C., 228. It, however, clearly appears that she understood what her rights were and intended to effectually part with them.

Without bringing into question the decision in *Watson v. Dodd, supra,* or any of the cases cited, we think that we should, so far as possible, consistently with elementary principles of law, hold that the deed of Mrs. Slocumb operates to vest in the plaintiff the equitable title to all of the interest, title, and estate which she has or may, by the happening of the contingency provided for, have in the *locus in quo;* that this title is something more than the mere right in equity; that in the event of the plaintiff's death without offspring the title will be perfected without any act on the part of the plaintiff or those claiming under him; that the consideration agreed upon by the parties is sufficient and adequate to pass such equitable title, and sustain it in the event the perfect
(669) title shall come to Mrs. Slocumb or her heirs.

We have given the subject a somewhat extended examination because of the uncertainty surrounding it. We feel that in the conclusion which we have reached we are promoting the wise and salutary

policy of the law, which seeks to liberate titles from obscure and uncertain limitations and render alienation easy and simple. There are few greater clogs upon the growth of the industrial life of a people, or the encouragement of home building, than obscurity, uncertainty, and insecurity of titles to land. In respect to transfers or assignments of mere possibilities, especially expectant interests in the estates of parents, we adhere strictly to the principles announced by this Court in *McDonald v. McDonald,* 58 N. C., 211; *Mastin v. Marlow,* 65 N. C., 695; *Boles v. Caudle,* 133 N. C., 528; Bispham Eq., 241. Such assignments are not promotive of either the moral, social, or material welfare of the people, and should be anxiously and jealously watched by the courts. It will be an evil day for us when children spend their inheritance before it comes to them, encouraging manifold evils to themselves and to society. The judgment of the court below must be

Affirmed.

HOKE, J., dissenting.

Cited: Cheek v. Walker, 138 N. C., 449; *Smith v. Moore,* 142 N. C., 279; *Beacom v. Amos,* 161 N. C., 367; *Hobgood v. Hobgood,* 169 N. C., 490; *Scott v. Henderson, ib.,* 661; *Lee v. Oates,* 171 N. C., 725; *Bowden v. Lynch,* 173 N. C., 208; *Smith v. Witter,* 174 N. C., 618; *Williams v. Biggs,* 176 N. C., 50; *Sharpe v. Brown,* 177 N. C., 297; *Loftin v. English,* 178 N. C., 607; *Malloy v. Acheson,* 179 N. C., 96, 97; *Hollowell v. Manly, ib.,* 264.

(670)

MAYO v. STATON.

(Filed 28 March, 1905.)

Sale of Trust Estate Under Execution—Equity of Redemption—Interlocutory Judgment—Sheriff's Deed.

1. When land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of a docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action.

2. An equity of redemption, as defined by the Court, whether created by mortgage deed made to the creditor or to a third person, with or without power of sale, may be sold under execution, as provided by section 450, subsection 3, of The Code.

3. An interlocutory judgment, containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, and the land was not sold, does not affect the rights of the parties.

4. The provisions of section 451 of The Code, that on the sale of equity of redemption the sheriff in his deed shall set forth that the "estate was under mortgage at the time of the judgment," are not mandatory.

ACTION by N. J. Mayo against Felix Staton and others, heard by *Peebles, J.*, at November Term, 1904, of EDGECOMBE.

This was an action for the recovery of real estate, the decision of which was submitted to the court upon a case agreed. On 7 March, 1885, the defendant, Felix Staton, executed two promissory notes to the payees therein named, and for the purpose of securing payment thereof he executed to W. H. Johnston, Esq., a deed conveying the *locus in quo*, which was duly recorded in the office of the register of deeds of Edgecombe County, upon the following trust: "To have and to hold said land
(671) unto said W. H. Johnston, his heirs and assigns, in special trust, however, to hold the same for the uses and purposes hereafter specified, to wit: That if said bonds, with the interest thereon, shall not be paid on or before the day on which they will be due, as before stated, the said Johnston shall, on demand of either of said obligees, after sixty days notice in writing to said Felix Staton that payment of said bonds is required and thirty days advertisement of the time and place of sale at the courthouse door in Tarboro and three other public places in said county, expose said land at public sale before said courthouse door, for cash or on a credit, as he may deem best, and the proceeds apply to the satisfaction of said bonds and interest, or so much as may be due thereon, after retaining reasonable commissions for his trouble, and the residue, if any, shall pay to said Felix Staton or his assigns." On 18 April, 1892, a judgment was recovered against the defendant Staton, which was duly docketed in the Superior Court of said county. At October Term, 1895, of the Superior Court of Edgecombe judgment was rendered in a suit properly instituted for the recovery of the said notes executed by the defendants and secured as aforesaid and sale of said land, in which it was ordered and adjudged that if the indebtedness was not paid by 1 February, 1896, the land conveyed to secure the payment of the same should be sold for cash at the courthouse door at Tarboro by a commissioner therein named. On 10 April, 1902, execution was issued on the aforesaid judgment recovered on 18 April, 1892, against the defendant Staton, and his homestead was duly allotted by metes and bounds; upon such allotment it was ascertained that the judgment debtor owned 80 acres of said land in excess of his homestead, which was also described by metes and bounds and due return made thereof. The
(672) sheriff duly levied said execution upon the excess of realty, and

after advertising the same at the courthouse door offered the said 80 acres for sale on the first Monday of September, 1902, when the plaintiff, N. J. Mayo, purchased the same for the sum of $250 and paid the purchase money therefor, receiving a deed from the sheriff for said land, which was duly recorded and made a part of the case agreed. That it appears from said deed that the sheriff sold the said 80 acres of land, making no reference to the deed in trust hereinbefore mentioned or other encumbrance thereon. On the first Monday in January, 1903, the commissioner appointed by the court for that purpose offered for sale at the courthouse door in Tarboro all that portion of the land embraced in the deed in trust to Mr. Johnston of 7 March, 1885, which included the part of said land allotted to the defendant Staton as his homestead; he did not expose to sale the portion of said land in excess of the said homestead; the land was bid off at said sale for the sum of $2,000; the bid was raised 10 per cent, and at March Term, 1903, an interlocutory judgment was rendered in which the court used the following language: "I am of opinion that Mayo, being a purchaser for value of the 80 acres in the mortgage outside of homestead boundaries, and having paid his money ($250) therefor, acquired title thereto, subject to this mortgage lien, and has an equity as against defendant to have the land in the mortgage and within homestead boundaries sold first and before the 80 acres. This equity is strengthened by the admitted fact that the land within the homestead boundaries will bring sufficient to give defendant $1,000 and to pay the mortgage debt and the balance due on the judgment debt, and still leave a surplus to be paid defendant." It was adjudged that if the defendant Staton failed to pay the judgment on or before the day therein named, that the commissioner should proceed to advertise the land described in the deed of trust, excepting the 80 acres, and sell the same at the courthouse door for cash, etc. The (673) defendant Staton thereafter sold and conveyed all his right, title, and interest in the entire tract of land to his codefendant, Lucy C. Staton, who, prior to the day fixed, paid off and discharged the debt secured in the said deed in trust to Mr. Johnston. At September Term, 1903, of said court the said commissioner made his report, in which he set forth the payment of said judgment, etc. At the said term final judgment was rendered confirming said report and directing the payment of costs, etc. There are other facts stated in the case agreed which it is conceded are not material to be set forth or considered for the purpose of passing upon this appeal. His Honor, *Judge Peebles,* adjudged upon the case agreed that the plaintiff was the owner of the land and entitled to the immediate possession thereof, to which the defendant excepted and appealed.

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

CONNOR, J., after stating the facts: It is conceded by counsel in their well-considered briefs that the case agreed presents for decision the question whether, at the time of sale by the sheriff and purchase by the plaintiff, the interest of the judgment debtor in the *locus in quo* was subject to sale under execution. His Honor in his carefully prepared opinion and judgment makes an able and exhaustive review of the cases decided by this Court and answers the question in the affirmative, rendering judgment for the plaintiff. The case was ably and exhaustively argued and counsel have furnished us full briefs of the authorities. The act of 1812 may be found in The Code, sec. 450, subsecs. 3-4, and sec. 452. It has been frequently construed by this Court. It must be conceded that the decisions are not in harmony, and that there is much *dicta* to be found which it is difficult to reconcile. The question being of (674) much practical importance, especially since deeds in trust have so largely superseded the use of mortgages for the security of debts, we have deemed it well to endeavor to "run the line" and "mark the boundaries," removing, if possible, such confusion as may exist in our decided cases. We are not unmindful of the difficulty of the undertaking. As we shall see, several of the ablest and most learned of the judges who have sat upon this bench have given the subject careful consideration. It may be that some of them have failed to carefully examine the decisions made by those who have preceded them. However this may be, our investigation brings us to a conclusion different from that reached by the learned judge of the Superior Court, and it is proper that we set forth the reasons by which we have been controlled in our conclusion.

In *Harrison v. Battle,* 16 N. C., 537, one Hunt conveyed to Mr. Battle valuable real and personal estate in trust to sell and apply the proceeds to the payment of certain debts scheduled in the deed, with a resulting trust to the grantor. Judgment was recovered on a debt not secured in the deed and execution levied upon Hunt's interest in the property. Before the sale of any part of the property, Hunt assigned to several persons his interest in the residue after the payment of the debts, notice of which was served on the trustee. The debts secured in the deed were paid from the proceeds of the personal property assigned to the trustee. The plaintiff being the owner of the judgment against Hunt, filed his bill in equity against the trustee and all others interested in the property and its proceeds. The court decreed a sale by the trustee, with direction to hold the proceeds subject to the direction of the court. *Henderson, C. J.,* delivering the opinion after an *advisari,* says that prior to the act of

1812 the levy of the execution did not create a lien on the inter- (675) est of Hunt, because it was not liable to sale. He said: "Nor is the trust in favor of Hunt one of that description authorized to be taken in execution under the first section of the act of 1812. The use or trust there spoken of is a pure and unmixed one; for the doing execution under that section, to use its own terms, divests the estates both of the trustee and *cestui que trust* and transfers them to the purchaser." We note this case now only so far as it affects the construction of the first section of the act. It does not appear from the statement of facts whether the debts were paid by the sale of the personalty prior or subsequent to the levy or teste of the *fieri facias*. The next case in order of time is *Pool v. Glover,* 24 N. C., 129. Josiah Jordan cenveyed to a trustee real estate in trust to secure and pay certain debts, etc., and upon further trust that if said debts should be paid without a sale of the lands, to convey to said Josiah, etc. A judgment having been recovered against Jordan, a writ of *fieri facias* was issued and the sheriff sold "the equity or interest of Jordan of and in the premises." Defendant purchased and refused to pay his bid, for that Jordan had no interest subject to sale under an execution. *Ruffin, C. J.,* referring to *Harrison v. Battle, supra,* says: "That case determines the precise point that a conveyance of land of this nature by a debtor to a third person in trust by a sale to pay the bargainor's debts, with a resulting trust to the bargainor, leaves an interest in the bargainor which is not a trust within the first section of the act." We quote the remaining part of this sentence later on.

In *Davis v. Petway,* 27 N. C., 576, *Ruffin, C. J.,* after stating the distinction between those cases in which the *cestui que trust* could, at once, call for the conveyance of the legal title, and those wherein it was necessary that the trustee should retain the legal title to protect the interest, either of immediate or ulterior trusts, says: "Now, the act of 1812 did not mean to change the nature of trusts, the relation of trustee and *cestui que trust,* or the rights of the latter against the former. The sole purpose of it was to render the interest of the *cestui que trust* (676) liable, at law, as it was in equity, for the debts of the *cestui que trust* in certain cases by transferring by a sale or execution against the *cestui que trust* the legal estate of the trustee as well as the trust estate of the debtor. It is the necessary construction of such a provision that it was not intended to embrace any such cases as those adverted to, in which the trustee could not voluntarily convey to the debtor without incurring a breach of trust to other persons with whose interest he is also charged. He concludes: "As the court would not decree a conveyance at the suit of the *cestui que trust,* it follows that we must hold that the trustee's estate would not be divested by a sheriff's sale under execution against the *cestui que trust.*" The next case in which the question is

discussed is *Anderson v. Holloman,* 46 N. C., 169. The point decided there is that "The purchaser at a sheriff's sale of an interest resulting to a debtor under a deed of trust does not acquire a legal estate." That was an action of trespass *q. c. f.* It was held that as the plaintiff did not show actual possession, he did not have legal title which drew the possession to it, and could not, therefore, maintain the action. The debts secured by the trust deed had not been paid, and it was held that until paid the legal title remained in the trustee. No case is cited upon this point. In *Thompson v. Ford,* 29 N. C., 418, a slave had been conveyed in trust for the payment of debts. He was sold under execution against the party executing the deed in trust. *Ruffin, C. J.,* said that no title passed under the second section of the act of 1812, because it was confined to mortgages of lands, tenements, and hereditaments. Nor could the slave be sold under the first section, because when he was sold there was a balance due on the debts secured by the deed. These cases being the only ones in which the question is raised prior to 1870, would seem

(677) to settle the proposition that a resulting trust such as Staton owned could not be sold under execution against the *cestui que trust* under the first section of the act of 1812. It would seem to be equally well settled by these decisions that such interest could be sold under the second section of the act, treating it as an equity of redemption. Returning to the case of *Harrison v. Battle, supra, Henderson, C. J.,* says: "But we believe that, so far as regards the land, Hunt's interest may be sold under second section of the act, for we cannot distinguish his right to have the land again, after the payment of the debt, for which it stood as a security, from an equity of redemption. It has all the essentials of that right, although it wants some of its formal parts; it is conveyed to secure the payment of a debt; upon the payment of the debt Hunt has a right to call for a reconveyance. . . . We cannot, therefore, distinguish this interest from an equity of redemption; and its exemption from sale under a *fieri facias* is equally an evil with the exemption of equities of redemption. The mischief is precisely the same, and we therefore think it is within the spirit of the second section of the act of 1812." The learned justice proceeds to say that although the creditor has a remedy at law, "it is not an effectual one." He decides that the jurisdiction of the court of equity is not ousted because a remedy is given at law, *"unless it be a plain one,"* concluding: "The remedy here is more effectual, because this Court ascertains all the claims upon the thing and sells the *corpus* itself. The purchaser gets what he purchased, no more and no less. He does not make his gain by another's loss." It would be difficult to state the reasons for confining the operation of the act of 1812 to its terms more strongly or clearly. How far the Court

was controlled in its decision by the fact that the debts secured by the trust deed had been paid, it is impossible to say.

Returning to *Pool v. Glover, supra,* we find *Ruffin, C. J.,* con- (678) curring in the decision that the resulting trust could not be sold under the first section, a part of his language we have quoted, referring to the trust, concluding with these words: "But is an equity of redemption within the second branch of it (the act of 1812)? As an authority none could be more apposite to the case before us. The counsel, indeed, endeavored to distinguish the cases upon the ground that in *Harrison v. Battle* the time for the sale had passed and enough of the estate conveyed had been sold to pay all the scheduled debts; whereas here the time for a sale has not arrived, and no part of the debt has been paid. But that distinction cannot be sustained; for, although there might be something in it, if the case stood on the act of 1812 by itself, yet the subsequent acts subject the legal right of redemption to execution in like manner as the equity of redemption was liable under the previous act." He concludes that whatever might have been sold after the day of forfeiture may be sold before that day. The learned *Chief Justice* discusses the question at some length. As was his custom, he states his conclusion forcibly and clearly. There can be but one construction put upon his opinion. The case is cited in *S. v. Pool,* 27 N. C., 108; *Doak v. Bank,* 28 N. C., 332. Since 1872 this Court has, with equal uniformity, held that a resulting trust remaining in the grantor conveying property to secure the payment of a debt therein recited, is not subject to sale under execution. In *Sprinkle v. Martin,* 66 N. C., 55, it would seem that the exact question was presented. The action was for the recovery of a tract of land. The title was put in issue. It appeared that the plaintiff, being the owner of the land on 27 March, 1855, conveyed it to one Cook to secure the payment of a debt due to two other parties. On 12 March, 1869, Cook reconveyed the land to him. On 31 May, 1858, the interest of the plaintiff in the land was sold under an execution issued upon a judgment against him and purchased by the defendant (679) The sole question presented by the exception was whether the defendant acquired any title under the sale and deed made pursuant thereto. *Pearson, C. J.,* said: "The defendant acquired no title by his purchase at the sheriff's sale, for Sprinkle (the defendant in execution) had no estate or interest in the land which could be sold by the sheriff under execution," citing *Thompson v. Ford* and *Harrison v. Battle, supra.* He says: "After all the debts secured by the deed of trust are satisfied, the resulting trust becomes liable to sale under execution, for the purchaser may then take the legal as well as the equitable estate without prejudice to third persons. Such was the case in *Harrison v. Battle.*" While it is true the opinion is short, and no other authorities cited than those

named, we cannot suppose that the *Chief Justice* wrote for a unanimous Court without consideration. Able and learned counsel represented the parties in this Court.

The question was again before this Court at the same term in *McKeithan v. Walker,* 66 N. C., 95. The plaintiff having a docketed judgment against the defendant, made a motion based upon an affidavit pursuant to section 266, C. C. P., section 490 of The Code, setting forth that an execution had been issued on the judgment and returned unsatisfied; that W. J. Brown had property in his possession belonging to the defendant, etc. Brown, pursuant to notice, appeared and stated that he held a deed of trust executed by defendant to secure certain debts, etc. That if said debts were not paid he was directed to sell the land and from the proceeds pay them and pay the surplus to said Walker. Plaintiff asked the court to direct the sale of the land, etc. Motion denied, and plaintiff appealed. *Rodman, J.,* said: "At the time of the docketing, therefore, the defendant Walker had a resulting trust in the land
(680) conveyed after payment of the debts secured." The learned justice proceeds to declare that the language of section 254, C. C. P. (Code, sec. 435), is sufficiently comprehensive to include equitable as well as legal estates, and that by docketing the judgment the plaintiff acquired a lien on the resulting trust of the defendant. He says: "It must be noted, however, that this section does not make liable *to sale under execution* any equitable estates which were not so by the construction of the act of 1812 before the C. C. P. In order to sell an equitable estate, not liable to sale under execution at law by that act, that is to say, one which is neither a pure and simple trust nor an equity of redemption, the plaintiff in the execution must still resort to his action as formerly to his bill in equity, to ascertain the rights of the parties and enforce his lien by the docketing of his judgment instead of by the filing of his bill, or the issuing of his summons to enforce it. Thus the law is made more uniform, and the unnecessary and useless distinction between legal and equitable estates is destroyed. And that is probably as far as the law can go in that direction." The Court, therefore, twice at the same term, held that a resulting trust, such as the one before us, could not be sold under execution. The next case in which any reference is made to the subject is *Hutchinson v. Symons,* 67 N. C., 156. It must be conceded that the question was not presented in that case and that the observations of *Chief Justice Pearson* were not necessary to its decision. For the first time we find any criticism of *Pool v. Glover, supra,* although the two cases decided at the preceding term cannot be reconciled with it. The *Chief Justice* says plainly that in *Pool v. Glover* there was "a misapprehension of the law" and "a confounding of the distinction between a 'trust' and 'an equity of redemption.'" He accounts for

this by the failure of the Court to advert to the fact that in *Harrison v. Battle* all of the debts secured in the deed of trust had been paid, etc. As we have seen, *Ruffin, C. J.*, expressly notices the fact (681) that in the first case the debts had been paid, where as in the case before the Court no part of the debts had been paid—and says that "the distinction cannot be sustained." It is true that he gives a reason which does not seem responsive to the objection made by counsel. He seems to think that the question is affected by the act of 1812, which subjects the legal right of redemption to sale. The reason which evidently the distinguished counsel for the defendant gave for the distinction was that until the debts were paid the trust was not a pure, unmixed one, as in *Harrison v. Battle.* This distinction is clearly recognized and pointed out by *Pearson, C. J.*, in *Sprinkle v. Martin, supra.* It is difficult to understand why he did not make the criticism of *Pool v. Glover* in *Sprinkle v. Martin,* wherein his opinion is in direct conflict with that case However this may be, there can be no misunderstanding the opinion of the *Chief Justice.* He says that the distinction between a trust and an equity of redemption, though plain, is confounded by the decision in *Pool v. Glover,* "Notwithstanding that the statute of 1812, by having two distinct sections, takes care to prevent this conclusion and treats a trust and an equity of redemption as two separate and distinct things." The effect of the act of 1812 is again discussed in *Tally v. Reid,* 72 N. C., 336, by *Reade, J.*, and *Sprinkle v. Martin* approved. The relation of the parties there was vendor and vendee, and it was held that the interest of the vendor was not subject to sale under execution. This line of cases has been uniformly followed. *Mannix v. Ihrie,* 76 N. C., 299; *Hardin v. Ray,* 94 N. C., 456; *Trimble v. Hunter,* 104 N. C., 129; *Everett v. Raby,* 104 N. C., 479; *Gorrell v. Alspaugh,* 120 N. C., 362; *Johnson v. Case,* 131 N. C., 492. In several of these cases the exact point was not involved. They are cited for the purpose of showing that since 1872 there has been a uniform current of decisions citing and approving *Sprinkle v. Martin* and *McKeithan v. Walker, supra.* In (682) but one of them (*Hutchison v. Symons, supra*) is *Pool v. Glover,* cited, and then, as we have seen, strongly criticised. It is true that in some of the cases *Harrison v. Battle* is cited, and we concur with his Honor in the opinion that its full scope is not adverted to. While the point actually decided in that case is that the resulting trust in the grantor was likened to an equity of redemption, the fact is that the debts were paid from other sources. It is true, as said by his Honor, that it does not clearly appear whether they were paid before or after the *teste* of the execution or levy on the land. It is clear that both *Ruffin* and *Pearson, C. J.*, treated the case upon the theory that they paid prior to the *teste* of the execution. It is certainly a subject of regret that a question of so

much practical importance to both debtor and creditor has been involved in uncertainty. We cannot concur with his Honor in the opinion that the point is not presented in *Sprinkle v. Martin* and *McKeithan v. Walker*. In our opinion, those cases conflict with the reasoning of the Court in *Harrison v. Battle*. We cannot reconcile them with *Poole v. Glover, supra*. While, as we have said, the point was not presented in *Hutchison v. Symons*, we cannot escape the conviction that *Chief Justice Pearson*, writing for the same Court which had decided *Sprinkle v. Martin* and *McKeithan v. Walker*, at January Term, 1872, took occasion at the next succeeding term to express his dissent from *Pool v. Glover*, and give his reasons therefor. It is important that the question be settled so that counsel may know how to advise clients, and property affected by equitable titles shall not be made the subject of speculation and sacrificed by being exposed to sale under conditions which make the right acquired uncertain. We are, in view of the decisions of this Court, compelled to decide which of the two conflicting lines of judicial interpretation we will adopt. As we have endeavored to show, this
(683) Court has since 1872 uniformly held that such interest or estate as Felix Staton had in the land was subject to the lien of a docketed judgment, but that it could be enforced only by a civil action in the nature of a bill in equity. Mr. Freeman, in his work on Executions, 188, says that the English decisions confined the operation of the statute 29 Car. II., ch. 3, to "clear and unmixed trusts." He further says that in North Carolina and other states which he names "the decisions are in substantial harmony with those made under the statute of 29 Car. II. Lands are not, then, subject to execution against the *cestui que trust* unless the trustee convey him the entire legal title without committing a breach of trust." The same conclusion is reached by the Supreme Court of South Carolina in *Bristow v. McCall*, 16 S. C., 548. We concur with the opinion of *Judge Pearson* that the statute expressly recognizes the distinction between a resulting trust and an equity of redemption. The origin, history, development, and attributes of the two are a part of the common learning of students of our jurisprudence. We think that we can discover in the language of the *Chief Justice* in his opinion in *Pool v. Glover* that his mind was impressed with the difficulty of extending the section of the statute authorizing the sale of "trusts" to include an equity of redemption. However this may be, in our opinion the later decisions are controlling as authority. In view of the complications often attending the adjustment of the amount of indebtedness, the rights of creditors, homestead and dower rights of the debtor and his wife, we think it better for all interests involved that, except when the trust is "pure and unmixed" and the right of the *cestui que trust* to call for the immediate conveyance of the legal title, the lien of the judgment

creditor should be enforced by a civil action. All persons hav- (684) ing any interest in the land or the proceeds of the sale may be brought before the court, decrees may be so molded that they may be protected and a clear title sold. This is especially true at this time, when homestead rights are involved and to be preserved. This is illustrated in *Leak v. Gay,* 107 N. C., 468, and many other cases in our Reports. The judgment, when docketed, fixes the lien so that the rights of the creditor are protected. The remedy is simple and inexpensive. The creditor sets forth in a verified complaint a concise statement of the facts and the verified answer of the defendant brings before the court the exact condition of the title, so that a decree may be made promptly. The plaintiff, however, says that, conceding that the interest of Staton was not an equity of redemption and not subject to sale under the second section of the act, and conceding further that such interest could not be sold under the first section prior to 1883—this section was so amended by The Code of 1883, section 450, that it is now subject to sale. He calls our attention to the change made at that time. The original act provides that when any person shall be seized, etc., of any lands, etc., in trust for any person against whom any execution or other process shall be issued, such estate may be levied on or sold under such execution or process. "And the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the person so seized or possessed in trust as aforesaid." The last clause is stricken from the section in The Code of 1883. The plaintiff's counsel says that the reason assigned by the court why mixed trusts could not be sold under execution was that, by virtue of the statute, the legal as well as the equitable title vested in the purchaser, thereby preventing the trustees from executing the trust.

Counsel overlooked the fact that the language stricken out in subsection 4, section 450, is incorporated in section 452. Hence, so much of the argument as relates to that phase of the case becomes ir- (685) relevant. If the sale is sustained the legal title passed from Mr. Johnston into the plaintiff.

The real test which is applied in all of the cases is whether the trust is pure and unmixed, so that the *cestui que trust* may, immediately and without affecting or disturbing the relation of the trustee to any other person, call for the legal estate. If so, his estate may be sold under execution; otherwise, it may not be. We think this the true criterion by which to solve the question. To the end that we may be clearly understood, we deem it not improper to say that our decision is confined to deeds of trust, both in form and substance. It does not in any manner involve mortgages wherein an estate is conveyed, either to the creditor or to some third person, upon condition that if the indebtedness be

paid at maturity "the deed and every clause thereof are null and void." It has become usual to insert a further clause empowering the mortgagee, who may be either the creditor or some third person named in the deed, in the event of a failure to pay the debt by the mortgagor, to sell and from the proceeds pay the debt, and the residue to the mortgagor. The right left in the mortgagor is twofold; first, to pay the debt before maturity and thus perform the condition by which the deed is avoided at law, and, second, after forfeiture and condition broken, to pay the debt and have a reconveyance. Under our statute this is accomplished by cancellation of record. This latter right is a well-defined estate, created and recognized, originally, only in equity, but by a process of judicial evolution and legislative enactment recognized at law. Bispham Eq., 150. This estate was well known to lawyers prior to the statute of 29 Chas. II., and when it was described in the second section of the act in contradistinction to trusts, it was clearly, as said by *Pearson, C. J.*, a recognition that it was a separate and distinct thing from a resulting trust. While it is true that in one sense the act of
(686) 1812 was remedial and should be construed to advance the remedy and remedy the evil, it was also in derogation of the common law and the statutes then in force, which permitted only well-defined estates to be sold under execution. *Henderson, C. J.*, in *Harrison v. Battle, supra,* concedes that a resulting trust such as Hunt had in the land is not within the words of the second section of the act, but says that it comes within its spirit. Upon a careful review of the question, the adjudged cases and the language of the act, we conclude:

1. That when land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of a docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action.

2. That an equity of redemption, as we have defined it, whether created by mortgage deed made to the creditor or to a third person with or without power of sale, may be sold under execution as provided by section 450, subsection 3, of The Code, being section 2 of the act of 1812.

We do not think the interlocutory judgment rendered by *Judge Brown* at March Term, 1903, affects the rights of the parties. The recitals by his Honor were made only for the purpose of directing the commissioner how to proceed in that action. It was not a final determination of the rights of the parties. The land was not sold by the commissioner. His Honor's judgment, from which this appeal is taken,

does not treat the interlocutory judgment as in any manner affecting the questions decided in this action.

We concur with his Honor in the opinion that the provisions (687) of section 451 of The Code are not mandatory. *Thorpe v. Ricks,* 21 N. C., 619.

For the reasons pointed out, the judgment of the court below must be reversed, with directions to it to render judgment for the defendant upon the case agreed.

Reversed.

Cited: McPeters v. English, 141 N. C., 494; *Johnson v. Whilden,* 166 N. C., 111; *Williams v. Parsons,* 167 N. C., 531; *Fowle v. McLean,* 168 N. C., 540; *Parrott v. Hardesty,* 169 N. C., 668; *Evans v. Brendle,* 173 N. C., 155, 160.

(688)

STEWART v. RAILROAD COMPANY.

(Filed 28 March, 1905.)

Carrier—Collision—Presumption of Negligence—Contributory Negligence—Evidence—Province of Jury.

1. Where an engineer was running an "extra" and had orders to pass No. 8 at Station V and notice that No. 66 was running late, but had no orders that he would pass No. 6 at V. He passed No. 8 at V, and asked if there were further orders, and the agent told him "no" and gave him a "clearance card." He then proceeded towards the next telegraph station, and within two miles thereof collided with No. 6 and was killed: *Held,* in an action for damages, a judgment of nonsuit was erroneous. The cause should have been submitted to the jury to find what was the proximate negligence which caused the death.

2. Proof of a collision raises a presumption of negligence on the part of the carrier, and the burden is thrown upon it to disprove negligence on its part, and the case must go to the jury.

3. Chapter 33, Laws 1887, requires the defendant to both plead and to prove contributory negligence, and the court cannot adjudge that a defense is fully proved, nor can it hold that there is no evidence of negligence when proof of the collision raises a presumption of negligence, which presumption is itself evidence.

4. Where the evidence is conflicting upon any material point, or even where there is no conflict in the evidence, but more than one inference may be drawn from it, it is the province of the jury to find the facts and make the deductions.

5. It is culpable negligence in a carrier, when any employee or passenger loses his life or sustains injury in a "head-end" collision from the failure of the carrier to provide the "block system," which would prevent the possibility of that class of collisions. CLARK, C. J.*

ACTION by Mary Stewart, administratrix of S. T. Stewart, against Raleigh and Augusta Air Line Railroad Company and another, heard before *Long, J.*, and a jury, at October Term, 1904, of WAKE. From a judgment of nonsuit, plaintiff appealed.

Douglass & Simms and Busbee & Busbee for plaintiff.
Day & Bell, T. B. Womack, and Murray Allen for defendant.

CLARK, C. J. This is an action for damages for negligently killing plaintiff's intestate, S. T. Stewart, a locomotive engineer in defendant's service. On 23 June, 1903, he was ordered to take engine No. 200 and tender and run "extra" from Raleigh to Hamlet, on the main line, over probably the busiest part of the system. Not running on any schedule, he was necessarily subject in his movements to telegraphic orders. He had such telegraphic orders to pass the regular freight, No. 8, at Vass, and notice that regular passenger train No. 66 was running forty minutes late, but no order that he would pass No. 6 at Vass. At Vass he passed regular freight No. 8. He then went into the telegraph office and asked if there were further orders, but the agent told him no, and gave him a "clearance card." He accordingly proceeded towards Southern Pines, the next telegraph station, and within two miles of that station he collided with train No. 6, and, with three other men, was killed. There were three stations between Vass and Southern Pines, a distance of eight miles, but no telegraph office was maintained at either of these, though one had been formerly.

Upon this evidence his Honor intimated that upon all the evi-
(689) dence the plaintiff could not recover, whereupon the plaintiff submitted to a nonsuit and appealed.

The intimation of the court was erroneous. This cause should have been submitted to the jury, who alone are empowered to find what was the proximate negligence which caused the death.

This case, arising out of a collision, is one of those in which the law raises a presumption of negligence on the part of the carrier. *Wright v. R. R.*, 127 N. C., 229; *Marcom v. R. R.*, 126 N. C., 200; *Kinney v. R. R.*, 122 N. C., 961; *Grant v. R. R.*, 108 N. C., 470; 2 S. and R. Neg., sec. 516, and numerous cases cited. In *Wright's case* it is said: "It is true that a common carrier is not an insurer of the safety of an em-

*Held to be the law by the full Court in this case, 141 N. C., 274.

ployee, neither does it insure the safety of a passenger; but when there is a collision or a derailment, and in like cases, the presumption of negligence arises. It is a rule of evidence, which in nowise springs out of the contract for carriage, but which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the *carrier,* and therefore it arises equally whether the injured party is a passenger or an employee." In *Marcom's case* it is said: "Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the defendant company, a *prima facie* case of negligence is to be inferred and the burden is thrown upon the defendant to *disprove* negligence on its part." In *Kinney's case,* which was a case of collision, the Court says: "If the doctrine of *res ipsa loquitur* ever applies, it would certainly do so in such a case. . . . This was particularly a case for the jury."

"Where the court is asked to withdraw the case or one or more questions of fact involved, from the jury, it is not the province of the court to weigh the evidence and determine what are the proper inferences to be drawn therefrom, but the only question is whether there is any testimony tending to establish the fact or facts against which the (690) court is asked as a matter of law to find." 23 A. & E. (2 Ed.), 561. The rule as announced in *Russell v. R. R.,* 118 N. C., 1098, and ever since followed, is that "where the testimony is conflicting upon any material point, or more than one inference may be drown from it, it is the province of the jury to find the facts and make the deductions." Here, the facts were in dispute and the inferences to be drawn from them.

If there were facts consistent with the absence of negligence on the part of the defendant, still there would be a conflict with the *presumption* of negligence on the part of the defendant arising from the fact of collision, which presumption is itself evidence. "A presumption of law. . . . is evidence. In all systems of law legal presumptions are treated as evidence. The presumption . . . is one of the instruments of proof." *Coffin v. U. S.,* 156 U. S., 459, 460. "The burden is thrown upon the defendant to disprove negligence on its part" (*Marcom v. R. R., supra*) and show that the injury was due to the negligence of the plaintiff's intestate—a question for the jury.

"Even when there is no conflict in the evidence or when the facts are not disputed, if different minds might honestly draw different conclusions from the evidence or from the undisputed facts, a question of fact is presented which should be left to the jury for its determination." 23 A. & E. (2 Ed.), 565, citing a vast number of cases, many of them from this Court.

The statute (1887, ch. 33) requires the defendant to both plead and to prove contributory negligence, and there being a presumption of negli-

gence in the defendant, the case must go to the jury. "It was error to put upon the plaintiff the burden of proving that her intestate
(691) was not negligent." *Peoples v. R. R.*, 137 N. C., 96; *Fulp v. R. R.*, 120 N. C., 525. The court cannot adjudge that a defense is fully proved, nor can it hold that there is no evidence of negligence when proof of the collision raises a presumption of negligence.

Besides, there was this evidence, besides other, tending to show negligence, independent of the presumption, which, as above, has been held to arise from the fact of the collision. It was, according to the evidence, the duty of the agent at Vass to notify the engineer of train No. 6 of the departure of "extra 200" (Stewart) from Vass, which he did not do, and as the collision was six miles from Vass and two miles from Southern Pines, this negligence would seem to have caused the collision. The witness further stated that if the operator at Vass had wired the train dispatcher of the departure of No. 200, that in his opinion No. 6 could have been prevented from going beyond Manly. The train dispatcher, who was at Raleigh, while giving Stewart orders to pass No. 8 at Vass, apparently, from the evidence, overlooked making any meeting place for the "extra, 200," and No. 6, though he knew that No. 6 had no knowledge of No. 200 being on the road. If he was to pass No. 6 as well as No. 8 at Vass, why was No. 8 alone mentioned in his order? When the agent at Vass gave Stewart a "clearance card" that was notice to him that the way was clear, "to go ahead" to the next point where there was a telegraph office to get further orders—as he was running under such orders and not under any schedule. Had the operator at Vass promptly notified the dispatcher at Raleigh, he could have notified and held No. 6 at Southern Pines or directed it to take the siding at Manly, for the collision occurred only two miles from Southern Pines, near Manly, and six miles from Vass. It was also the duty of the operator at Southern Pines to notify the train dispatcher at Raleigh
(692) of the departure of No. 6, but the train dispatcher at Raleigh had to ask. The latter's uneasiness, after actually receiving notice of the departure of "200 extra" from Vass, and his efforts to stop the trains, tend to show that he had failed to notify No. 6 as well as "extra 200" where they must pass. Had he done so, he would have had no uneasiness, as there were three side-tracks between Vass and Southern Pines. Stewart, having received orders to pass No. 8, but no orders as to passing No. 6, upon receiving "clearance card" from the agent at Vass, proceeded in accordance with his only other order to go "from Raleigh to Hamlet," expecting, of course, to get other orders, if any, at Southern Pines. The company's rule 174*a*, which Stewart had in his pocket when killed, provides: "Receipt of train order does not give a train the *right* to leave until signal is set to safety or *clearance*

card is given." It was in evidence that "meeting orders were always given to extra trains"; that Stewart had such orders as to No. 8 at Vass, and there was told there were no other orders for him and was given the clearance card (found on his dead body) which under the above-quoted rule gave his train "the right to leave." He could get no further orders till he got to Southern Pines. There was negligence in the train dispatcher in giving neither Stewart nor No. 6 notice of meeting point, and in the agent at Vass giving Stewart a clearance card, which could only mean "Go ahead; the way is clear."

There was much said in the argument as to the provisions as to "superior" and "inferior" rights of way in the rules and regulations of the company, but Rule 455 expressly provides: "The terms 'superior right' and 'inferior right' in these rules refer to the right of trains under time-table and train rules, and not to rights under *special* orders." This "extra" No. 200 was running solely under special orders "to go to Hamlet" and with orders to pass No. 8 at Vass, and a "clearance card" at the latter place, which authorized the engineer to go on to the next point where he could get orders. If it did not give (693) him that authority, for what purpose was it given him? He could not know what trains were late, and after his "clearance card" he had a right to presume that if there was any other train in his way it had been or would be notified not to leave Southern Pines.

If there is evidence, or inferences, to be drawn contrary to the above, it was a matter solely for the jury. The plaintiff insists that besides the presumption of negligence arising from the fact of collision, there were nine particulars as to which there was negligence, which should have been submitted to the jury, to wit:

1. In sending the plaintiff's intestate on the road without a sufficient and proper train crew. *Arrowood v. R. R.*, 126 N. C., 629.

2. In failing to arrange a meeting place for "extra 200" and train No. 6.

3. In the failure of the operator at Vass to notify the engineman of No. 6 of the departure of "extra 200" from Vass.

4. In the failure of the telegraph operator at Vass to promptly report to the train dispatcher at Raleigh the arrival and departure of "extra 200."

5. In the failure of the operator at Southern Pines to notify the train dispatcher at Raleigh of the arrival and departure of No. 6 from Southern Pines.

6. In violation of Rule 389 by the crew of No. 6 in leaving Southern Pines in less than twenty minutes after the departure of No. 8.

7. In violation of Rule No. 405 by the engineer and crew of No. 6 in leaving Southern Pines before the arrival of No. 66.

8. In failing to establish and maintain telegraph offices at Lake View, Niagara, and Manly, so as to insure the safe operation of its (694) trains between Southern Pines and Vass.

9. In failing to adopt and use the safer system known as "block system," which was in general use, and referred to in the rules of defendant.

But as we have held that enough has been shown to require the facts to be submitted to the jury, it is unnecessary to consider the other grounds of negligence presented. As to the eighth ground, if there had been no telegraph office between Raleigh and Hamlet, or such offices only fifteen or twenty miles apart, it would certainly be negligence as a matter of law to risk the lives of employees and passengers without such necessary adjuncts in operating the defendant's trains. Whether it was negligence to fail to have a telegraph office between Vass and Southern Pines, a distance of eight miles, when the single track was so crowded as to require three stations, or sidings, between these two points, and when (as on this occasion) such intermediate telegraph office would have saved the lives of four men and the crippling of others, is probably a mixed question of fact and law, which should be submitted to the jury. The question whether the receipts of such telegraph office would be enough to make it profitable to the company to maintain it, is an entirely secondary consideration, if it was reasonably necessary for the safeguarding of the lives of employees and passengers.

Nor is it necessary to hold now that the failure of this great through line, crowded with business, to adopt the "block system" is negligence which, as this Court in the *Greenlee* and *Troxler cases,* 122 N. C., 979, and 124 N. C., 191, held in regard to the failure to adopt automatic couplers, would render the common carrier liable *per se* for any death or injury caused by the failure to adopt them. The evidence in this case is that the "block system" is in very general use, and that (695) if it had been in use on this system this catastrophe could not have occurred. The ruling of the Court in *Witsell v. R. R.,* 120 N. C., 557, is that it is culpable negligence, making the carrier responsible for all injuries resulting therefrom, to fail to use "any approved appliance which is in general use and necessary for safety." This rule has been reiterated and adhered to in every case since, including *Bottoms v. R. R.,* 136 N. C., 473. The writer, however, is free to say now speaking for himself, that it is culpable negligence when any employee or passenger loses his life or sustains injury in a "head-end" collision from a failure to provide the "block system," which would prevent the possibility of that class of collisions. The obtaining of higher dividends is entirely a secondary matter to the safety of employees and passengers, as it is also to the convenience and comfort of the public, for which end

alone charters to railroads, with the power to condemn rights of way under the power of eminent domain, are granted. For the guaranty of that safety and convenience the sole resort is to the courts and juries of the land.

The plaintiff had a constitutional right to have the question of negligence, upon this evidence, submitted to a jury, and in denying her that right there was

Error.

HOKE, J., concurs in result.

BROWN, J., did not sit in this case.

WALKER, J., concurring in result only: Our decision, I think, should be confined to only two grounds: First, That the agent at Vass had given to Stewart, the engineer of train No. 200 a clearance card which, interpreted by the language of Rule 174*a*, meant that he had the right to leave the station and proceed with his engine to the next stop. This, I think, was evidence of negligence on the part of the agent at Vass, which might have been the proximate cause of the intes- (696) tate's death and should have been submitted to the jury, the negligence of a fellow-servant not now being among the ordinary risks which are assumed by an employee of a railroad company. Private Laws 1897, ch. 55. Second. There was evidence tending to show that it was the duty of the agent at Vass to notify the train dispatcher at Raleigh of the arrival of No. 200 (the engine in charge of Stewart) at Vass, so that orders could be issued to Stewart for his guidance in the further movement of his engine, and in my opinion the failure of the agent at Vass to notify the train dispatcher may have been the proximate cause of the testator's death. The decision of either of these two questions in favor of the plaintiff is sufficient to dispose of the case, and it is not necessary to consider or discuss any other matter. For these reasons I concur only in the conclusion of the Court, and not in anything said in its opinion which does not bear directly upon the two questions I have mentioned.

CONNOR, J., concurs in opinion of WALKER, J.

Cited: S. c., 141 N. C., 251, 253, 264, 266, 275; *Fitzgerald v. R. R., ib.,* 550; *Hemphill v. Lumber Co., ib.,* 489, 495; *Overcash v. Electric Co.,* 144 N. C., 577; *Gerringer v. R. R.,* 146 N. C., 36; *Winslow v. Hardware Co.,* 147 N. C., 279; *Wright v. R. R.,* 151 N. C., 536; *Boney v. R. R.,* 155 N. C., 107, 108; *Adams v. R. R.,* 156 N. C., 175; *Lea v. Utilities Co.,* 178 N. C., 512; *Goff v. R. R.,* 179 N. C., 224.

(697)

CORPORATION COMMISSION v. BANK.

(Filed 28 March, 1905.)

Banks—Collections—Insolvency—Distribution of Assets—Trust Fund—Creditor and Debtor.

1. Where paper is sent to a bank for collection, and so restricted by indorsement, after collection made and proceeds mingled with the general funds of the bank, the relationship between the depositor and the bank becomes that of creditor and debtor, and on assignment, by reason of insolvency, the holder of such a claim can only share in the assets *pro rata* with general creditors.
2. While a bank is a going concern, it has a right to make collections, and it commits no breach of trust in mingling the proceeds thereof with its general assets according to the general custom of banks, and when so mingled, the character of a trust fund ceased by that act and a new obligation arose, to pay or remit, not the specific money collected, but out of its general funds.

STATE of North Carolina on the relation of the North Carolina Corporation Commission against the Merchants and Farmers Bank of Dunn, N. C., W. A. Stewart, receiver.

In the matter of the claim of the Voight Milling Company against the assets of the Merchants and Farmers Bank of Dunn, N. C., now in the hands of W. A. Stewart, receiver, heard before *Long, J.*, at November Term, 1904, of HARNETT. The defendant, the said bank, W. A. Stewart, receiver, being in liquidation, the claimant, the Voight Milling Company, duly presented its claim to the receiver, demanding priority of payment out of its assets. From a judgment of the court against the claimant, he excepted and appealed.

Godwin & Davis for claimant.
H. L. Godwin for receiver.

(698) HOKE, J. The Voight Milling Company, holding a claim against the defendant bank, demanded priority of payment from the assets of the bank, and the receiver to whom the matter was referred disallowed this demand and held that the claimant was only entitled to share *pro rata* in such assets as a general creditor. The judge below sustained the ruling of the receiver, and the Voight Milling Company excepted and appealed.

The facts upon which this ruling was made are, in substance, as follows: Just prior to the suspension of the Merchants and Farmers Bank, the Voight Milling Company forwarded to it for collection a draft in the sum of $693.91, to which was attached a bill of lading covering a

shipment of a car-load of flour to the Purdie-Hooks Company of Dunn, N. C., drawee of said draft. On 8 February, 1904, the bank delivered the draft and bill of lading to the drawee, accepting therefor a check of the drawee against a deposit in the bank. On 9 February, 1904, the bank voluntarily closed its doors because of insolvency and for the purpose of winding up its affairs through a receiver. The appellant was not a depositor of the bank. The bank did not account, nor make any attempt to account, for the proceeds of said collection, and at the close of business that day (8 February) there was more than sufficient currency on deposit in the bank to have accounted for the collection, and at all times of the transaction between the appellant and the bank the bank was in an insolvent condition. On the acceptance of the drawee's check and the surrender of the draft and bill of lading to the Purdie-Hooks Company, the proceeds of such collection were mingled with the general funds of the bank, and no sum or amount of money was separated or set apart from the other funds of the bank to the credit or for the benefit of the Voight Milling Company. The proceeds of such collection went into the general assets of the bank and were passed into the hands of the receiver. (699)

As disclosed in the foregoing statement, the transaction between the Purdie-Hooks Company and the bank amounted to a payment of the draft. Morse on Banking, sec. 248*a*, citing *Sayles v. Cox,* 95 Tenn., 583. According to the decisions of this State, and well-considered authorities elsewhere, it is held where paper is sent to a bank for collection and so restricted by indorsement, after collection made and proceeds mingled with the general funds of the bank the relationship between the depositor and the bank becomes that of a creditor and debtor, and on assignment by reason of insolvency the holder of such a claim can only share in the assets *pro rata* with general creditors. *Packing Co. v. Davis,* 114 N. C., 343; *Dowd v. Bank,* 38 Fed., 172; *Billingsley v. Pollock,* 69 Miss., 759; *Slater v. Oriental Mills,* 18 R. I., 352.

The doctrine is stated in 3 A. & E. (2 Ed.), 819, as follows: "Although a bank which has received paper for collection is, until collection made, the agent of the depositor, a different relation exists after the collection has been made. According to the established custom of banks, the proceeds of paper deposited for collection are mingled with the general funds of the collecting bank and are used by it in the same manner as its other funds. The depositor thereupon becomes the creditor of the bank for the amount so collected; and the debtor, the collecting bank, in consideration of the right to use the money, undertakes and is bound to refund it." "It follows," says the same authority at page 820, "from the change of relationship, that when the collecting bank becomes

insolvent, the depositor of the paper collected has no priority in the moneys that have been collected in this way, nor any lien thereon as against general creditors."

Of course, if the proceeds of such collection could be identified or traced into some specific property, a different principle would prevail, but no such facts existed here. It is expressly stated that the (700) proceeds of this collection were mingled with the general funds of the bank, and it is not claimed that any part of such collection can be identified or traced into other specific property or investments.

We are asked to sustain this demand on the idea that the proceeds of this collection constituted a trust fund, and, when traced into the general assets of the bank, a right to priority of payment arises in favor of the claimant; and we are referred to *McLeod v. Evans,* 66 Wis., 401, and other authorities in support of this proposition. The proceeds were a trust fund and would be so dealt with as long as the same were kept separate and could be followed or identified but after collection made and the fund was mingled with the general assets of the bank, its character as a trust fund ceased by that act, and a new obligation arose—the obligation of the collecting bank to pay or remit, not the specific money collected, but out of its general funds, most usually by check on some other portion of its assets. The bank committed no breach of trust in so mingling the proceeds of this collection with its general assets. That was the general custom of banks in dealing with such collections, and the claimant will be held to have forwarded his draft with this custom in mind. The bank then had a right to mingle this fund with its general assets. Its character as a trust fund thereby ceased, and the default alleged against the bank is not therefore a breach of trust, but a failure to pay a debt, and the holder of such a claim can only share *pro rata* as one of the general creditors.

It is this mingling of the assets according to the custom of banks, and of right, in pursuance of its contract for collection expressed or implied, that distinguishes cases of this character from many of those cited by counsel. They were, in the main, cases of individual trustees with the duties of trustees still upon them, and while their obligations as (701) such in reference to the trust funds were still existent. Here, the character of trust fund had ceased. The bank was under no obligation, as trusete, to keep this fund separate; on the contrary, in carrying the proceeds of this collection into its general assets, the bank acted according to the general custom of banks and as both parties contemplated that it would act. There was, therefore, no breach of trust, and the only obligation resting on the bank was to remit when called on, or in the usual course of business, out of its general funds.

McLeod v. Evans, supra, is to the effect contended for by the appellant, but this case was overruled by a decision of the same Court in *Silk Co. v. Flanders,* 87 Wis., 237, and the general tenor of this last opinion would seem to show that this able Court is in accord with the principle here declared.

As said in *Bank v. Bank,* 148 Mass., 553: "Upon the collection of a draft or check, the Fidelity Bank was not required to keep the proceeds by itself as the plaintiff's property, but might mingle it with its own money and make itself the plaintiff's debtor for the amount received. As soon as the proceeds became a part of the funds of the Fidelity Bank under this arrangement, the plaintiff's right to control it as specific property was gone, and the plaintiff had, instead, a right to recover a corresponding sum of money."

We are not inadvertent to the fact that the bank is said to have been in an insolvent condition. While the bank was open and doing business, and in the absence of any allegation or suggestion of fraud or collusion between the bank and the debtor, the transaction was a payment, and the same results would follow whether the bank was solvent or insolvent. It is not stated that the officers of the bank were aware of its insolvency, and we are not discussing here the effect of fraudulent conduct on the individual officers of the bank. We are seeking to lay down a fair and just rule for the disposition of the property of an insolvent among its creditors. As to them, while the bank was a going concern, (702) it had a right to make the collection and the same right to follow the general custom of banks and carry the proceeds into its general assets. The claimant gave this authority and took this risk when he sent his paper for collection, and we do not think the fact that he has selected a faithless agent gives him any right to priority over other creditors when he can no longer identify his property. Of course, after a bank has suspended business and closed its doors a different rule prevails. But the facts of this case do not require that this rule should be dwelt upon.

We are of opinion that on principle and authority the claimant can only share in the assets *pro rata* as one of the general creditors, and the judgment of the court below is

Affirmed.

Cited: Chemical Co. v. Rogers, 172 N. C., 155.

(703)

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS AT FALL TERM, 1904

WINDER *v.* R. R. Pasquotank. *E. F. Aydlett* for plaintiff; *Pruden & Pruden* for defendant. *Per Curiam.* Affirmed.

GERALD *v.* R. R. Beaufort. *Rodman & Rodman* for plaintiff; *Small & McLean* for defendant. *Per Curiam.* Affirmed.

S. *v.* MORRIS. Hertford. *Attorney-General* for State. *Per Curiam.* No error.

DREWRY *v.* HARRISON. Halifax. *Day & Bell* for plaintiff; *W. E. Daniel* for defendant. *Per Curiam.* Affirmed.

BROWN *v.* R. R. Northampton. *Peebles & Harris* for plaintiff; *Day & Bell* for defendant. *Per Curiam.* Affirmed.

STATE EX REL. GREENVILLE *v.* FLEMING. Pitt. *Attorney-General* for State. *Per Curiam.* Dismissed.

S. *v.* SPRUILL. Martin. *Attorney-General* for State. *Per Curiam.* No error.

STALLINGS *v.* TELEGRAPH CO. Martin. *A. O. Gaylord* for plaintiff; *H. W. Stubbs* and *F. H. Busbee & Son* for defendant. *Per Curiam.* Affirmed.

WORSLEY *v.* CREECH. Edgecombe. *W. O. Howard* for plaintiff; *G. M. T. Fountain* for defendant. *Per Curiam.* Affirmed.

PORTER *v.* ARMSTRONG. Pender. *J. D. Bellamy* for plaintiff; *E. K. Bryan* for defendant. *Per Curiam.* Petition to rehear dismissed. *Walker, J.,* dissenting.

(704) WHITFIELD *v.* GOODSON. Duplin. *Stevens* for plaintiff; *Rountree & Carr* for defendant. Defendant's appeal dismissed for failure to prosecute.

COOPER *v.* LUMBER CO. New Hanover. *Russell & Gore* for plaintiff; *E. K. Bryan* for defendant. *Per Curiam.* Affirmed.

S. *v.* MCLEAN. Wake. *Attorney-General* for State; *H. E. Norris* for defendant. *Per Curiam.* No error.

S. *v.* SOUTHERLAND. Wake. *Attorney-General* for State. *Per Curiam.* No error, on authority of *S. v. Pigford,* 117 N. C., 748.

LAMB *v.* YOUNG. Harnett. *Busbee & Busbee* for plaintiff; *J. C. Clifford* for defendant. Defendant's appeal dismissed for failure to print record.

HOSIERY CO. *v.* R. R. Wake. *Battle & Mordecai* for plaintiff; *Day & Bell* for defendant. *Per Curiam.* Affirmed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

ROBERTSON *v.* THOMAS. Wake. *Douglass & Simms* for plaintiff; Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

S. *v.* SMITH. Richmond. *Attorney-General* for State; *H. H. McLendon* for defendant. *Per Curiam.* No error.

GRIFFIN *v.* R. R. Anson. *Robinson & Caudle* for plaintiff; *J. D. Shaw* for defendant. *Per Curiam.* Affirmed. *Montgomery, J.,* dissenting.

MCNEILL *v.* R. R. Moore. *W. J. Adams* for plaintiff; *Guthrie & Guthrie* for defendant. *Per Curiam.* Defendant's petition to rehear dismissed on authority of *Weisel v. Cobb,* 122 N. C., 67—no new principle being presented.

MCLEAN *v.* BULLARD. Scotland. *H. H. McLendon* for plain- (705) tiff; *J. A. Lockhart* for defendant. *Per Curiam.* Affirmed.

WILLIAMS *v.* DILLON. Union. Appeal by Belk heirs and Rogers heirs. *Redwine & Stack* for Rogers heirs; *R. W. Lemmond* for Belk heirs. *Per Curiam.* Affirmed in both appeals.

LEMMOND *v.* MCCAIN. Union. *Adams, Jerome & Armfield* for plaintiff; *Redwine & Stack* for defendant. *Per Curiam.* Affirmed.

IN RE FOWLER. Moore. *Habeas corpus. U. L. Spence* for petitioner; *Murchison & Johnson contra. Per Curiam.* Affirmed.

EZZELL *v.* ROBINSON. Union. *Adams & Jerome* for plaintiff; *Redwine & Stack* for defendant. *Per Curiam.* Affirmed.

KENNEDY *v.* R. R. Union. *Redwine & Stack* for plaintiff; *J. D. Shaw* for defendant. *Per Curiam.* Affirmed.

THOMAS *v.* MACKNIGHT. Moore. *Murchison & Johnson* for plaintiff; *H. F. Seawell* for defendant. *Per Curiam.* Affirmed.

MCGIRT *v.* R. R. Guilford. *R. C. Strudwick* for plaintiff; *King & Kimball* for defendant. *Per Curiam.* Affirmed.

COBLE *v.* HUFFINES. Guilford. *A. M. Scales* for plaintiff; *A. L. Brooks* for defendant. Defendant's appeal dismissed for failure to file brief.

TURNER *v.* ANDREWS. Orange. *C. D. Turner* for plaintiff; *J. W. Graham* for defendant. Dismissed for failure to file brief.

IDDINGS *v.* TELEGRAPH CO. Iredell. *L. C. Caldwell* for plaintiff; *Armfield & Turner* for defendant. *Per Curiam.* Affirmed. *Connor, J.,* dissenting.

S. *v.* BILLINGS. Cabarrus. *Attorney-General* for State; *Adams* (706) *& Maness* for defendant. *Per Curiam.* No error.

RAYNOR *v.* LIDDELL CO. Mecklenburg. *A. B. Justice* for plaintiff; *C. W. Tillett* for defendant. *Per Curiam.* Affirmed.

ALEXANDER *v.* R. R. Mecklenburg. *Burwell & Cansler* for defendant. No counsel for appellant. *Per Curiam.* Affirmed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

MORROW *v.* R. R. Gaston. *A. G. Mangum* for plaintiff; *G. F. Bason* for defendant. *Per Curiam.* Affirmed. *Douglas, J.,* dissenting.

SIGMON *v.* FOY. Catawba. *E. B. Cline* for plaintiff; *T. M. Hufham* for defendant. *Per Curiam.* Affirmed.

IN RE ENTRIES OF DREWRY. Burke. *J. T. Perkins* for appellant Bernhardt; *A. C. Avery contra. Per Curiam.* Petition to rehear dismissed.

MCBRAYER *v.* WITHROW. Rutherford. *S. Gallert* for plaintiff; *McBrayer & Justice* for defendant. *Per Curiam.* Affirmed.

PEARSALL *v.* WOOTEN. Burke. *Avery & Erwin* for plaintiff; *Avery & Avery* for defendant. *Per Curiam.* Affirmed.

S. *v.* DILLINGHAM. Buncombe. *Attorney-General* for State; *Locke Craig* for defendant. *Per Curiam.* Affirmed.

CLARKE *v.* RANKIN. Buncombe. *Locke Craig* for plaintiff; *F. A. Sondley* for defendant. *Per Curiam.* Affirmed.

COWAN *v.* ROBERTS. Buncombe. *J. C. Martin* for plaintiff; *W. W. Zachary* for defendant. *Per Curiam.* Affirmed.

S. *v.* GENTRY. Cherokee. *Attorney-General* for State; *Ben* (707) *Posey* for defendant. *Per Curiam.* No error.

AMMONS (appellant) *v.* R. R. *Per Curiam.* This is a motion to dismiss on same grounds as in *Curtis v. R. R., ante,* 308, and is denied on the same grounds as stated in that case and in *Benedict v. Jones,* 131 N. C., 474. Motion denied.

TURNER (appellant) *v.* WILSON. *C. D. Turner* for appellant; *Graham & Graham* and *S. M. Gattis* for appellee. *Per Curiam.* Reversed on the authority of *Turner v. McKee, ante,* 251.

INDEX